

Thoughts from an Unconstrained Practitioner

**Writing An Appellate Brief, Or,
How To Make Tax Law An Interesting Read**

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Almost every article or book that tries to teach good writing says the same things: be succinct; be clear; use the active voice; use common words; avoid verbosity; use simple sentences; use topic sentences and be sure your paragraphs follow a logical progression.

We've heard all that for years. I can picture my seventh grade English teacher, a true blond whose image I recall well, wagging her index finger at the class as she instructed us to conform to those rules. The finger wagging thing must be genetic among writing instructors because nearly every one I've had since has wagged and admonished me to fit my writing into that mold, as if their first digit would give me the wherewithal to do so.

There is some value to each of the mantras our writing teachers lectured about. But I have a different way of viewing the work of writing. I don't have rules you should follow. Instead, I offer ideas to consider. I can't tell you how to assemble the words that will make a good appellate brief. But think about these ideas and you'll likely write a better appellate brief.¹

Readability

Is your brief susceptible to being read? Will a judge want to read it to conclusion?

Readability is a function of style. What is writing style? It is the way you write; it is the method you use to convey your ideas in writing; it is the manner of delivery of the written word.

For a brief to be readable, it has to be interesting and it has to have consistency. Most of the briefs I see are unreadable because they violate these two basic principles. Here are some style pointers to consider.

Overcome reader fatigue and disinterest by being assertive and unrelenting.

A good deal of the subject matter we write about lends itself to boredom. If you let it, a discussion of the revenue code or the UCC or the marital dissolution act or any of the other obscure things that occupy lawyers will provide your reader with hours of baby-like sleep. And the obverse happens all the time: a bad brief makes the most exciting subjects awful to read about. But the denseness of a subject doesn't mean your brief has to be boring. You can't afford to let ennui creep into your brief: you and your client want to win your appeal.

Transcend the dull-and-tedious syndrome by writing resolutely, sometimes even boldly. Readability and persuasiveness are improved by being assertive and positive.

Advance the facts so the court will want to rule for you. Then advance the argument so the legal conclusion is inevitable. Everything you say in your brief must have a purpose toward those ends. If you state something that doesn't move your theory forward — or worse, steps backward — get out the red pen and cut it. You don't earn points for smart-sounding footnotes or parentheticals. But you never have to apologize for persistently pursuing your theory.

I'm not advocating ignoring the warts in your case. That's a sign of a weak brief. Just the opposite is better practice. But there is a difference between glossing over bad law and facts, and dealing with them in a positive discussion. Weak briefs fail to do the latter. Good briefs show why those bad things are not as important and persuasive as other points you emphasize.

Give your brief a consistent voice.

The next style factor to think about concerns consistency. Your brief should be in a consistent style written with one voice. Multiple styles and writers are distracting for the reader and make it difficult to progress through the brief. When different sections of a brief are stamped out by different writers — or worse, when a single section has many hands — the result usually is incongruous. The tone will be different; the vocabulary will be different; the quality of rhetoric will be different. Don't make the court fight these changes from section to section. Deviation from consistency distracts the reader.

I've worked on many briefs that were team efforts. The best ones had a chief at the end of the line who shuttered himself in with a last draft and made the brief his own. That assures the court will receive a brief articulated in one way, a much cleaner, more digestible read.

Pay attention to writing style.

Consistency is great, but consistently dull and plodding will challenge the reader's sleep function. How then do you choose a writing style that will capture and keep the court's attention? How do you make tax law an interesting read?

Don't be fooled by anyone who pretends to know that there is a "best" writing style. There isn't one. The devotees to the subject-verb, subject-verb, subject-verb repetition style are wrong. It's workmanlike, but intrinsically boring.

Writing styles are like baseball batting stances. Some work better for certain individuals than do others. Choosing a writing style is critical because you want your brief to be read. Your finest thoughts are meaningless if your audience doesn't read and like them.

Your style has to overcome two factors that plague your audience – fatigue and disinterest. These are the same problems you often encounter. The way to combat fatigue and disinterest is to use an inspirational and determined writing style that makes you want to keep reading. So ask yourself: What do I like to read? What keeps my interest? And why?

I'm not encouraging you to make your appellate brief sound like a romance novel. But what is there about Danielle Steele's writing that keeps you turning the pages? It's not just the lusty subject matter. Imagine if that were written like a typically sedating legal brief. It would be equally as dull.

Maybe you like Michener, Steinbeck, or the back of cereal boxes. (All good for different reasons.) What makes it enjoyable? Model your writing style after good and interesting writers. That's not copying. It's acknowledging a superior style and crafting yours likewise to enhance readability.

All good writers read a lot. They are constantly evaluating what works and what doesn't. Most writers will readily talk about other writing that has influenced their work. That technique applies as well to legal writing.

