Legal Writing as Good Writing; Tips from the Trenches

Michael A. Zuckerman
Andrey Spektor
LEGAL WRITING AS GOOD WRITING; TIPS FROM THE TRENCHES

Andrey Spektor¹ and Michael Zuckerman²

[For publication as an Essay or Article]

¹ Andrey Spektor graduated with honors from the University of Michigan Law School, where he was a Dean’s Scholar. After law school he clerked for a federal district judge and litigated class actions at a non-profit organization. Mr. Spektor then joined the Appellate Litigation Practice Group at Weil, Gotshal, & Manges, LLP and will soon begin a federal appellate clerkship on the Third Circuit.

² Michael Zuckerman is an associate in the Issues & Appeals practice at Jones Day. He has clerked for federal judges at the trial and appellate levels and is a recipient of the Burton Award for Distinguished Legal Writing. Mr. Zuckerman graduated with honors from Cornell Law School, where he was a note editor on the law review. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day.
It is an old complaint that law school does not prepare students for the practice of law. The criticism is often overstated—students are encouraged and indeed often required to participate in moot court, clinics, and seminar courses—but not when it comes to writing. During their law school careers, students read thousands of pages of mind-numbing prose, often without an antidote of interesting and clear writing. We leave it to Bryan Garner and others to explain why old cases—whatever their analytical virtues and precedential value—should not serve as models of good contemporary prose.

Suffice it to say that judges and partners don’t enjoy or have time to chew over young lawyers’ prose to get at its meaning; they demand clarity and succinctness. And clarity and succinctness is what we should strive to produce, along with grace and creativity when the moment calls.

Good writing is especially important today, when there is increased pressure for junior lawyers to stand out. Young litigation associates generally have fewer chances to showcase their writing skills; for obvious reasons, time intensive tasks like document review make their way down the chain a lot faster than do writing assignments. When those opportunities do present themselves, it is important to make the most of them—partners often peg young associates as stars based on memoranda and briefs that they author early in their careers. Clear writing often indicates clear thinking—or so many believe—and clear-thinking lawyers are always in demand.

Perhaps this explains why there is no shortage of useful literature on legal writing. We draw on this literature, as well as judicial opinions and our own experiences, to offer tips on writing strong briefs and memoranda.

1. Weave quotes into your argument and your text, and use them only when necessary. The tendency to paste block quotes is not unique to young associates. Whether it results from anxiety (to misconstrue) or lack of confidence (in one’s own voice), most of these cut-and-paste jobs should be reworked. Not only do block quotes often confuse more than they clarify, but

