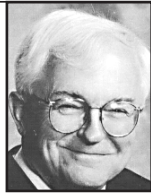


By
 Daniel U. Smith
 and
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Write to win

“If you can’t write, you can’t win,” warns Justice William D. Stein of the Court of Appeal. *The Recorder*, May 21, 1997, p. 1.

This warning raises important questions. What writing qualities are most persuasive to judges? What qualities comply with the “ethics of writing,” ensuring that the reader’s job “must never become a strain”? J. Barzun, *Simple and Direct*, p. 7 (1985).

Write for a busy judge!

Rule number one for the advocate who wants to win is to know your audience – the judge. To develop writing qualities that judges find persuasive, the advocate must recognize that judges are incredibly busy. Consider a law and motion judge who decides 25 motions daily. Assuming the judge has five hours to prepare, that leaves 12 minutes for each matter, or six minutes for each side. Or consider an appellate judge who authors 15 opinions monthly. This judge has only a day and a half to review the record and craft an opinion. At the same time, the judge must review twice that many opinions authored by colleagues, discharge supervisory and administrative responsibilities, and hear days of oral argument. Obviously, the time to study each advocate’s brief is limited.

Because of this relentless workload, a judge approaches your brief with two questions: (1) What issues must the judge decide? (2) Will your brief quickly provide the information needed to decide those issues? If your brief fails to give useful answers to both questions, the judge may be persuaded by your opponent’s brief, regardless of strength of your case.

A formula for winning

To encourage the judge to rely on your brief, consider incorporating into your writing style four essential qualities: brevity, simplicity, clarity of thought, and candor.

Brevity

Brevity helps the busy judge analyze

your arguments and supporting facts and law as quickly as possible. Brevity is the primary virtue extolled by judges and writing gurus. For example, Ninth Circuit Judge Harry Pregerson writes that the “[f]irst [s]in” of brief writing is “[l]ong, [b]oring [b]riefs.” H. Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 *UCLA Law Review* 431, 433 (1986). He notes judges’ “frustration when we are required to trudge through a fifty-page brief that could have presented its points effectively in fewer than twenty-five pages.” *Id.* at 434.

Similarly, the authoritative text on English usage, *The Elements of Style*, urges writers to “[o]mit needless words.” W. Strunk & E.B. White, *The Elements of Style*, p. 23 (4th ed. 2000). “Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.” *Ibid.*

Again, writer Isaac Babel advises: “Your language becomes clear and strong, not when you can no longer add, but when you can no longer take away.” John Updike, *Hide-and-Seek: The Complete Isaac Babel*, *The New Yorker*, p. 91 (November 5, 2001).

This advice requires that we delete everything that fails to advance the argument, that repeats a previous point or that would be understood in context. In short, delete everything that is unnecessary, redundant or implicit.

Simplicity

Simplicity also helps the busy judge. Applying legal principles to detailed and disputed facts is, by nature, a complex task. Complex matters demand simple explanations. The persuasive power of simplicity is noted by Judge Alex Kozinski of the Ninth Circuit in an e-mail to your author, Daniel Smith. Judge Kozinski wrote: “[S]imple, direct language is more persuasive than convoluted language. This is so for a num-

ber of reasons. First, simple language is more easily grasped.” Second, because “abstract language has a tendency to be soft and ambiguous,” simple language “forces the writer to focus his thinking and sharpen the argument.” Third, “abstract language can be easily waved aside by someone who is leaning the other way.” Judge Kozinski concluded: “[S]implifying and clarifying is not just a nice thing to do to be kind to the judges. It’s really the essence of advocacy.”

The *Elements of Style* also advocates simplicity: “The approach to style is by way of plainness, simplicity” Strunk & White, *supra*, p. 69.

To achieve simplicity, lawyers should “[p]refer the short word to the long; the concrete to the abstract; and the familiar to the unfamiliar.” Barzun, *supra*, p. 13.

For a shining example of simple English, consider the instructions crafted by a Task Force on Jury Instructions of the Judicial Council of California. This Task Force was appointed by Chief Justice Ronald George. Its Civil Section, chaired by your author, Hon. James D. Ward, issued in 2003, California Civil Jury Instructions (CACI) in plain English.

