

Ten(Approximately) Tips for Effective Legal Writing

Bridging the Gap 2016

Ventura County Barristers

Think about your audience and what you want from them?

Make it easy to agree with you

Tone

Name-calling

- i “Ad hominem arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names (Jane, you ignorant etcetera . . .) only shows the paucity of your own reasoning. ”(Huntington Beach City Council v. Superior Court (2002) 94 Cal.App.4th 1417, 1430 [115 Cal.Rptr.2d 439].)

On occasion, it is sanctionable conduct:

- i ‘Indeed, the tone of counsels’ brief suggests it was more cathartic than tactical. However, an opening brief is not an appropriate vehicle for an attorney to vent his spleen’ after losing at an arbitration hearing. This is because, once the brief is filed, both the opponent and the state must expend resources in defending against and processing the appeal. Thus, an unsupported appellate tirade is more than just words on paper; it represents a real cost to the opposing party and to the state. ... Thus, such an outburst, when committed to the pages of an opening brief, becomes an expensive proposition for all those concerned.

Justice requires that those costs fall on the person (or persons) who unreasonably caused them.(Pierotti v. Torian (2000) 81 Cal.App.4th 17, 32-33.)

Words that are disguised name-calling

- i Pretext
- i Egregious
- i Thinly-veild
- i Chose to disregard
- i Ridiculous
- i Misleading
- i Cursory

Excessively emotional screeds diminish credibility

- i "In a desperate attempt to avoid the statute of limitations , plaintiff resorts to making an absurd argument. "
- i "This is a story of a legal system run amuck, a Kafkaesque demonstration of tyranny given free rein. "

Strive for consistency in terminology throughout the document and preferably throughout the case.

Organization

Table of Contents

- i Road map to your document

Under the References tab in Word

- i Under Tools/References in WordPerfect

Using navigation map feature in Word

Introductions

Body

Use signposts (transition sentences)

Put citations in text, not footnotes

- i Reader forced to look up and down the page.
- i See, Roger D. Townsend, "A Functional Approach to Footnotes in Briefs and Opinions, "
<http://www.adjitlaw.com/assets/A%20Functional%20Approach%20to%20Footnotes%20in%20Briefs.pdf>

Paragraphs

Three parts:

- i Introduction ('topic sentence ')
- i Body (information)
- i Conclusion (summary and/or transition to next paragraph)

Start paragraphs with your point, not your opponents

Conclusions

Words

Use specific words rather than general

- i 'Clydesdale "or 'stallion "rather than 'horse "
- i 'Date of separation case "rather than 'family law case "

Use the correct word

Don't intensify absolutes

- i "very unique "
- i "perfectly parallel "
- i "Incredibly round "

Be careful of frequently confused and misused words

- i Parol/parole
- i Flout/flaunt
- i Discreet/discrete
- i Duplication/duplicity
- i Affect/effect
- i Accept/except
- i Allusion/illusion
- i Imply/infer
- i Its/it's
- i Principal/principle
- i Your/you're

Do not fill your document with acronyms.

- i "LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP. Even if there was a winning argument buried in the midst of that gobbledygoop, it was DOA. "(Alex Kozinski, "The Wrong Stuff "1992 BYU L.Rev. 325, 328.)
- i The use of obscure acronyms, sometimes those made up for a particular case, is an aggravating development of the last twenty years. Even with a glossary, a judge finds himself or herself constantly looking back to recall what an acronym means. Perhaps not surprisingly, we never see that in a brief filed by well-skilled appellate specialists. It has been almost a marker, dividing the better lawyers from the rest (Del. Riverkeeper Network v. FERC (D.C. Cir. 2014) 753 F.3d 1304, 1321.)

Avoid double negatives

- i Instead of "the rule does not preclude" use "the rule allows."
- i Instead of "not inconsistent," use "consistent."

Be careful of "not"

- i Can be ambiguous, e.g. "It's not a bad case."

Be careful of words that can be read two ways

- i "Both parties waive the right to claim reimbursement for the income being reported as salary until this stipulation and order is replaced by a judgment." Does "until" mean "the spouses are not entitled to reimbursement for the period before entry of judgment, or does it mean merely that the time to submit the claim is after judgment is entered?"