---

4 Brian A. Garner, Garner on Language and Writing: Selected Essays and Speeches 21 (Am. Bar Assoc. 2009); see also Hon. William Eich, Writing the Persuasive Brief, 76-Feb., Wis. Law. 20, 55 (2003) (“Lawyers whose briefs are studded with ‘thereunders,’ ‘hereinafters,’ ‘hereinaboves,’ ‘arguendoes,’ and ‘said’s’ (as one lawyer put it: “The facts with respect to said arrearage warrant said cancellation”) are really communicating only with themselves.”); see also infra Scalia & Garner at 62 (quoting Judge Frank Easterbrook) (“The best way to become a good legal writer is to spend more time reading good prose. And legal prose ain’t that! So read good prose. And then when you come back and start writing legal documents, see if you can write your document like a good article in The Atlantic, addressing a generalist audience. That’s how you do it: get your nose out of the lawbooks and go read some more.”).
5 See Wald, infra at 21 (“The well-turned phrase in a brief can capture a judge’s attention, which tends to wane after 60,000 words of legalese; the surprising allusion can set her thinking along different lines.”); See infra Eich at 55-56 (“Graceful legal writing didn’t die with Holmes and Cardozo.”).
6 See, e.g., Laborers-Employers Pension Trust v. Panera Bread, 697 F. Supp. 2d 1081, 1092 n.4 (E.D. Mo. 2010) (“Plaintiff’s extensive use of block quotes however, makes it difficult to ascertain precisely which statements it is challenging.”).
they encourage skimming or even skipping.\footnote{See Scalia & Garner at 128 (“many block quotes have probably never been read by anyone”).} Judges expect advocates to advocate, not to recite cold language on the assumption that the reader will study it and connect it to the present case. You would do just as well to print cases, highlight key passages, and hand them to the judge.\footnote{See In re Jay-Reyna & Constr., 387 B.R. 716, 720 (Bankr. W.D. Tex. 2008) (“The defendant’s motion consists almost entirely of block quotes copied and pasted from a few opinions. While the court does not take issue with the use of block quotes, it would have been more helpful had the defendant provided some context for those quotes. Instead, the defendant selected three opinions, one of this court, discussing different legal standards and pasted several lines of each opinion as her purported ‘arguments and authorities.’”)}. If you are going to write a persuasive brief, then you have to create a compelling, original work that draws on rather than parrots authority.\footnote{Cf. Tabor v. Bodisen Biotech, Inc., 579 F. Supp. 2d 438, 453 (S.D.N.Y.2008) (“Plaintiff’s use of large block quotes from SEC filings and press releases, followed by generalized explanations of how the statements were false or misleading are not sufficient to satisfy the heightened pleading standard.”); Santana-Concepcion v. Centro Medico del Turabo, 2012 U.S. Dist. LEXIS 46265, at *3 n.2 (D.P.R. Mar. 30, 2012) (noting various deficiencies in a brief, including “excessive, unnecessary quotations from depositions and sworn statements”).} Of course, a long quotation from a primary source can be necessary. But when it is, warn the reader that it is coming, that it is important, and that it should be read carefully. And to encourage her to take the plunge, briefly tell her why it is worth her time and energy. A good rule to remember is this: paraphrase when the language is not critical and quote only when it is.

2. Use preliminary statements to tell the judge why the brief is important and why you should win. Do it quickly and lively. The preliminary statement is an interesting creature in law firms. For partners, it’s often a place to put their stamp on the brief. For associates, it’s the part of the brief that is most often re-written. As a result, preliminary statements often feature a different writing style and even different arguments than those offered in the body of the brief. That’s problematic for obvious reasons, not least of which is the confusion that the disconnect between the sections can cause.

The significance of the preliminary statement depends on the judge and her clerks—at least some tend to immediately dive into the meat of the brief. But for those judges who do read it (we suspect most), this section is extremely important. Yet some young lawyers, overlooking the demands of a busy federal docket, do not see the value of summarizing something that is spelled out later in the brief. This leads many to put in rote recitation of the relevant standard and the adversary’s purported failure to meet it, thinking either that the remainder of the brief will do the rest of the work or that the partner will write something more enticing. That’s not enough. The preliminary statement is the associate’s chance to show off her creativity, impress her supervisor, and to persuade the judge.

We view the preliminary statement as carrying out two functions: to tell the judge why she should care about your brief and to summarize your arguments. The latter purpose is self-explanatory, and the former is often lost in briefs. For instance, many preliminary statements simply state that a discovery request is overbroad, but so what? Most motions seeking protective orders will argue that. Tell the judge what the dispute boils down to, and why she
should rule in your favor. Would it expedite the litigation? Is it easy—just a matter of confirming settled law? Would it, in other words, be an easy way to move the case along? Or will the judge be breaking new ground, writing on a cutting edge legal issue? These are the types of appetizers that intrigue the judge and encourage her to chew your arguments before swallowing.

