



Legal writing: Brevity, clarity, and honesty

Four steps that will make everything you write more effective

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Your ability to write persuasively will impact your case results. This is because your reader (judges and opposing counsel) bases decisions about your client's case on your papers.

For example, discovery battles over critical evidence are decided on the papers. Dispositive motions including demurrer, summary judgment, new trial, class certification are won or lost on the papers. Tentative rulings, which are difficult to change, are based solely on the papers. And at trial, your success on key in limine motions and evidentiary disputes will define the playing field.

So, your legal writing style is important.

Writing persuasively is a challenge for three reasons: (1) it's complex – the law is complex, the facts are complex, the application of the law to the facts is complex; (2) writing lacks the cues of the spoken word such as gestures, eye contact, body language and tone of voice; and (3) your reader may be distracted by phone calls, meetings, text messages, television, e-mails and social obligations.

How your writing impacts the reader

The goal of legal writing is to make the reader (1) like you, (2) see you as helpful, and (3) trust you.

Why worry about the reader? Our readers – judges or opposing counsel – are important people, holding either the power to decide critical issues (the judge) or the money we seek to compensate our clients' harms (opposing counsel). We thus best serve our client's interests when we devote ourselves to meeting the reader's needs.

Serving the reader also *increases our persuasiveness* because of "[t]he human proclivity to be more receptive to argument from a person who is *both trusted and liked*." (Scalia and B. Garner, *Making Your Case: The Art of Persuading Judges*, pp. xxiii-xxiv (2008).)

Moreover, a bored or frustrated reader may abandon your brief altogether and research the issue independently or turn to opposing counsel for guidance – a disaster!

For example, a petty argumentative tone does not serve your reader. "A *shrill tone in a brief diminishes its persuasive force*...If your position is strong and your client's cause just, there is no need to subject [the reader] to a barrage of abusive argument. This approach is *unpleasant, ineffective, and counterproductive*." (H. Pregerson, "The Seven Sins of Appellate Brief Writing and Other Transgressions," 1986 *UCLA Law Review* 431, 436.)

And an academic style full of throat-clearing jargon and complicated constructions does not serve your reader. Instead, this style could insult your reader; make your writing harder to comprehend; or make the reader distrust you – defeating your goal of being liked, helpful, and trustworthy.

On the other hand, when you put the reader first, you will be a more effective advocate not only on that case, but in future cases, this reputation will cause judges to reach for your brief first, relying on you to define the issues and frame the analysis – a worthy reward!

So, capitalize on every legal writing opportunity to show the reader that you are likeable, helpful, and trustworthy. How do you do this? By writing with brevity, clarity and honesty.

Four tips on writing

Here are four tips on writing with brevity, clarity, and honesty.

1. Put an assertive, detailed heading on almost every page.
2. Put a table of contents in every brief.
3. Delete hollow modifiers.
4. Edit for brevity.

#1: On almost every page, put an assertive, detailed heading

Put an assertive, detailed heading on almost every page of your brief. Headings are friendly signposts that guide the reader throughout your document.

For brevity, the headings should be two lines or less.

For clarity, a heading should assert a complete point. For example, instead of a heading titled "Negligence" (which doesn't even say what side of the issue you are on), it might say, "The driver was negligent in running the red light."

For honesty, a heading should be detailed. You've worked so hard to collect key facts; showcase them in the heading. For example, instead of saying, "The product was defective for many reasons," you might say, "Because the product did x and y, it was defective" or "The product was defective because (1)...., (2)....., and (3)....."

A heading should be punctuated like a regular English sentence with a capital at the beginning and a period at the end and should be bolded but should not be in all caps, WHICH ARE HARDER FOR THE EYE TO READ AND IS INTERPRETED BY JUDGES AS YELLING.

Now, use your headings to help you edit for further brevity, clarity, and honesty.

- Eliminate any paragraphs underneath each heading that are redundant or off-message.



- Check to see that the heading correctly summarizes the point made in the text below.
- Scan your text to make sure your best details are in the heading – it's the details that sell!

Of course, putting a heading on each page will result in a lot more headings than just the Introduction, Statement of Facts, Discussion, and Conclusion. This is good – this is what you want! Your document should be like a city with great signage – easy for the unfamiliar tourist (your reader!) to navigate. Though you occasionally will have a page without a heading, if you go three or more pages, you should use subheadings to continue orienting the reader.