Pay attention to the difference between "which" and "that" in the brackets below (the bracketed parts are called "adjective clauses" or "relative clauses")

1. The contract [that she drafted over the weekend] is easy to read.
2. The contract, [which she drafted over the weekend] is easy to read.

The first sentence suggests that she has drafted more than one contract, but the one described in the sentence is especially easy to read. The adjective clause cannot be omitted because then we would not know which contract the sentence referred to. The bracketed clause is “restrictive” in that it restricts the meaning of the noun “contracts.”

The second sentence tells you that we are concerned with only a single contract. The information beginning with “which” could be omitted and the sentence would still convey the same information with less detail. The bracketed clause is nonrestrictive because the information in it is not essential to the meaning of the sentence; it just adds detail.

3..The contracts [that were mailed to San Francisco] are easy to read.

4..The contracts, [which were mailed to San Francisco], are easy to read.

The third sentence tells us that only some of the contracts were mailed. If the phrase in brackets is left out, the sentence would say that all the contracts are easy to read, which might not be true. The bracketed clause is restrictive. Because the fourth sentence intends to tell us that all the contracts are easy to read, the “which” clause is non-restrictive, and it can be omitted.

Avoid pompous-sounding words

- i People who sprinkle long, complicated words in their writing are viewed as less intelligent by readers, according to a 2006 study in Applied Cognitive Psychology. (http://www.abajournal.com/news/article/want_to_appear_smart_pretentious_language_and_a_poker_face_dont_work/?utm_source=maestro&utm_campaign=weekly_email&job_id=150114BS&utm_medium=email.)

Sentences

Put the important part of the sentence FIRST

- i 'My client, Smith, will settle if your client apologizes "
- i (emphasizes what Smith will do)
- i 'If your client apologizes, Smith will settle "
- (emphasizes what your client must do to get a settlement)

Beware of too many introductory clauses

Never put two commas in a sentence before the main subject

It's easier to read two short sentences than one long sentence.

Subject → verb → object is the easiest kind of sentence to read.

Keep the verb close to the subject

Use active voice

Active voice directly describes action with single-word verbs

- i "The delivery van crushed the victim. "

Passive voice uses auxiliary verbs and moves action further into the past

- i "The victim was crushed by the van "
- i Passive voice constructions are often followed by a preposition, e.g. "The victim was crushed by the delivery van. "

Reasons to use passive voice

- i To emphasize the action rather than the actor
- i To avoid blaming the actor ('Mistakes were made ')
- i To create authoritative tone ('Visitors are not allowed ')

Yes, you may end a sentence with a preposition.

Avoid pompous, esoteric, academic, and overly-technical wording

- i "This bias is attributed to a metacognitive inability of the unskilled to recognize their ineptitude. "
- i "In fine, I resile from turning ERISA decision making into an aeonian logomacy. "(Kearney v Standard Insurance Company (9th Cir. 1999), 175 F.3d 1084, 1105, (concurring and dissenting opin. of Fernandez, J.)

Punctuation

- i Do not use commas to make two independent clauses into a single sentence ("Plaintiff filed the complaint December 1, he alleged six causes of action. ") Instead, use a semi-colon ("Plaintiff filed the complaint December 1; he alleged six causes of action. ") Alternatively, and often preferably, make two sentences. ("Plaintiff filed the complaint December 1. He alleged six causes of action. ")
- i Understand the appositive comma when the word or words between the commas mean the same thing as the subject of the sentence: "The plaintiff, Edgewood, lost \$50,000 in profits "refers to the single plaintiff in a case; the words "plaintiff "and "Edgewood "mean the same thing. But "The plaintiff Edgewood lost \$50,000 in profits "implies that there are other plaintiffs who lost other amounts or who did not suffer losses.
- i Separate interchangeable adjectives ("Strong, healthy man ") but do not use comma if switching the order of the adjectives would produce a different meaning or an ambiguous or nonsensical sentence. For example, "This is complicated bad faith case "works, but "This is a bad faith complicated case "does not.
- i If you list more than two items ("dogs, cats, horses and birds ") they are separated by commas, but it is optional whether you add a comma before the word "and. "When a comma is inserted before "and "it is called an "Oxford comma. "Occasionally the Oxford

comma is necessary for clarity, but otherwise it's up to the writer.

