TIPS AND STRATEGIES FOR ALL LEGAL WRITERS

No More Writer's Block!

Before we get into the process of legal writing at any level, in any setting, let's confront that almost mythical monster, the dreaded writer's block. For our purposes, writer's block is essentially the inability to get started on – or to complete - a legal writing project.

Trouble getting started

When we look at the first type – a seeming inability to get started – it seems completely crippling. You stare at the blank computer screen, or a blank page. Your mind is suddenly blank. The task seems so vast that it feels like no matter where you start, it will be the wrong point. I've had my students - and clients - at all levels of sophistication find themselves frozen at this point. I've been there myself more often than I like to think. The answer is deceptively simple. Start writing. Keep your fingers moving on the keyboard. Keep your pen moving on the page. Write your thoughts about the legal analysis you must do, but if you don't know what to write, keep writing anyway! The point is to fill the screen – or page – with words. A blank screen or page is infinitely scarier than a page filled with words. It is infinitely easier to edit than to compose. And at the end of the process, there will *always* be some content worth saving, even if it is no more than a phrase or two. And a phrase or two are writer's gold! You are off and running! When my daughter was a college student struggling with the writing process, I gave her an analogy that I don't think you'll find in any textbooks. Writing, I said, is like vomiting. You don't want to - you don't want to - then you do - and you feel wonderful.

Finishing the legal writing project

You've gotten started. You've written a few paragraphs or a few pages. But suddenly it looks disorganized or simplistic or incomplete – and you simply don't know how to fix it. Here are several tried and true ways to escape the paralysis.

1. Take a break. Legal writing experts refer to this step as "achieving critical distance." Go for a short walk, run a quick errand, make a cup of coffee. If your workload makes even these steps impossible, then work on an entirely

different project. The idea is to give your brain a break.
2. Turn off your "inner editor." Your inner editor is the voice in your head that reviews your ideas, your writing style, the connections you see in the legal problem you need to address. Your inner editor makes your analysis original, vital and sometimes even revolutionary. Most of the time, your inner editor is a wonderful asset. But your inner editor can sometimes start criticizing your work too soon. When this happens, acknowledge it. Say - out loud - "it is too soon to edit." Alternatively, some people like to draw the face of an imaginary editor on a piece of blank paper, and then turn the page over so they can't see it. Sometimes just realizing what is going on is all it takes.
3. Read what you have written aloud. It's nice to have a listener; having a listener "keeps you honest" in that you'll have to keep reading despite any doubts that may well up. But an actual listener is not necessary. Just reading what you've already written aloud will jumpstart the process, and get you writing again.

Advocacy Through Writing: An Overview

When you write a legal brief to a court, you write as an advocate. This sounds straightforward, but its implications permeate the entire process and can hardly be over stated. An advocate's task is to write *to make something happen*. Not to describe something. Not to explain something for explanation's sake. The writer's task is to influence future events, to influence the court's decision-making process on behalf of the client.

As advocate, you want the judge to write an opinion that follows and adopts your conclusions. To do this, you must provide the judge with a step-by-step process for reaching your conclusions. Any gap forces the judge to extrapolate, and that can be fatal to your cause. In a nutshell, you must show why your conclusions are not simply plausible, reasonable or correct. It is not even enough to show that your conclusions are supported by sound precedent. You must show why they are *necessary*.

The best example of this strategy in action comes an oral argument I watched as a law clerk, years ago. The issue in the case focused on an individual's age. The court needed to decide if a person turned twenty-one at 12:01 a.m. on the day of his birthday, or at 11:59 p.m. on that same day. I no longer remember the specifics of the issue. But I will never forget the brilliant tactics. The attorneys had combed through state statutory law, and presented the court with a seemingly endless, almost staccato, litany of instances where one definition of age made sense and one did not. The examples came from different areas of civil law, and from criminal and administrative law as well. As I listened, I became convinced that the definition the attorneys advanced was necessary to avoid irreparable conflicts within the body of state statutory law as a whole. It sounds melodramatic, but I remember thinking I was witnessing a defining moment of some kind.