#2: Put a Table of Contents at the beginning of every brief

Present your assertive, detailed headings in a Table of Contents that will generate automatically from your headings (i.e. no manual copying of the headings to the Table of Contents is required). All word processing programs have this capability, so if you don't know how to use it ask your paralegal or legal secretary to learn it and then teach you.

A Table of Contents helps achieve your three goals of brevity, clarity, and honesty.

It helps you achieve brevity and clarity by showing you at a glance all of your arguments and supporting points. This allows you to identify immediately any sections that are redundant or unnecessary (brevity) and if any sections need to be re-ordered (clarity). In general, the facts should go in chronological order and legal arguments should go from strongest to weakest.

A Table of Contents also makes you helpful and trustworthy to your reader. It's helpful because it exposes the organization of the document to the reader, who may want to jump directly to a later section of the brief (as opposed to reading it straight through), and it makes it easy for the reader to later find specific sections of the brief. And it gives the reader an immediate impression that you are trustworthy

There is only one way to learn how to edit for brevity – practice, practice, practice. To get you started, here are a few short exercises (with suggested answers on page 42.)

You can also find more exercises on the Internet at <http://www.testden.com/business-english/Questions-And-Exercises-Chapter-XIV-Fullness-And-Brevity.html>.

Make these phrases as short and simple as possible.

1. Evidence in this case _____
2. Testified at trial _____
3. Said in his testimony _____
4. At this point in time _____
5. In the instant case _____
6. For the duration of _____
7. The reason why is that _____
8. Check in the amount of _____
9. Did not in any way _____
10. Is based on _____
11. Pursuant to the provisions in the policy _____
12. The evidence in the record in this case showed _____
13. It is important to note that _____
14. There is ample evidence to support _____

because your document fulfills the promise of the Table of Contents (assuming it is accurate – another reason you want the Table of Contents to be automatically generated from the headings).

#3: Delete hollow modifiers

Hollow modifiers are words such as “clearly,” “essentially,” and “many.” Hollow modifiers impede brevity because they take up space without communicating any new information to the reader. They impede clarity because they are ambiguous. And they can make the reader distrust you (or at least give your reader an excuse to disagree with you).

For example, consider the word “clearly” in this sentence: “Clearly, the driver was negligent.” If you haven't already made the driver's negligence clear, your claim that it's clear will not convince your reader, who is supposed to be skeptical. And if you have made it clear, then you don't need to say it's clear – just conclude by saying, “In sum,” or “Thus.”

It is easy to root out hollow modifiers. From the list below pick the five words you are most likely to use and ask your staff to do a word search for these

words in your draft documents and either delete them (or flag them for your review) before a brief is filed.

Hollow modifiers: absolutely, certainly, clearly, completely, definitely, entirely, essentially, extremely, many, obviously, plainly, purely, several, seriously, totally, utterly, virtually.

#4: Edit for brevity

When you edit for brevity, you can reduce your word count by 30 percent or more, producing a document that is not only shorter but more muscular – and thus more persuasive.

Justice Scalia and Bryan Garner explained the importance of brevity for legal writers: “Every word that is not a help is a hindrance because it distracts. A [reader] who realizes that a brief is wordy will skim it; one who finds a brief terse and concise will read every word.” (Scalia and Garner, *supra*, p. 81.)

Strunk and White led by example when they told us to “[o]mit needless words.” (W. Strunk, Jr. and E.B. White, *The Elements of Style*, p. 23 (2000).)

But when should you do this and how?



You should focus on brevity only when you are in the editing stage. If you worry about being too wordy when you are drafting, you will inhibit your creativity and stop the flow of ideas. Only when you are done with your drafting is it time for you (or someone else) to get out the red pen and edit with the sole purpose of using fewer words to say the same thing.

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See Answers to Quiz on Next Page



Answers to McGinty & Smith Quiz

- | | | | |
|--------------|------------|----------------------|--------------------------------|
| 1. Evidence | 5. Here | 8. Check for | 12. The evidence showed |
| 2. Testified | 6. During | 9. Did not | 13. Notably (or omit it) |
| 3. Said | 7. Because | 10. Rests on | 14. Substantial evidence shows |
| 4. Now | | 11. Under the policy | |