Of course we can't write with the beauty of Dickens or the perfection of Churchill. So is this advice a copout? Just tell me what to do and I'll do it, you're thinking. But writing style is not susceptible to color-by-numbers. It doesn't matter if your preference is long, Faulknerian sentences or minimalist, Hemingwayesque prose. The point here is that you should use a technique that enhances the readability of your brief. You can do

that by understanding the style of the writers you admire, and incorporating those positive aspects of their style in your writing.

If you begin to do that, your brief will command interest and increase the chance that your arguments will get due consideration.

Respect for language

There are rules by which we structure writing. This is the grammar of our language. Use the rules. Your reader expects you to and generally the rules help you convey your ideas.

The expectation of your reader is important. When you meet those expectations, your judge can proceed through the brief without an eyebrow-raising incident. Poor grammar, failure to follow the rules, is a distraction and usually makes for difficult reading. You, notice it and pause because it is harder, to read if I misplace the commas.

If you want the court to focus on what you're saying, rather than how you're saying it, then stay within the bounds of acceptable grammar. Remember, you're not writing a new-wave piece that will be reviewed in the *New Yorker*. You are writing a legal document of great importance to your client and that reflects on your professionalism.

You make it more difficult to persuade when you step out of bounds. You want to draw attention to your ideas, not your style. Style is only important to the extent it is a tool to further your goal of conveying your idea and persuading the reader that you're right.

Don't be enslaved by the rules of grammar.

By the same token, don't become a slave to the rules. American English is a mish-mash of grammar from many sources. Grammar rules do not always improve readability. Sometimes it's just better to split an infinitive or to end a sentence in a preposition.

Respect for words

Words are the symbols of our language. Each word symbolizes an idea or a concept. Don't use words loosely. "Approximately" isn't close enough when writing a brief. It is a big mistake to assume the court will know what you mean. Always have a good dictionary next to you when you're writing. I'm partial to my old Random House Unabridged and my Shorter Oxford. [Freedictionary.com](http://freedictionary.com) is a good alternative. Usage guides also are helpful. (Quick: what's the difference between "continually" and "continuously"?) I like Follett's [Modern American Usage](#), Fowler's [Modern English Usage](#), and Garner's [Modern Legal Usage](#).

I'm a believer in stripping a brief of legalese, but not at the cost of detracting from brevity and clarity. Don't bloat your writing with Latin and French. But don't be afraid to use accepted terms of art. Sometimes "inter alia" works better than "among other things." And "voire dire" works well as a noun and a verb.

What to do about writer's block.

Writing is a mix of craft and art. We use rules to hang the brief together. Use, or disuse, of the rules is the crafty part. Creating an appellate brief, putting the words on the blank page, is a little like painting on an empty canvass. That's the artistic part.

There are times when a blank page is intimidating, when no matter how clever you try to be, everything you write sounds trite. Or even worse — and this happens to me frequently — you cannot figure the best way, or any way, to say something. Writer's block incapacitates your brain. When you're working under deadline, writer's block is crippling.

Don't let it happen to you. When all else fails, write using a basic subject-action structure. This is the writer's equivalent to "what happened next?" It will get you started so you can find your writing groove.

Slow down, you move too fast.

We are conditioned to work quickly. It's a product of trading time for money. It's hard to bill clients for time spent thinking. If you have a case on a contingent fee arrangement, every moment you spend on the case makes it marginally less profitable.

Good writing does not lend itself to working fast. It takes time to assure you are using the correct word. It takes time to assemble the words to say exactly what you intend. It takes time to create the voice you want to make your points. You can try to crank out the words quickly and robotically, and you might even put together a workmanlike brief. But that is unlikely to give you the good read you're after.

Read your work aloud.

The best way to make sure your brief says what you intend, and what you think it does, is to read it out loud. This is time consuming, and feels like a burden, especially when you feel like you're through writing. Recently, I heard a novelist say that he does this exercise because "the words on the page may not read the way you understand it." You know what you mean to say when you commit the words to the page. Reading those written words out loud forces you to look at every word, and to hear whether the

words convey your ideas □ that is, whether the words express what you understand them to mean.

Paperwork

The late Peter De Vries, a writer and editor perhaps known chiefly for his work at the New Yorker magazine, said, “I love being a writer. What I can't stand is the paperwork.” There is one goal of your appellate brief: to persuade the court that you should win. That only can happen if the court will read the brief and consider the arguments. Your chances of that happening are better if you file a thoughtful, interesting brief. Writing an appellate brief requires creativity to make it interesting and persuasive and intellectual honesty to be true to your theories and the law. If you can manage that, then you'll only need to deal with the paperwork.

¹ This article is about the nitty-gritty of writing an appellate brief. For advice on the steps to draft a brief that answers the court's questions, see the first in this series, “Thoughts of an Unconstrained Practitioner,” DCBA Brief at 29, November 2006, and also is available at www.illinoislocalcounsel.com.

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