3. Throwing mud at the other side wastes time and distracts from your argument. Many clients like aggressive lawyers. Litigation frequently stems from relationships gone awry, making it natural for clients to encourage their lawyers to throw low blows. There is no place for that in briefs.\textsuperscript{10} Ascribing bad motive to counsel or lodging personal attacks makes you seem petty and only raises questions about the strength of your substantive arguments—if your argument was strong, the judge may think, why would you need to attack your adversary? Be forceful, be persuasive, and be professional.\textsuperscript{11} And most importantly, stick to the law and the relevant facts.\textsuperscript{12}

4. Connect your arguments to the legal standard. Arguments matter only if they move you closer to victory. You can argue persuasively that the sky is blue, but if you never explain why that matters, the judge is again more likely to skim. Connect your argument to the legal standard.\textsuperscript{13} Show the relevance of what you are trying to prove. Doing so has two primary benefits: First, it discourages you from making irrelevant or weak arguments; it focuses your brief on what matters. For instance, arguments that are built around a “clear error” standard of review won't waste the appellate judges' time with the trial court's factual findings. Second, it encourages the judge to incorporate your brief into a judicial opinion, moving you one step closer to victory.

\textsuperscript{10} See Miller v. Adv. Studies, Inc., 685 F. Supp. 1196, 1200 n.5 (N.D. Ill. 1986) (“Both side's attorneys should spend less energy slinging mud at each other and (1) spend more time researching the legal issues involved in a motion which will occupy the court’s time; and (2) try to cooperate with each other to resolve this case either by settlement or trial”).

\textsuperscript{11} See Bettencourt v. Bettencourt, 909 P.2d 553 (Haw. 1995) (referring matter to state disciplinary committee where the “lack of professionalism and civility demonstrated in appellant's opening brief does not comport with” the professional ethics).

\textsuperscript{12} See Wald, infra at 22 (“Examples of “no-nos” taken from a recent brief include general allegations that the author’s opponent “misstated issues and arguments raised by appellants,” “made selective and incomplete statements about the evidence,” “distorted the causation issue.” Judges' eyes glaze over as we read that kind of prose.”); Hon. Ruth Bader Ginsburg, Remarks on Appellate Advocacy, 50 S.C. L. Rev. 567, 569 (1999) (“A top quality brief also scratches put downs and indignant remarks about one's adversary or the first instance decisionmaker. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.”); see also supra Eich at at *57 ("Casting aspersions on your adversary throws a shadow on your own standards and on the strength of your argument. Trashing your opponent or, perhaps worse yet - from the judges' standpoint, at least - trashing the trial court, will, at best, distract the judges from your arguments. At worst, it will irritate them; and that, I am sure, is not what you want.").

\textsuperscript{13} See, e.g., In re Feature Realty Litig., No. 05-CV-333, 2006 BL 104463, at *4 (W.D. Wash. 2006) ("[The movant] has failed to connect its argument to any legal basis for a claim of summary judgment on the issue of coverage. Accordingly, at this time summary judgment is not warranted."). Cf. Natural Res. Defense Council v. Abraham, 388 F.3d 701 705 (9th Cir. 2004) ("The abstruse and abstract arguments by the parties show that this case is not presently fit for review").
5. Emphasize with your prose and structure, not with your font. Emphasizing by bolding, highlighting, italicizing, and underlining is convenient—you don’t have to think how to structure your sentence so that the reader understands your message. But it doesn’t work. Judges are drowning in court filings and may skim when they think the brief allows it. Put yourself in their shoes: you have too much to read in too little time; you pick up a brief and see emphasized language, you naturally begin to speed-read, focusing on what is bolded and ignoring what is not. The result is a disconnected narrative that fails to persuade. Even for the diligent judge who reads every word, the impression that over-emphasizing provides is one of shouting, disorganization, and inability to make an argument. Emphasize with headings (by aiming at the heart of your argument), with structure (by leading with your strongest contentions), and with diction and syntax (by using crisp and original prose or by backloading your sentences with important information left to the very end). Leave your crayons at home.

6. Implement a structure and stick to it, but don’t forget to tell a story. Many young attorneys churn out briefs that lack structure or are too mechanical. Having a “background” and “argument” sections is usually not enough—give your reader breaks and provide her with a roadmap before you take her on the journey through your argument. Explain where she is going and why she should follow. If the destination has a number of alternative routes, tell her that at the outset. Don’t just dive in. And use topic sentences along the way. At the same time, remember that judges are humans and humans are, more than anything, persuaded by stories.