- i Apostrophes mark contraction of two words into one ('don't ') or possession ('Ms. Wright's book '). They are not used after people's names unless you are indicating that those people possess something.

Length

- i "No one ever complained about a too-short brief. "
- i "However, the learned counsel may not have had time to prepare a short brief, and for that reason have cast upon us the unnecessary labor of reading and extracting therefrom points made. If we overlook any of them, counsel will readily understand the reason." (King v. Gildersleeve (1889) 79 Cal. 504, 507.)

Don't repeat yourself

Excessive repetition insults the reader's intelligence

Eliminate unnecessary words and phrases

- i "Please do not hesitate to let me know "
- i "Due to the fact that "
- i "It is clear that "
- i "I am writing to let you know that "
- i "We are in receipt of "

Techniques for making a memo or brief shorter

- i Start with only a summary of facts; save details for the specifically related arguments
- i Reduce explanations of well-known principles of law and refer to leading cases providing more detail about those principles
- i Avoid reciting the facts of cases unless there is a reason you need those facts to illustrate your point
- i Avoid quotations from the record or cases when a paraphrase would do.

- i Consider eliminating make-weight arguments
- i

Edit, edit, edit

Print and move away from computer

Get someone else to edit for you

Appearance and Readability

What the Rules Require

- i California Rules of Court, rules 2.100-2.119 address the form of papers filed in trial courts
- i California Rules of Court Rules 8.
- i California Rules of Court Rule 8.40 addresses the form of papers filed in appellate courts
- i Local Rule 11-3 governs the format of documents filed in the Central District of California

Citations

- i 'Citations to cases and other authorities in all documents filed in the courts must be in the style established by either the California Style Manual or The Bluebook: A Uniform System of Citation, at the option of the party filing the document. The same style must be used consistently throughout the document. '(Rule 1.200, California Rules of Court.)

Use block quotes sparingly; better to paraphrase them.

Typography

Seventh Circuit Court of Appeals, "Requirements and Suggestions for Typography in Briefs and Other Papers" <http://www.ca7.uscourts.gov/rules/type.pdf>

Electronic documents

- i Use short summaries at the beginning and end of each section
- i Enable skimming by making the structure of the document visible
- i Use short, argumentative headings
- i Edit bookmarks to make them shorter
- i Increase white space by using shorter sentences and paragraphs
- i Avoid footnotes because they force the reader to navigate away from the page.

Resources for Writers, Legal and Otherwise

- i "Top Technical Flaws in Briefs," The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit, <http://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf>, p. 64
- i Mary Beth Beazley, "Writing (and Reading) Appellate Briefs in the Digital Age," The Journal of Appellate Practice and Process Vol. 15, No. 1, p. 47 (Spring 2014)
- i Byron Garner, Legal Writing in Plain English (Univ. of Chicago Press 2001)
- i Byron Garner and Antonin Scalia, Making Your Case: The Art of Persuading Judges (Thomson West 2008)

- i Jacob Gershman, "Why Adverbs, Maligned by Many, Flourish in the American Legal System," Wall Street Journal (Oct 8, 2014)
<http://www.wsj.com/articles/why-adverbs-maligned-by-many-flourish-in-the-american-legal-system-1412735402>
- i Wes Hendrix, "From Good to Great: The Four Stages of Effective Self-Editing," The Journal of Appellate Practice and Process Vol. 14, no. 2, p. 267 (Fall 2013).
- i Alex Kozinski, "The Wrong Stuff "1992 BYU L.Rev. 325
- i <http://www.lawprose.org/>
- i Christina Sterbenz, "13 Rules for Using Commas Without Looking Like an Idiot,"
<http://www.businessinsider.com/a-guide-to-proper-comma-use-2013-9>
- i Word Rake www.writetothepoint.com