

Paint outside the legal lines

Advanced legal writing: High-risk, high-reward techniques

By Clint Ehrlich

The highest expression of any field is the selective transgression of its norms. Rachmaninoff was a master of classical harmony, but he shocked listeners with unconventional chords. Degas painted the human form in perfect proportion, but he framed his subjects from strange vantage points. The best appellate advocates operate in the same tradition. They master the conventions of legal writing so that they will know precisely when and how to depart from those strictures.

I do not purport to be a Rachmaninoff or a Degas. But I have enhanced my briefs by taking risks they might appreciate. These flourishes are like garlic or jalapeños: deployed sparingly, they can elevate an entire work. Used carelessly, they will overwhelm it.

This article surveys these high-risk, high-reward tactics in legal writing, so that you can add them to your inventory. They are not the tools you will use in every case. You may keep them in storage for years, until the perfect opportunity presents itself. But when that moment arrives – when a case demands something beyond the ordinary – you will be ready to break the rules with purpose.

Visual aids

The most powerful way to depart from the norms of legal writing is to replace words with images. There are two ways of doing this, each of which has its place.

The more conventional approach is to take images that already exist in the record — e.g., as trial exhibits – and to embed them in your brief. If you have encountered judicial opinions that use this technique, you know how powerful it can be. (See e.g., *Carr v. City of Newport Beach*

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(2023) 94 Cal.App.5th 1199, 1209-1213 (Moore, J., dissenting) [including photos of alleged dangerous condition].)

As an advocate, including these images does more than bring your words to life. It allows you to curate the most favorable portions of the record and put them directly in front of your reader. This ensures that your best evidence is seen, rather than buried in thousands of pages of the appendix.

For example, in an appeal involving the question of municipal liability for a mass shooting, I recently embedded an entire org chart into my statement of facts. It was the critical piece of evidence to show that the killing was caused by identifiable employees of the defendant, not merely the public entity as a whole.

In other cases, what you want to communicate is something that no single piece of the record can capture. That is when creating original visual aids for your briefs can be worthwhile.

This is a higher-risk technique, because you are showing the court an image that is not actually in the record. Some judges bristle at that reality. For that reason, original visual aids should be used less frequently than images of exhibits – and with extra caution. You should ground your illustrations in the record as meticulously as possible, but never in a way that gives the false impression that they are themselves pieces of evidence.

To minimize the risk of confusion, it is often best to employ abstract illustrations. In a pending Supreme Court case, I inserted a Venn diagram immediately after the first paragraph of my reply brief. The question before the Court was whether MICRA applied when a health-care provider breached both a general and a professional duty of care. There was no better way to convey that issue than by literally showing the two duties as overlapping circles.

Maxims of jurisprudence

In theory, the maxims of jurisprudence should be well within the mainstream of what lawyers cite to courts. In practice, most lawyers do not know the maxims well enough to recognize when one of them applies to a given legal controversy. Memorizing the maxims is like having a legal superpower. In almost any case, you will be able to pull up a pithy adage that is only one step removed from the law itself.

In California, there are 38 maxims, codified at sections 3510 to 3548 of the Civil Code. They are there for the express purpose of aiding "just application" of the code's provisions. (Civ. Code, § 3509.) You should review the full list yourself, but these are the ones I find most consistently potent:

- "When the reason of a rule ceases, so should the rule itself." (Civ. Code, § 3509.)
- "Where the reason is the same, the rule should be the same." (Civ. Code, § 3511.)
- "No one can take advantage of his own wrong." (Civ. Code, § 3511.)
- "He who takes the benefit must bear the burden." (Civ. Code, § 3521.)
- "For every wrong there is a remedy." (Civ. Code, § 3523.)
- "The law respects form less than substance." (Civ. Code, § 3528.)
- "The law never requires impossibilities." (Civ. Code, § 3531.)
- "The law neither does nor requires idle acts." (Civ. Code, § 3532.)
- "An interpretation which gives effect is preferred to one which makes void." (Civ. Code, § 3541.)

Even when lawyers cite maxims, they often use them inappropriately. Maxims are different than precedents, in that you cannot cite a maxim and expect a court to recognize that its facts are on all fours with those of your case. There are no facts! That is what makes a maxim so flexible; it is a universal, platonic expression of the law, with no grounding in what happened in a particular case.

When you are relying on a maxim, it is therefore incumbent on you as an advocate to bridge that gap by explaining *why* a particular maxim provides the rule of decision in your case. That requires an additional level of abstraction. Rather than simply citing the maxim, you need to understand the concerns that gave rise to the maxim, and you need to frame your case so that the court naturally believes that the same animating principle is at work. The *ur*-maxim, so to speak.

This does not have to be as complicated as it sounds. For example, if you are invoking the maxim that for every wrong there is a remedy (Civ. Code, § 3523), then you should couple that maxim with an explanation of what will happen if justice is not served. How might the wrongdoer be emboldened? Who could the next victims be? It is not only the maxim you are wielding, but all of the policy considerations that made courts adopt the maxim in the first place.

Colloquial sayings

Another way of deviating from convention is to quote a colloquial saying in your brief. This technique is most powerful when a saying (1) perfectly fits the facts of your case and (2) has already appeared in a published opinion that you can cite.

The inclusion of a citation has several advantages. The fact that a prior court employed the colloquialism provides a certain judicial imprimatur for repeating it in your writing. And the citation calls attention to the saying, particularly in an introduction or conclusion that is otherwise citation-free. It also adds a layer of meta-humor, due to the juxtaposition between the casualness of the expression and the solemnity inherent in invoking caselaw.