Let's take a look at the components of the strategy that brought those attorneys victory in that far off day. (Seriously, you aren't surprised that they won after that build up are you?) The components can be referred to, collectively, as the building blocks of the Art of Persuasion. The Art consists of three related parts, and we'll go through these building blocks one at a time.

Persuasive Use of Supportive Authority

Accomplishing an effective presentation of law and facts entails following some very specific, concrete principles.

First, the specific set of set of conclusions you want the court to adopt must always "drive the bus." Your arguments dictate your selection of case law, never the other way round. Case law, in itself, does not argue. It may suggest a certain conclusion to you, but cases are deliberately written to address a variety of possible future scenarios. It is up to you to provide context to the reader *before* you provide any case law at all. It would be foolhardy, indeed, to describe any part of a case before you have indicated how it must be applied to the facts of your case. This is true even if is a given case constitutes the bedrock of your argument.

Therefore, if you are given a case on which to focus as an associate, or asked to write a "case description" as a law student, don't get wrapped up in the case itself, because what matters is what the case means to your argument and to your client. And what the case actually means is, to some extent at least, up to you. If you don't provide context for the presentation of a case, you give your reader an opportunity to decide its significance for himself or herself. Definitely risky business.

As an aside, you may have noticed that I am not a fan of the way legal writing is taught at many American law schools, and the "case description," as it is often taught, is prime example of what disturbs me. Case descriptions are sometimes assigned in a vacuum. ("Write a case description for XX v. yy and bring it to class on Tuesday.") However, a case description should *never* simply be a summary of a case. To think of a case description that way would be to confine yourself, as a lawyer, to a life that is the intellectual equivalent of digging ditches. The case description will fit into a specific aspect of your analysis. It works for you, you are not its slave.

Thus, it is no accident that a brief to the trial court is called a memo of *points and authorities* in California. The writer's *points* must always come first, and the supporting *authorities* come second.

It may be helpful to consider the real world setting in which your brief to the court will be read. Banish any thoughts of a reader with an uncluttered desk and an entire afternoon to thoughtfully peruse your brief, perhaps over a cup of tea. And, while you are at it, you can banish any thoughts of a reader with sufficient - albeit limited – time to review your brief. On law and motion day in a typical California trial court, for example, the judge scans numerous briefs, and his or her clerks arrive in chambers punishingly early in the morning to make sure they can refresh the judge's recollection of those briefs. Including clearly defined, readily accessible conclusions in your brief will allow it to speak to all its readers in *your* voice, in service to your arguments, no matter what tasks or distractions compete for their time and attention.

Therefore, at any given point in a brief, the reader should know not merely what the law is, but what the relationship of the law is to the points that you are advancing. No case should be used beyond its value in supporting or articulating a proposition that you make in your argument. This principle should help people who worry how much of a case to include when they cite it. All jargon aside, simply ask yourself, does the reader need to know *this* to understand my argument? Does the reader need to know *this*? Or *this*? And if the answer is *no*, start hitting the delete button!

Organizationally, keeping the reader informed requires each new paragraph or section to begin with your conclusion. You accomplish this by writing topic sentences that express the point of the paragraph, and point headings that express the point of the group of paragraphs that follow it. With regard to topic sentences, compare the following two examples.

EXAMPLE 1

In G. v. C. N., a non-resident defendant regularly entered into sale and purchase agreements with a California corporation. The business negotiations took place almost solely through the mail and over the telephone. The court held that the use of the mail, telephone and other communicative media does not qualify as continuous and systematic activity that would justify general jurisdiction. Similarly, the facts in this case do not establish general jurisdiction because…

[Honestly, as you read this excerpt, didn't you think "Wake me up when this is over. I could care less how some random non-resident conducts business".]

