August, 2019

Thoughts on Legal Writ. from the Greatest: Scalia & Garner—Part II

Gerald Lebovits

Available at: https://works.bepress.com/gerald_lebovits/342/
The Tech Challenge

Defensible Data Disposal: Once a Risk Mitigation Strategy, Now a Compliance Requirement
By Gail Gottehrer

Patching Horror Stories
The Housing Stability and Tenant Protection Act of 2019
New York Takes the Lead on Online Document Providers

LAW PRACTICE MANAGEMENT:
DIGITAL MARKETING FOR SOLO AND SMALL FIRMS
Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner — Part II

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we continue our focus on Antonin Scalia and Bryan A. Garner’s preeminent book, *Making Your Case: The Art of Persuading Judges*. In Part II of this two-part column, we address Scalia and Garner’s suggestions on writing persuasively and using an effective writing style.

**PERSUASIVE-WRITING TECHNIQUES**

“The overarching objective of a brief is to make the court’s job easier.”

**Acquire a good desk reference.** A good desk reference on proper English usage separates good lawyers from great lawyers. “Essentially, a usage guide is a compilation of literary rulings on common language questions: What’s the difference between *consists of* and *consists in*?” Scalia and Garner recommend the fourth edition of William Strunk and E.B. White’s *The Elements of Style* and Norman Lewis’s *Better English.*

**Spend time “getting” your arguments.** Review each fact and how it correlates to a legal claim or defense. “Don’t start writing until you’ve turned the case over in your mind for days,” they explain, because “[n]ew ideas may occur to you as you read the leading cases and scholarly authorities.” Take time to think about your adversary’s case — not just your affirmative case. And avoid producing a draft too soon; you can shut off alternative approaches during your deliberative process.

**Outline the brief.** Avoid using key words as topic sentences in your outline. Rather, using full sentences “has three advantages: (1) it helps you understand your own organization at a glance; (2) it often flushes out redundancies, weak links, and inconsistencies; and (3) once you’ve completed it, it allows you to feel as though the brief is halfway written.” Outlining can also help you identify weak arguments.

“Sit down and write. Then revise. Then revise again. Finally, revise.” Writing can be hard to start, but force yourself to stick to your schedule. Start with the question presented, then the body of your arguments, and then the statement of facts. Then write your introduction and conclusion. Finally, write the summary of your argument. “Many judges find the summary of the argument the single most important part of a brief, so don’t omit this part — and give it the attention it deserves.”

Put the draft aside for some time in between each read-through. It’s helpful to get some good lawyer friends who know nothing about the case to read your draft. They can “spot gaps and deficiencies” you wouldn’t perceive.

“Advise the court by letter of significant authority arising after you’ve filed your brief.” Keep track of developments in your field. Bring to the court’s attention any new legislation or new rulings from governing authorities that support your case. Even if they support your adversary’s case, you should bring it to the court’s attention by letter, with a copy to opposing counsel. Keep your letter to one page.

**State the questions presented up front.** Put on the first page what the court must resolve. It’s the first thing the court will see. “Follow it religiously — even in memorandums in support of motions.” “Many advocates fail to appreciate that the outcome of a case rests on what the court understands to be the issue the case presents.”

**The Statement of Facts “is narrative rather than argument.”** A Statement of Facts describes the facts and the proceedings to date. Don’t omit a crucial fact or misstate a fact. “Nothing is easier for the other side to point out, and nothing can so significantly damage your credibility.” The Statement of Facts must also be persuasive. Advance your objective “by your terminology, by your selection and juxtaposition of the facts, and by the degree of prominence you give to each.”

---

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research, she thanks Christy Li (St. John’s University School of Law), his judicial fellow.
so, you’ll “amplify the facts that suggest your desired outcome by placing them prominently in the narrative.”

**Keep your argument logical and brief.** Remember two points when writing your argument: “(1) keep your eye on the ball; (2) be brief.” First, write down the “syllogism that wins your case.” Every aspect of your argument must support your syllogism. Second, your argument must be brief. Thus, “a brief that is verbose and repetitious will only be skimmed; a brief that is terse and to the point will likely be read with full attention.” Brevity means entirely eliminating weak points, unnecessary elaboration, and phrases that “that add nothing but length.”

**Conclude with more than just a request for relief.** Be ambitious. Include the request for relief, but “preface that with a true conclusion to your argument — one or two paragraphs encapsulating your winning syllogism in a fresh and vivid way.”

