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Young Lawyers: Keys to Successful Writing and Unlocking Your Talent

By Sylvia H. Walbolt – June 28, 2012

Associates flee in terror when they hear I need help on a brief. They should not do so. As tough as I admittedly am on legal writing, constructive criticism is the best way for young lawyers to improve their legal writing. So welcome tough graders and do not shy from working with them.

That said, you should try to put your best writing foot forward for the hard taskmasters. You should for everyone, of course, but especially for those folks. Then you will do so for everyone as a matter of habit. Here are some suggestions for how to do so, many of which I learned from the painful experience of having my own legal writing torn to shreds by tough graders.

To begin with, the hardest part of writing is putting something on paper in the first place. The *New York Times* had a hilarious story that makes this point:

One morning at breakfast, when she was in the first or second grade, E.L. Doctorow's daughter, Caroline, asked her father to write a note explaining her absence from school, due to a cold, the previous day. Doctorow began, "My daughter, Caroline. . . ." He stopped. "Of course she's my daughter," he said to himself. "Who else would be writing a note for her?" He began again. "Please excuse Caroline Doctorow. . . ." He stopped again. "Why do I have to beg and plead for her?" he said. "She had a virus. She didn't commit a crime!" On he went, note after failed note, until a pile of crumpled pages lay at his feet. Finally, his wife, Helen, said, "I can't take this anymore," penned a perfect note and sent Caroline off to school. Doctorow concluded: "Writing is very difficult, especially in the short form."

Roger Rosenblatt, "The Writer in the Family," *N.Y. Times*, May 13, 2012, at BR 43.

So don't try to put a draft brief on paper at the very outset. As you do your research in preparation for drafting an opening brief or as you review a brief to which you will be preparing a reply, make notes about points that need to be made. Gather cases you need to address. Pull out good quotes you want to use. Then prepare an *outline*. That is the single best thing you can do to improve your written work. Not only does outlining help you get something on paper, but also it forces you to organize your thinking.

Outlining seems to be a lost art these days, but try it—it really works. One of the best briefs I ever wrote came together from a comprehensive outline. Once the outline was done, the brief

just wrote itself. By contrast, I almost always can tell when a lawyer did not do an outline, as the resulting brief usually lacks organization and focus. The best writers bring me an outline early on so that we can make sure they are on track before time is wasted off track.

When you start actually writing the brief itself, keep in mind the pitfalls of working on the computer rather than by pencil and paper (as we did in the old days). The computer can make you lazy. It is so easy to cut and paste long quotes or long sections from your research memoranda. If you were writing by hand, you would keep the brief to the bare essentials, and it would be more effective. So you must be watchful that you have not included material merely because it's so easy to do on the computer.

It also is easy on the computer to move inserts to the wrong place. Or to omit good transitions as you move material around. Outlining, of course, avoids that. There I go again.

And more about long quotes. Don't use them. It makes the reader work too hard. Cut them down to the bare essential. If a long quote is really that good, cut it in two, with some transition to break the quote. In fact, you always should have some transition before the quote to tell the reader the relevance of the quote about to be read. The easier you make it for the reader, the more impact the quote will have.

It is not just quotes that should be shortened. Look at your paragraphs. Page-long paragraphs are unacceptable. Break them up. I have a hard-and-fast rule in my brief writing for judges that I never have more than three, or at most four, sentences in a paragraph. Well, hardly ever and only when they are very short and crisp sentences.

It is easier for the reader to absorb material—especially complex material—in small bites. Breaking up a paragraph is just like taking a pause after a few oral statements; it gives the reader a chance to catch up. Furthermore, as you work on breaking paragraphs up, you often will find some repetition you can eliminate. In the end, you may be able to make your point in only a single paragraph.

Every once in a while, a one-sentence paragraph can be effective. Consider this excerpt from a *New York Times* article:

What it showed was this: While places like Seattle and Denver and Brooklyn and Delaware can claim impressive craft brewing scenes, and a weirdly large number of people nationwide now speak of hop fetishes and beer crushes, Bend is a per capita powerhouse. With 80,000 people surrounded by not much of anything—with no Interstate, and the closest major city 160 miles away across steep and snowy mountains—beer has had room to make a difference.

And it has.

William Yardley, "An Economic Lifeline of Barley and Hops," *N.Y. Times*, May 6, 2012, at A6. The second paragraph is a powerful paragraph.

This excerpt makes a further point—you can learn a lot about good writing from reading the *New York Times*. Its articles are clear and crisp, and they flow in easy, logical fashion. Read them and learn good writing techniques from them.

It is important to understand why good writing is so hard: The person you are attempting to communicate with is not present. You cannot see from body language that the person is not following the argument, and the person cannot ask you questions. So you have to be absolutely clear in your writing and anticipate those questions in your writing.

It goes without saying that you should be every bit as careful with your internal writing as you are with written work to be filed in court, even though you may be able to discuss your internal work in person. Good written work from you makes it easier for the senior lawyer. Remember: Senior lawyers continue working with those young lawyers who make their lives easier, not harder.