EXAMPLE 2

Plaintiff simply cannot successfully assert general jurisdiction over Defendant in this case because Defendant did not engage in systematic activity within the forum. In G. v. C. N., a non-resident defendant regularly entered into sale and purchase agreements with a California corporation. The business negotiations took place almost solely through the mail and over the telephone. The court held that the use of the mail, telephone and other communicative media does not qualify as continuous and systematic activity which would justify general jurisdiction. In that case, the non-resident defendant regularly entered into sale and purchase agreements with a California corporation. Their negotiations took place solely through the mail and over the phone. Similarly, in this case…*****

["Aha! Now I know why I'm reading this! I'm finding out what Plaintiff can and cannot argue! I'm thinking about the comparison between that *case and* this *case."]*

Such is the magic of topic sentences. The reader is happy. If the reader is a judge, he or she is especially happy because the topic sentence makes it easy to see the writer's point.

We could summarize the format that makes the magic happen as follows:

The **conclusion** is advanced
The authority – or **rule** – is given
The rule is **applied** to the case
The **conclusion** is given again, this time shaded in light of the support you have just provided.

One could summarize: C-R-A-C

A simple way to check yourself is to remember that any time a new point is introduced within an argument, the paragraph should not begin with a

description of law or with a naked fact drawn from your case. Begin each new point with the conclusion you are advancing. If you do this faithfully, you will be able to extract an outline of your argument by reading the topic sentences of each paragraph. And so will every busy reader who must digest your argument.

This brings us to the second building block of advocacy:

EFFECTIVE ORGANIZATION OF ARGUMENTS

When you structure your argument, you must always begin with any procedural or otherwise threshold argument. After you do that, however, several guidelines apply.

Present your arguments first
Present your strongest argument first
Present your most significant arguments first

Hopefully, these will all be the same argument, but if not, you have a judgment call to make.

The first organizational step to take is to make sure your own arguments precede any refutation of opposing counsel's points. You want a reader with limited time to see why your arguments are good, rather than why opposing counsel's arguments are weak. Also, if you don't do this, you may give the impression that opposing counsel's arguments are so strong that you cannot discuss your own arguments until you have dealt them! In some non-legal settings, good writers build up to a strong conclusion, getting weak or less important points out of the way first. Not a good strategy in legal writing! Your reader may stop reading before the "good stuff."

Second, make sure to write from a positive point of view, if possible. Tell the court what you *want* it to do, not what you do *not want* it to do. Your position will always be stronger this way.

Third, after you make your own arguments, make sure to refute opposing counsel's arguments. You probably won't be able to refute every single argument opposing counsel makes, but do refute as many points as you can. Go for the most significant arguments you can refute. This is necessary step

in effective advocacy because it illustrates why your argument is superior, not merely good.

While you refute opposing counsel's arguments, however, keep the reader's focus on your arguments. Do this by using topic sentences that not only tell your reader what opposing counsel will argue, but, simultaneously *why that argument will fail*. Let's look at two examples to see why this is important and how it can be accomplished.

Example 1

Defendant will argue that his claim was timely filed because it was filed within two years of his discovery that the surgeon left a sponge in his abdominal cavity. The statute of limitations for medical malpractice begins to run only when the patient has notice of the doctor's negligence. [Cite] However, in this case the defendant actually had constructive notice of the doctor's negligence when…

In this first example, you have spelled out the your opponent's argument and placed it at the beginning of the paragraph, one of the "positions of emphasis." It is like giving your opponent some space in *your* brief.

Compare the structure and effect of the rewrite in the second example:

Example 2

Although the defendant filed his claim within two years of his actual discovery that the surgeon had left a sponge in his abdominal cavity, the defendant had constructive notice a year earlier when he had severe stomach pain. The statute of limitations for medical malpractice begins to run when the patient has notice of the doctor's negligence through any means. [Cite] In this case, the defendant actually had constructive notice of the surgeon's negligence when…

In this second example, in contrast to the first, the reader's attention is drawn to what *you* have to say about your opponent's argument. Although you have described his argument to the same extent in this example as in example 1,

the focus is no longer on the substance of his argument. By restructuring your writing you can put your assessment of your opponent's argument in the position of emphasis. You can avoid giving your opponent space in *your* brief. And, if you are fond of somewhat more technical word choices, you could describe the rewrite we have just seen as the process of *subordinating the opposing argument to the point you wish to advance.*

The bottom line is that you must present your argument first, whether you are explaining your own argument or refuting your opponent's argument.