These instructions are a model of simplicity. They omit legalistic redundancies. For example, the phrase “injury, damage, loss, or harm” (BAJI 3.76) is simplified to “harm.” CACI 430. The new instructions omit awkward negative constructions. For example, the instruction, “Failure of recollection is common. Innocent misrecollection is not uncommon” (BAJI 2.21) is simplified to read: “People often forget things or make mistakes in what they remember.” CACI 107. The new instructions avoid legal jargon. For example, the phrase “preponderance of the evidence,” is simplified to read: “more likely to be true than not true.” CACI 200. Lawyers are “strongly encouraged” to use these new, plain-English instructions. California Rules of Court, Rule 855, subdivision (e).

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Simplicity in legal writing is a national trend. The Securities and Exchange Commission now requires disclosure documents to use “plain English,” “at a level the audience can understand.” U.S. Securities and Exchange Comm’n, *A Plain English Handbook: How to create clear SEC disclosure documents*, p. 7 (1998). (www.sec.gov/pdf/handbook.pdf). SEC Rule 421 requires disclosure documents to use “definite, concrete, everyday words.”

Though some lawyers fear that simple words or expressions suggest that the writer is simple, the opposite is true. Simplicity in writing “paradoxically, . . . lead[s] readers to conclude that the writer is smarter.” B. Garner, *A Dictionary of Modern American Usage*, p. x (1998).

So, to be on the cutting edge of persuasive legal writing, write simply.

Clarity of thought.

If your brief lacks a clear train of thought, busy judges may lose their way. As C.S. Lewis notes, “I sometimes think that writing is like driving sheep down a road. If there is any gate to the left or right, the readers will most certainly go into it.” Quoted in Barzun, *supra*, face page to p. 1.

Here are some specific tips to maintain a clear train of thought, especially at transition points: from heading to text, from paragraphs to paragraph, and from sentence to sentence. In headings, state the key terms you will use throughout. In the first sentence after the heading, echo the heading, using its key terms. In the first paragraph after the heading, orient the reader by giving a summary of the analysis and conclusion to come. Repeat key terms in subheadings and topic sentences. Link sentences by starting the new sentence with the thought that ended the previous sentence. Show the logic of what is to come by starting paragraphs and sentences with short signals, such as “First,” “But,” “Hence.” Eliminate detours – stay “on message” by deleting nonessential information. Use the same word for the same thought. In conclusions, summarize the details just analyzed. Avoid acronyms – use a key word instead. Put citations at the end of the sentence.

Candor

The final quality that invites judges to rely on your brief is candor. Absolute honesty about the facts and the law is a requirement of rhetoric and ethics.

Candor makes your writing more persuasive by showing your good character. As Aristotle explains: “Persuasion is achieved by the speaker’s personal character when the speech is so spoken as to make us think him credible. . . . [The speaker’s] character may almost be called the most effective means of persuasion he possesses.” R. McKeon, ed., *The Basic Works of Aristotle, Rhetoric, Bk. I: Ch. 2*, p. 1329 (1941). “Aristotle believed that the greatest speakers don’t just persuade audiences to accept an argument – they get people to trust their judgment.” David Brooks, *The Happy Populist*, *The New York Times* p. A27 (Jan. 27, 2004). Candor is the writer’s most powerful tool for gaining acceptance: “The way you write reflects the way you think, and the way you think is the mark of the kind of person you are.” William Safire, quoted in J. McQuain, *Power Language*, p. 149 (1996).

Hence, if you exaggerate a fact or rule of law, your credibility will be destroyed. “Credibility is just as fragile for a writer as for a president. Don’t inflate an incident to make it more outlandish than it actually was. If the reader catches you in just one bogus statement that you are trying to pass off as true, everything you write thereafter will be suspect. It’s too great a risk, and not worth taking.” W. Zinsser, *On Writing Well*, p. 78 (6th ed. 2001).

Candor is an ethical requirement. California Rules of Professional Conduct, Rule 5-200, requires lawyers to use “such means only as are consistent with truth,” to avoid “seek[ing] to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law,” to avoid “intentionally misquot[ing] to a tribunal the language of a book, statute, or decision,” and to avoid, “knowing its invalidity, cit[ing] as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional[.]” Similar requirements of candor are found in the American Bar

Association’s Model Rules of Professional Conduct: Rule 3.3, “Candor Toward the Tribunal.”

Specific tips

Here are some tips to help you write with brevity, simplicity, and clarity of thought at each level of your motion or brief.