There are, however, some keys you should particularly keep in mind in writing to persuade a judge (although they will make your internal writing better as well). In no particular point of order, they are as follows:

- Always give a brief introduction of your argument at the very outset of your brief. Do so before you get to the facts and issues. It should explain your argument “in a nutshell,” in order to give the judge context for what will follow. The best introduction is a paragraph or perhaps two. This is a place you really need to focus your editing so that the judge quickly grasps your argument and hopefully buys into it from the beginning.
- Eschew overstatement. Why take on an unnecessary burden of persuasion you do not need to assume? Do not tell the appellate court that the trial court grossly abused its discretion when all you need to do to prevail is to show that the trial court abused its discretion.
- Learn the power of understatement. It can be powerful. Don’t complicate the obvious. The more simple and obvious something appears to be, the more likely it is to be accepted.
- To that end, set forth the facts and legal principles you rely on in such a simple fashion that they inexorably lead the reader to the conclusion that you win. This says easy and does hard. It requires editing, editing, and more editing.
- Ruthlessly eliminate repetition. Reading the same thing twice is irksome to the reader. If you have a sentence that starts “in other words,” you should recognize that as a red flag that you are trying to say again in different words what you know you did not clearly say in the first place. Instead, edit the first sentence until it is clear and then delete altogether the second sentence.

- At the same time, repeating a theme throughout a brief can be, as one judge put it at a seminar on appellate practice, as beautiful as the melody that flows through a symphony. The trick, of course, is how to do it without appearing to use irksome repetition to say the same thing over and over again. Again, says easy and does hard, but good editing is the key. Don't repeat without a reason for the repetition.
- Avoid footnotes. Never use them to address tough substantive points. You will look defensive. Confront those points head-on in the text. Beyond that, remember that footnotes break the readers' train of thought, and readers may not continue that train of thought as well if they are distracted by a footnote.
- Footnotes should be confined to truly peripheral points that must be made. If it is a point that is important to be made, it almost always should be in text. All too often footnotes are used on stuff that does not really advance the argument and can be eliminated. Footnotes always are a good place to start editing.
- Avoid legalese and jargon. Avoid overuse of acronyms. You know them in your sleep, but the judge will not, and it may stop the judge in his or her reading.
- Mark Twain said that "the difference between the almost right word and the right word is . . . the difference between the lightning bug and the lightning." Mark Twain, Letter to George Bainton, Oct. 15, 1888. He was exactly right, so pay attention to the words you use. "Warranted" means "justified," not "required." "Required" is the stronger, and therefore better, word.
- Don't turn a silver bullet into a BB shot by burying a great case in a string cite with a parenthetical. Put it in the text and show why it means you should prevail. If it has a (short) quote that really makes your point, use the quote with an appropriate lead-in, rather than paraphrase it.
- Headings and subheadings (which usually come from your outline) can help you make your case clearly. I started paying a lot of attention to my headings after I heard an appellate judge say at a seminar that the table of contents was the first thing she reads in a brief. Now I make sure that my headings and subheadings tell a story and tell it in an advocacy form.
- To that end, headings should be complete sentences and pointed, not merely descriptive. They should present in a nutshell the gist of the argument that follows. For example:

No: The Statute at Issue.

Yes: The Statute Does Not Permit the Requested Relief Because Plaintiff Failed to Satisfy Its Conditions.

- One of the last things I do in my editing is take out all the emphasis I have added in the drafting process. I made that my practice after hearing a judge say at an appellate advocacy seminar (I learn a lot at seminars) that the overuse of emphasis (which is easy to do if you aren't watchful) made him feel like he was being shouted at by the writer.
- I also delete the adjectives and adverbs. Once again, Mark Twain had it right when he said “[a]s to the Adjective: when in doubt, strike it out.” Mark Twain, *Pudd'nhead Wilson*, ch. 11 (1894). Someone else said “pick adjectives the way you would diamonds. . . .” As part of my last editing, I also eliminate any hint of hyperbole or overstatement that has crept into the draft.
- But here is my best tip on editing. I adopted it after writing an appellate brief in a jurisdiction that had a word limit rather than the page limit I was accustomed to in my usual jurisdiction. Now, even if I have complied with the page (or word) limit for my brief, I still pretend I need to cut a certain number of words and then I edit to do so. It always makes the brief crisper and more effective.
- Do your last edit (the one you do after your next-to-last edit when you edit to eliminate a fixed number of words) on hard paper rather than on the computer. You will be amazed at the things you spot by doing this. You will get the most mileage out of this editing step if you have the luxury of setting the draft aside for a day or two before your last edit.
- Be sure to proofread, carefully, your final draft. Errors in grammar, spelling, and punctuation make the reader wonder if you have been equally careless in the substance of your writing. If you proofread on hard paper, you are more likely to catch things your eyes may slide over on the computer screen.

Albert Pujols says baseball is hard—it looks easy but it is hard. So, too, good writing looks easy but it is hard. It requires lots of work and lots of self-discipline, and you never can stop learning good writing techniques.

Know your weaknesses. A key strategy to better writing is knowing and correcting your weaknesses, whether they be grammar (is it “that” or “which?”), passive voice, or wordiness. Whatever they are, confront them head-on and be self-aware as you write and self-edit.

Reading books on writing always advances your writing skills. The following are two of my favorites:

- Mark Herrmann, *The Curmudgeon's Guide to Practicing Law* 1–8 (2006) (particularly, the first chapter entitled “How to Write: A Memorandum from a Curmudgeon”). Funny but dead-on.

- Anne Lamott, *Bird by Bird: Some Instructions on Writing & Life* (1995). Personal insights into the writing process by the author of *Traveling Mercies* and other novels, especially on how to start drafting “bird by bird.”

In the end, however, the best way to improve your writing is to subject it to the crucible of a cold set of eyes. Painful but always constructive. I know that from my own painful experience of having others tear up my written work. If I can do that, so can you. Try it—it works.

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