**WRITING STYLE**

“Literary elegance, erudition, sophistication of expression — these and all other qualities must be sacrificed if they detract from clarity.”

“Value clarity above all other elements of style.” Blunt, straightforward legal writing is the most persuasive. Avoid “puffed-up, legalistic language.” “If you ever use a word that the judge may have to look up.” Clear legal writing makes it harder for your adversary to mischaracterize your arguments. Your opponent won’t be able to distort your words. And the court won’t be confused.

**Signpost your arguments.** Use guiding words to help the reader follow your arguments — between and within paragraphs. “These words and phrases turn the reader’s head, so to speak, in the direction you want the reader to look.” For example, using the word “but” tells your reader that your “next thought will somehow qualify the point just made.”

**Give examples to clarify abstract concepts.** Just as your words need to be clear, so do your abstract concepts. One way to clarify difficult concepts is to give the judge examples. For example, the reader probably won’t understand a description of the interpretative canon of *noscitur a sociis*. But in giving this example to your reader — “pins, staples, rivets, nails, and spikes” — the reader will know that “nails” don’t refer to fingernails.

“Consider using contractions occasionally — or not.” Scalia and Garner differ on whether lawyers may use of contractions in their legal writing. According to Garner, lawyers may contractions that enhance the natural flow of writing. Contractions shouldn’t be used in every single sentence, but should be used when, in speaking, they’d be spoken naturally. Scalia contends that contractions have no place in legal writing. They serve no benefit and can often offend judges. So, he thought, nothing will be gained, only lost, by contracting.

“Swear off substantive footnotes — or not.” Garner and Scalia offered opposing viewpoints on using substantive footnotes. Garner rails against substantive footnotes. If your argument isn’t important enough to include in the text, he says, then it doesn’t belong in your brief. Some courts have even noted that they won’t consider arguments raised exclusively in a footnote. But Scalia supported the use of substantive footnotes because they can support an argument. Substantive footnotes can provide a space for rebuttal to weak counterarguments.

**Use the parties’ names.** Avoid referring to the parties by their “status in the litigation (plaintiff, respondent,
40 This will confuse a judge who might be reading a long brief. Also, this “can make the record on appeal confusing if status-names are used in the briefing and argument at each level.” 41 Don’t try to “depersonalize the opposing party” by calling it the “Defendant,” either. The court will likely be annoyed at your attempt to personalize your client by using this tactic. 42

Use bold and italics sparingly; and never underline. “Don’t overuse italics; don’t use bold type except in headings; don’t use underlining at all.” 43 First, when “too much is overemphasized, nothing is.” 44 Playing with word order can emphasize the word you’re italicizing. For example, “instead of writing ‘She held a knife in her hand,’ write ‘What she held in her hand was a knife.’” 45

Second, save bold type for headings only. You don’t want to distract the reader by overemphasizing a word in your brief. Underlining is a “crude throwback.” 46 When italicizing was unavailable, writers used underlining. Thus, “[n]obody using a computer in the 21st century should be underlining text.” 47

Cite cases accurately. Never distort a case to fit the facts. Doing so will make you look bad, especially if opposing counsel brings it to the judge’s attention. 48 Even if a case marginally matches the facts, say so. “Explain why the difference is insubstantial” and shouldn’t affect the outcome. 49 Use the accurate conventional introductory signals when citing. After one bad citation, a court will become suspicious about the accuracy of all the citations.

Cite sparingly. A brief isn’t “a treatise, a law-review article, or a comprehensive Corpus Juris annotation.” 50 Citing too many cases will distract the reader. The court doesn’t care about how many cases you cite, but how well you use them. 51 Citing one case in your argument for a noncontroversial point is enough. There’s no need to show off to the court. But if the argument is central to your case and will probably be contested, “cite the case but [also] concisely describe its facts and its holding.” 52 And “follow that description by citing other governing cases.” 53

Use proper typography. Poor typography will hinder the persuasiveness of your brief. That’s why “a brief that is ugly in typeface, with crowded lines, will not invite careful perusal.” 54 If the court in which you’re filing has no printing requirements, refer to the United States Court of Appeals for the Seventh Circuit’s website for guidance on typography. 55

The Legal Writer will continue its series on what we can learn from the great writing teachers — lawyers and non-lawyers.