Two examples illustrate the point. Young attorneys are often relieved when their legal analysis must be filtered through a multi-prong test. But marshalling through each factor does not substitute for telling your side of the story. The judge will not review your analysis and that of your adversary’s and pick the better of the two. She reads the briefs to be persuaded and then issues her own decision, based on her own reasoning. Winning takes more than simply

---

14 See, e.g., City of Pontiac Gen. Emp. Ret. Sys. v. Stryker Corp., No. 10-CV-520 (W.D. Mich. July 8, 2011) (“In many instances, portions of block quotations emphasized with italics and bolding; no explanation of the significance of such emphasis is provided.”).

15 Hon. Patricia M. Wald (1999), 19 Tips from 19 Years on the Appellate Bench, 1 J. APP. PRAC. & PROCESS 7, 10 (“With the docket the way it is—and growing (federal court appellate filings went up again last year)—we judges can only read briefs once. We cannot go back and re-read them, linger over phrases, chew on meanings. Your main points have to stick with us on first contact—the shorter and punchier the brief the better.”).

16 Wright v. Elston, 701 N.E. 2d 1227, 1231 (Ind. App. Ct. 2008) (“We further remind the Wrights that well-reasoned arguments making proper references to the record and supported with citations to legal authority are far more persuasive to this court than rambling stream-of-consciousness assertions which rely on excessive use of bold-face type.”); see also infra Scalia & Garner at 122 (“Some brief-writers ill-advisedly use boldface type within normal text. The result is visually repulsive.”).

17 See, e.g., Allen v. Astrue, No. 10 C 994 (N.D. Ill. Aug. 1, 2011) (lamenting that a party’s “brief is disorganized and at times, unintelligible”).


19 See, e.g., Richard A. Posner, How Judges Think, 207 (Harvard University Press 2008) (writing that in reaching decisions, judges ask “what outcome would be the more reasonable, the more sensible, bearing in mind the range of admissible considerations in deciding a case, which include but are not exhausted by statutory language,
making the better argument; it takes persuading the judge because she is often free to come up with her own argument, to fill the void left by your adversary. To persuade, tell a story—and be succinct and interesting.\textsuperscript{20} If that means leaving the factors for last, then so be it (but mention them up front, see \# 4).

The same goes for over-relying on case law. Briefing is not a research contest (though thorough research is a prerequisite for any good brief). Too many opposition and reply briefs fail to engage the other side, and too many lawyers operate under the assumption that there are “good” cases and “bad” one, that briefing is about highlighting the good cases and minimizing the bad ones, and that the winner will be the side that brings the most friends to the party.\textsuperscript{21} Authority—decisional or statutory—should be weaved into the story. Precedent alone rarely governs the outcome of motions; if it did, the case would probably have settled well before briefing.\textsuperscript{22} A good story persuades the judge to fit your case within existing precedent.

7. **Learn grammar and proper usage.** This seems basic enough, but even experienced attorneys frequently disregard fundamental rules.\textsuperscript{23} As a result, court filings are routinely littered with sentences starting with “as such,” substituted for the proper “therefore” or “thus.” “As such” has a precise meaning. Learn it. That's one common example; others include confusing “that” for “which,” which stems from a lack of appreciation for the difference between restrictive and non-restrictive clauses.\textsuperscript{24} And some senior attorneys continue to peddle the tale to their subordinates that sentences should never start with “and” or “but,” that the bulkier “however” is more dignified—this all despite reputable authority explaining why that myth is both wrong and unfortunate.\textsuperscript{25} A complete list of common misconceptions is beyond the scope of this article but not many essays and books. Do not put it past judges to discount credibility based on repeated grammatical infractions.\textsuperscript{26}

\textsuperscript{20} For excellent advice on how to declutter and simplify your writing, consult William Zinsser's book, *infra* Chapters 2 and 3.