Headings

- Assert a complete point. Do not write: “The accident.” Instead write: “The accident: Johnson ran the red light.”

- Use parallel structure. Parallelism makes the logic of related points readily apparent.

- Keep headings short; strive for two lines or less.

- In the first sentence after the heading, repeat key terms from the heading to orient the reader to the discussion and conclusion to come. This transition from heading to text is an important opportunity to maintain a clear train of thought.

- Make headings easy to read. Do not underline or use all caps or initial caps. Use only bold and capitalize only the first letter.

- Edit headings in the Table of Contents. The judge will likely read your Table of Contents first. Make it sparkle and sing.

Paragraphs

Limit each paragraph to a single point, stated in the topic sentence. The topic sentence is both a promise and an obligation. It promises the reader what topic will be discussed, and it obligates the writer to limit the paragraph to that topic.

Start the paragraph by linking it to prior text. Linking is achieved in three ways: (1) repeat key terms from the prior paragraph; (2) refer to prior points collectively, using “this,” “that,” “these,” or “those”; (3) start with signals like “And,” “Under,” “Because,” “Six weeks later,” “But,” “Hence,” “For example.” These links help the reader by showing the logical relationship between prior text and the new paragraph.

Sentences

Here are seven techniques to make your sentences short and simple, with a clear train of thought.

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- Start with a link to prior text (as shown above with paragraphs).

- Put the point of emphasis at the end of the sentence, where the period and white space allow the point to linger. Because the reader expects to find your most important point at the sentence's end, use that expectation to your advantage. You must determine your most important point and reorganize the sentence to put that point at the end. For example, you would not write "Defendant knew, but concealed from plaintiff, the truth." It is more persuasive to write: "Defendant knew the truth but concealed it from plaintiff."

- Keep introductory phrases short — three to four words. The heart of your sentence is the subject acting through the verb on the object. Long introductory phrases block the reader from getting to the heart of the matter.

- Use a strong subject and verb — a person or thing taking action. Avoid weak subjects with forms of "to be," such as: "There is [was/will be]," or "It is [was/will be]," or "The reason that . . . is."

- Use parallel structure for parallel ideas. Parallelism adds power to a point the reader might resist. Consider Lincoln's statement that, "As I would not be a slave, so I would not be a master." Parallelism highlights similarities or distinctions and makes complex information easier to grasp.

- Keep sentences short. Aim for two lines. Here are seven tips to keep sentences short: (1) Delete what is unnecessary, redundant, or implicit. (2) Condense clauses into phrases and phrases into words. (3) Eliminate adjectives and adverbs by using stronger nouns and verbs. (4) Divide a long sentence in two. (5) Eliminate introductory clauses or limit them to three words. (6) Limit the sentence to a single point or two contrasting points. (7) Avoid compound sentences, two independent clauses joined by "and."

- Use punctuation for brevity and to show the logic of your thought. Use the dash and colon to emphasize a point. Use the semicolon to join closely related points. Use bullets to list a series of paral-

lel points. Use parentheses to slip in minor but essential information.

Plain English can be forceful

Writing that is concise and simple need not be bland. Here are some tips to make your writing forceful.

Use short, punchy words that sound like their meaning. For example: avalanche ("avalanche of litigation"); cascade ("a cascade of exceptions engulfed the rule"); foil ("foil the Legislature's intent"); spasm ("the apartment complex erupted in a spasm of gang violence").

Keep key details in the foreground. Details are your most persuasive tools, painting a vivid picture the judge will remember. Compare a sign saying "No Swimming" with this sign: "No Swimming. Last year Susan Parks and Tom Simpson died in the undertow."

Write in the order of time, cause and effect and climax. This is the order of events in the real world. Reflect this order in your writing to spare the reader the effort of sorting out the true sequence of events. You would not write: "He jumped to his death, crazed with jealousy." That sentence reverses time, reverses cause and effect, and starts with the climax. The natural order is more forceful: "Crazed with jealousy, he jumped to his death." D. Lambuth, *The Golden Book on Writing*, p. 18 (1987).

The persuasive brief.

Here are some tips to make each part of your brief useful to the judge.

Introduction

The introduction has several goals. First, it orients the judge to the field of law, to what happened between the parties, and to the case's procedural history. Second, it states the issues presented. Finally, it presents the key facts or rules that resolve those issues. On each issue give enough detail and analysis to show the validity of your position.