LAW BEFORE POLICY

The second general "rule" is to position your own legal arguments before your own policy arguments. Policy arguments are important; they demonstrate why your position leads to the right result for the legal system or for society as a whole. Ideally, policy arguments also show that your position is entirely consistent with existing legal principles.

Don't let anyone tell you that policy arguments are second-class arguments, particularly if he or she adds that "policy is not tested on the bar." This is the somewhat shabby - and certainly shallow - refrain of many the law school administrator, for whom "good" bar results are the cha-ching of success. True, policy is rarely tested on the bar, but life after the bar exam is considerably longer and more important than the process of taking the bar itself. And, in all honesty, considering potential policy concerns actually can help you figure out a legal rule, either in the bar exam or in real life.

But, this diatribe aside, you should think of your policy arguments as "back up."

STRONGEST ARGUMENTS FIRST

This is the last organizational strategy. In persuasive writing, your best and most significant arguments must come first. You are not writing a novel, where the goal may be to lead the reader along, building up to a powerful finale. There is a practical reason for this strategy: your reader may never get to the end of your document.

After you figure out the strongest and most significant points you have to make, spend some time thinking about how weaker or less significant arguments can be presented as part of a stronger argument's support. This can strengthen both your most significant arguments, and the weaker points that support you.

In building the defense for a parent sued in a grandparent visitation case, for example, the centerpiece of an effective argument is the constitutionally protected right that fit parents enjoy to childrearing autonomy. But the less weighty argument, that a child will suffer because of the litigation itself, is certainly a related concern. And it can support the constitutional argument beautifully, as it did in the hands of Justice O'Connor, writing the plurality opinion in the United States Supreme Court's landmark grandparent visitation case, Troxel v. Granville.

SOME "MECHANICS"

1. Point Headings

Point headings are a separate persuasive tool at your disposal when writing a brief to the court. Good headings are both substantive and organizational; they should not simply divide your document into sections.

Point headings are statements of your contentions on each issue. A student of mine once dubbed them "super topic sentences," and I think that is a helpful characterization. Topic sentences provide the point of a single paragraph; point headings provide the point of a group of paragraphs.

Point headings should assert conclusions, not merely describe points or the topic of the next section. Main point headings, those numbered with roman numerals, correspond to, and answer, the questions presented. If you have two questions presented, you should have two point headings. No such rules dictate the number of the more minor headings you can use. Viewed schematically, point headings might be organized this way:

First main point heading ("I")

First subheading ("A")

First sub-subheading (“1”)

First sub-sub-heading (“a”)

Second sub-sub-heading (“b”)

Second sub-subheading (“2”)

Second subheading (“B”)

Second main point heading (“II”) and so on…

Note that where you have an “A” you must have a “B.” Where you have a “1” you must have a “2.” What if you have written a good sub-subheading, “1,” but now you cannot think of a second sub-subheading to be your “2”? Simple. Don’t use sub-subheadings at all in that section.

You may want to look at the point headings in the sample appellate briefs on this website at this point, to see how they function in a fully fleshed out document.

Where you use a sequence of point headings, the point headings move from broad to narrow. So your main point heading (“I”) will give your more global point for the section as a whole, while the minor point headings (subheadings: “A,” “B,” etc.) give the reasons that justify the main point heading and correspond to the flow of the points in your argument.