\textsuperscript{21} See, e.g., Richard A. Posner, How Judges Think, 229 (Harvard University Press 2008) (lamenting the amici briefs that “treat an appeal as a duel of precedents” which ignores “the judicial mind” and does not acknowledge the “politicization of constitutional law and the consequences for effective advocacy”).

\textsuperscript{22} See Wald *supra* at *12 (“don’t over-rely on precedent; few cases are completely controlled by it”).


\textsuperscript{26} See Mermelstein v. Maki, 830 F. Supp. 184, 187 (S.D.N.Y. 1993) (“Submissions like plaintiff’s papers, reflecting inadequate and incomplete research and riddled with grammatical and typographical mistakes, should be deterred, not rewarded. They taint counsel’s credibility, affront the dignity of the Court, and impair the efficiency of the judiciary. Rather than reject the papers or dismiss the motion, I accepted them and evaluated the issues on the merits.”). *Cf.* Breaux v. Pritchard, No. 09-CV-3531, 2010 BL 43808 (E.D. La. May. 1, 2010) (“Plaintiffs’ motion is so riddled with grammatical errors that the Court finds it hard to decipher Plaintiff’s arguments.”).
8. Pay attention to syntax; stay away from unnecessarily long sentences. It afflicts lawyers of all stripes: the long-sentence disease. Our writing—no matter how convoluted and impenetrable—make perfect sense to us; when we re-read our sentences, they flow effortlessly because we anticipate their every curve and know exactly where they lead. Other readers don’t share that benefit. Nor do they have the attention span to plow through one dense sentence after another. The same is true of choppy prose that results from disconnected short sentences packing less than full ideas. In short, readers get bored with ineloquence. Like musicians and dancers, some talented writers (like Scalia, Roberts and Kagan) are born with natural rhythm and may need nothing more than a little refinement; we mortals require training, which is best accomplished by making a habit of reading good writing.

In the age of e-readers, that should be easy: download *The New Yorker* and *The Atlantic*, and read Hemingway and Fitzgerald.

9. Footnotes have their place—it is small and insignificant. Footnotes are a common pest. Some local rules even limit their use. Why have judges restricted these traditionally helpful devices and why would attorneys over-designate text to subordinate portions of their briefs? We won’t address the obvious offender, who thinks that single-spaced footnotes are a legitimate tool to game page limits; many judges already preempt these transgressions. Apparently, many lawyers think that a marginal argument not worth primetime real estate can be cleverly tucked away in a footnote. Not clever at all, it turns out. Burying an argument in a footnote is a signal to the judge that either you don’t believe in it or it’s not important. Why should I waste my time then, the judge will often think—if the argument is not important to the person making it, certainly it is not important to me. In fact, some appellate courts have held that footnoted contentions are not even preserved for appeal. So an argument not made in the body of the brief, in many cases, is not made at all.

Bryan Garner has advocated a novel approach: use footnotes for references only—a tool that (1) disciplines the drafter to avoid dumping substantive material below the line, and (2) declutters the body of the brief from reporter citations and dense parenthetical explanations,

---

27 O’Diah v. State, No. 08-CV-941, 2010 WL 44568, at *2 (N.D.N.Y. Mar. 2, 2010) (“The Complaint also includes multiple repetitive clauses, connected by long, confusing sentences which are, at best, difficult to decipher. Indeed, it is difficult to fully comprehend the nature and details of the present claim.”).

28 See infra Scalia & Garner, 61 (noting that improving as a writer is a “lifelong project[]” in which the first step is “to read lots of good prose”).

29 See, e.g., Rule 32.2(a), Local Rules of the U.S. Court of Appeals for the Third Circuit.

30 See, e.g., Ohio Head Start Ass’n v. United States HHS, 873 F. Supp. 2d 335 (D.D.C. 2012) (“The briefing of the parties’ cross-motions demonstrates that counsel in this case is highly skilled, and counsel for both sides artfully presented complex legal arguments. However, the parties’ tendency to respond to important substantive issues in footnotes frustrates the overall effectiveness of their briefs[.]”)