Record cites are required in the Introduction because briefs must "support any reference to a matter in the record by a citation to the record." (Cal. Rules of Court, Rule 14, subd. (a)(1)(C); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126

Cal.Rptr.2d 178] (claims lacking record citations will be disregarded).

Statement of facts

The statement of facts must "provide a summary of the significant facts" (Cal. Rules of Court, Rule 14, subd. (a)(2)(C)) under the applicable standard of review. Thus, appellant must present the evidence and inferences supporting the judgment. Appellant's failure to fairly and completely state the evidence may lead to waiver and sanctions. *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97 [131 Cal.Rptr.2d 746, 754] (waiver); *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884-886 [271 Cal.Rptr. 513, 520-521] (sanctions).

To orient the reader, use frequent headings and subheadings, asserting major points.

Argument

Organize points from strongest to weakest.

Present each point in four stages (similar to law school's IRAC method).

(1) Provide a roadmap. Summarize the section's point, identify its supporting information, and show how this point supports your result.

(2) State the controlling rules of law in a neutral way. Argument is not appropriate in stating rules of law.

(3) Apply the rules to the facts or procedural history of your case. This is where you argue that the rules support your result.

(4) Conclude by reciting the key details that support your result rather than a conclusory statement.

Citations

Citations, though necessary, clutter the text. Citations at the beginning or middle of a sentence prevent you, the writer, from creating a clear train of thought and prevent the reader from discerning your train of thought. To overcome these obstacles, draft with the citations in footnotes, to see whether you created a clear train of thought. Then before filing, restore the citations to the text at the end of the sentence. If you must start the sentence by referring to authority,

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simply say: “As the Supreme Court held...”

Some writing teachers urge lawyers to put citations in footnotes. B. Garner, *Legal Writing in Plain English*, pp. 77-81 (2001). And your author, Hon. James Ward puts citations in footnotes in his opinions.

But a widely-held contrary view is that citational footnotes are a burden, forcing the reader to scan up and down the page to verify the assertion in the text. Judges and staff attorneys have told your author Daniel Smith that they want the citation in the text, right next to the proposition it supports. One California appellate court even warns lawyers that briefs that regularly put citations in footnotes may be stricken. There is merit to both sides of this dispute, but caution requires conformity. Put your citations in the text following your points.

Visual aids

Illustrate major points visually. Use photos, charts, diagrams, lists, tables and graphs. They must, of course, be part of the record. (Cal. Rules of Court, Rule 14(d).) Visual depictions are more

persuasive than a dense prose paragraph. For example, to show the defect in the design of a car’s fiberglass roof, plaintiffs in one case put in their brief a photograph of the car – its roof crushed down to the dashboard. The appellate court responded to plaintiffs’ arguments by reinstating a multi-million dollar punitive damage award. *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115 [122 Cal.Rptr.2d 139]. Again, where plaintiff’s hand was severed by an unguarded saw blade, a diagram showing the on/off switch just above the unguarded saw blade helped obtain affirmance of a multi-million judgment. *Dendy v. Sears Roebuck & Co.* (1999) (A070356).

Editing

A persuasive brief requires frequent editing. “Rewriting is the essence of writing well; it’s when the game is won or lost. . . . The newly hatched sentence almost always has something wrong with it. . . . [C]lear writing is the result of a lot of tinkering.” Zinsser, *supra*, p. 85.

Consider these editing techniques. Edit the hard copy, because your abili-

ty to edit on screen is limited. Edit away from the office – at home or in a restaurant, bookstore or library. Have the brief edited by an attorney unfamiliar with the case. Read important parts aloud, especially the Introduction. Complete the draft two days before filing so your mind will be fresh for your final edit.

In sum, judges are persuaded by briefs that display brevity, simplicity, clarity of thought, and candor. If your briefs exemplify these qualities, you will maximize your chance of persuading a busy judge.

James D. Ward is an Associate Justice of the California Court of Appeal, Fourth Appellate District, and is chair of the Judicial Council’s Advisory Committee on Civil Jury Instructions. He was formerly the chair of the Task Force on Civil Jury Instructions.

Daniel U. Smith is a Certified Appellate Specialist (State Bar Bd. of Legal Specialization). CAALA named him Appellate Lawyer of the Year for 2002. He served on the Task Force on Civil Jury Instructions and serves on CAOC’s Amicus Curiae Committee.