There is, however, no rule that you have to use minor point headings at all. Sometimes an argument does not seem to lend itself to multiple, clearly defined subheadings. If that is the case, write somewhat more substantial main point headings and call it a day. Whether you use main headings only, or opt for a mixture of main headings and subheadings, your headings, taken together, should provide the court with an outline of your argument. It is also important not to go crazy writing point headings. To justify including a new point heading you should have at least a page of material to write beneath it. If you find yourself with two point headings on a single page, one or both of those point headings is probably just a topic sentence in disguise.

2. Style, Tone and Diction

The final building block of advocacy is your writing itself. Looking critically at your style, tone and diction must always be the final stage of the writing process. If you start scrutinizing your writing too soon, your "inner editor" may rear its ugly head and make it difficult for you to finish. (See the Writer's Block post on this website for more on the connection between editing your writing prematurely and having trouble finishing a project.)

But now let's say each argument and counterargument has been made, and it is time for sentence level editing. Here are my three favorite inquiries.

First, is your tone positive?

Ask the court to "do this," rather than "don't do that" and to "deny" rather than "don't grant." Although these pairs of phrases mean the same thing, the effect on the reader is quite different. If you use positive phrases like "do xxx" or "deny," you focus the court's attention on your argument. If you use negative phrases like "don't do xx" or "don't grant" you have focused the court's attention on your opponent's argument.

Second, have you used the active voice in every instance except when you have specifically concluded that the passive voice will be more persuasive?

The active voice is more succinct and direct. We can dip a toe into the sometimes murky waters of grammatical terminology to explain this. The active voice keeps the subject of a sentence, the verb and the object together, in that sequence. Schematically, this looks like S-V-O. "Kate loves Bert." "Kate" is the subject. "Loves" is the verb. "Bert" is the object of her affections. The passive voice alters this construction by moving the actor – here Kate – out of the first spot. Using the passive voice, we might say "Bert is loved by Kate." You can see that this sentence is longer by two words. Passive voice constructions will always be longer by at least two words, and those two words are often some form of the verb "to be." Unnecessarily wordy sentences and unnecessary use of the verb "to be" are generally frowned upon, so the passive voice is disfavored. In the legal writing classes of some professors I have known, and will not name here, the passive voice is subject to an outright ban. This has made me wince for years.

In point of fact, there are times when the passive voice is so useful that it is virtually indispensible. Compare the difference in the sense of culpability in the following two examples:

1. The defendant's speeding car struck the man who was jaywalking across the street.

2. The man who was jaywalking across the street was struck by the defendant's speeding car.

The second example emphasizes the jaywalker and deemphasizes the defendant's speeding car. Jaywalking suddenly seems as much of an offense as speeding!

Or consider:

1. Joe hit Bill.

vs.

2. Bill was hit by Joe.

The mysterious and wonderful processes of the computer underlines the second sentence with a disapproving green line as I type. It has correctly identified the second example as passive voice, and like those unnamed legal writing professors, it "knows" that it is bad. The wisdom of computers and unnamed legal writing professors notwithstanding, however, if you represent Joe use the second example.

Third, have you let the court know that you want it to be actor? To act in your favor?

Assert, don't describe, the action you want taken:

"This Court must recognize the modern trend… and extend it to…"
This phrasing lets the court know what you want it to do. "Must" is a scary word to use in addressing the court - for law students, new lawyers, and, really, for anyone who understands the extent of a judge's power in his or

her courtroom. But it is a good word to use in a legal brief, from the court's point of view. Your position is clear!

Compare to: "The modern trend must be recognized and extended…"
Who must recognize it? This phrasing is much weaker, and it is passive. You have not told the court how you need it to act.

Or even worse: "The modern trend is …"
I don't think I even need to comment!

FINAL THOUGHTS

As you look at the other posts on this website, consider them in light of the ideas and principles you've read here. All writing in law, and, indeed, most writing in life, is advocacy on some level. Sometimes you are trying to persuade a court to rule in your client's favor. Sometimes you are trying to persuade your reader that you have reached a reasoned and reasonable interpretation of *something*. In the final analysis, these tasks are more similar than they might, at first, appear.