31 See, e.g., Judge Robert W. Gettleman (N.D.Ill.) Standing Order Regarding Briefs, Motion Practice, Disclosures, and Protective Orders (“Excessive and/or substantive footnotes are strongly discouraged and will be counted as double-spaced passages when computing the number of pages in a brief.”).

32 See supra Eich at at *55 (“As in most other affairs of life, I would say that moderation should be the rule; keeping in mind, perhaps, Noël Coward’s observation that ‘[h]aving to read a footnote resembles having to go downstairs to answer the door while in the midst of making love.’ In other words, it better be good.”).

33 See, e.g., United States v. Dairy Farmers of Am., Inc., 426 F.33d 850 (6th Cir. 2005).
requiring the latter to be weaved into the narrative.\textsuperscript{34} We have our reservations about using a method too far out of the mainstream--judges are too trained on parentheticals, we think, and some may be dismayed by their complete absence.\textsuperscript{35} And a brief without parentheticals reads too much like a law review article for our taste. But the broader point is well-taken--force the writer to make her points through full sentences, not parentheticals and to avoid what Mr. Garner calls “talking footnotes” at all costs. The former can be achieved without implementing Mr. Garner’s method and the latter, we believe, are still appropriate in four rare occasions: (1) to introduce something potentially but not necessarily significant, which may otherwise require the judge to browse the record on her own, like citations to previous decisions and their docket entry numbers; (2) to help the judge write her opinion by giving her additional authority (without overwhelming her with pointless string-cites of settled law); (3) address possible questions the judge may have in reading the brief without distracting from your story, like a brief description of claims made in the complaint, even if they are irrelevant for the motion; and (4) preempt an argument that you are sure the opposing side will make.

10. When writing memoranda for senior attorneys, educate, don’t inundate. Research thoroughly, think deeply, and write confidently. A good place to try Mr. Garner’s footnote approach is in formal memoranda. Here, the purpose is to survey the legal landscape and answer a precise legal question. For this exercise, an academic tone that naturally flows from turning parentheticals into full sentences is quite appropriate. The young attorney’s common mistake is giving her supervisor too much without explaining much at all. If you are at a large law firm, search your database for legal memoranda and you’ll likely find yourself drowning in string-cites, block quotes, and cautious statements. All of these are symptoms of apprehension.

A young associate’s inclination is to do the heavy-lifting for the more senior attorney by copying relevant statements, dumping them on a page, and hoping that this authority will open up the clouds for the supervisor and reveal its meaning for the particular case. This urge is understandable--the hierarchical structure of big law firms doesn’t always encourage young associates to think critically.\textsuperscript{36} It’s an urge that must be resisted at all costs. You are a lawyer now; you are trained and paid to think and to analyze. And the heavy-lifting often comes from the analysis itself. There is an answer to every legal question, even if neither the legislature nor the courts have directly addressed it. If you think there is room for a competing interpretation of the law that diverges from the one you find most compelling, say so and explain why the view you advocate is more compelling.

Conclusion

Writing is an art, and there is no silver bullet when it comes to a good brief. There is only practice, reading, and learning good habits (and unlearning bad ones). The bottom line is that as a profession, we can do better -- we too often put out briefs that are confusing, dull, dense, and defective both in style and in grammar. Our clients deserve good writing. And so

\textsuperscript{34} See Scalia & Garner at 129-34 (debate between Garner and Scalia).
do judges and members of the public who too are consumers of our writing. Start by following the tips in this article, all of which focus on common shortcomings that we have observed as practicing attorneys and judicial law clerks. These tips, again, are just a starting point. Literature on good writing abounds, as do illustrations of it in novels, court opinions, briefs, and magazines. It's a good investment.