To achieve this effect, in an appropriate case, you might say:

- "[N]o good deed goes unpunished." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1292.)
- The "devil is in the details." (*Barclays Bank Internat. Ltd. v. Franchise Tax Bd.* (1992) 10 Cal.App.4th 1742, 1761.)
- "[T]wo wrongs do not make a right." (*Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 154; accord, *People v. Clark* (2021) 62 Cal.App.5th 939, 972.)

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- "Actions speak louder than words." (*International Ass'n of Fire Fighters, Local No. 1396, AFL-CIO v. Merced County* (1962) 204 Cal.App.2d 387, 391.)
- "[I]f it looks like a duck, and quacks like a duck, it's a duck." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1437; see also, *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co.* (1994) 24 Cal.App.4th 247, 256, fn. 10. ["If it looks like a settlement agreement…"].)
- "[W]inning isn't everything, it's the only thing." (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 103, *citing disapprovingly*, Vince Lombardi; see also, *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 878 ["The best defense is a good offense."].)
- "[I]t is pointless to close the barn door after the horse has gotten out." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187; accord, *Caminetti v. Guaranty Union Life Ins. Co.* (1942) 52 Cal.App.2d 330, 333.)
- There is no such thing as "a free lunch." (*In re Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1109.)
- "[P]ut the shoe on the other foot." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 992.)
- "[M]aking a mountain out of a molehill." (*Estate of Kempton* (2023) 91 Cal.App.5th 189, 202.)
- "If at first you don't succeed, try, try again." (*Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128, 136.)
- "[H]e he who pays the piper calls the tune." (*Arocho v. California Fair Plan Ins. Co.* (2005) 134 Cal.App.4th 461, 469; see also, *Price v. Price* (1966) 242 Cal.App.2d 705, 710 ["He who dances must pay the fiddler."].)
- "There is a time and place for everything." (*Parrish v. Municipal Court, Modesto Judicial Dist., Stanislaus County* (1968) 258 Cal.App.2d 497, 504.)
- One "cannot eat his cake and have it too." (*People v. Wilkins* (1959) 169 Cal.App.2d 27, 34.)
- "You can lead a horse to water, but you can't make him drink." (*Fischler v. Municipal Court, Newport Beach Judicial Dist., Orange County* (1965) 233 Cal.App.2d 780, 783.)
- "[O]ne should not kill the goose that lays the golden egg." (*Stromberg v. Stromberg* (1963) 220 Cal.App.2d 307, 310.)
- "[P]ractice makes perfect." (*In re D. W.* (2004) 123 Cal.App.4th 491, 501, fn. 4.)
- "[G]oing to the well too often." (*McClain v. Rush* (1989) 216 Cal.App.3d 18, 22.)
- "[A] picture is worth a thousand words…" (*People v. Marsh* (1985) 175 Cal.App.3d 987, 1000 (Kintner, J., concurring.)
- "Ask the wrong question, and you will get the wrong answer." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 657.)

Literary references

What can be done with colloquialisms can also be accomplished with references to literature. (The line between the two is often indistinct.)

"[W]ith apologies to Voltaire," in the right case you might note that if the statute at issue "did not exist the courts would have to invent it." (*People v. Superior Court* (2003) 107 Cal.App.4th 488, 495.) There may be occasions to quote T.S. Eliot. (See, *Phillips v. San Luis Obispo County Dept. etc. Regulation* (1986) 183 Cal.App.3d 372, 381, *quoting*, *The Hollow Men* (1925) ["not with a bang but a whimper"].) I am myself partial to Dostoevsky. (See, *In re Joseph G.* (1983) 34 Cal.3d 429, 437, *citing*, *The Idiot* (Mod.Lib. ed. 1935) p. 356. ["the law of self-destruction and the law of self-preservation are equally strong in humanity"].) The favorite of appellate courts is, however, unquestionably Shakespeare.

They are particularly fond of his quip on substance prevailing over form. (See, *Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc.* (2006) 143 Cal.App.4th 319, 321, *quoting*, *Romeo and Juliet*, Act II, Scene ii ["What's in a name?"]; accord, *Carachure v. Scott* (2021) 70 Cal.App.5th 16, 28 ["A rose by any other name would smell as sweet."]; see also, *Western Union Financial Services, Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1534 [analyzing financial transactions under the "rose by any other name theory"]; *Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal.App.4th 782, 787 ["that which we call a lien, By any other word would smell as sweet"]; *Lokeijak v. City of Irvine* (1998) 65 Cal.App.4th 341, 342 ["a rule by any other name is still a rule"].)

Yet, in published decisions, other references to his works abound. A non-exhaustive list includes:

- That a party "doth protest too much." (*Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 280, *quoting*, *Hamlet*, act III, scene 2, l. 242.)
- "There's the rub." (*In re Angelina E.* (2015) 233 Cal.App.4th 583, 589 (Johnson, J., concurring.) *quoting*, *Hamlet*, act 3 scene 1.)
- "Misery acquaints a man with strange bedfellows." (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1090, *quoting*, *The Tempest*, act II, scene II, line 41.)
- "All the world's a stage, and all the men and women merely players." (*Douglas v. E. & J. Gallo Winery* (1977) 69 Cal.App.3d 103, 111, fn. 8., *quoting*, *As You Like It*.)
- "[P]ast is indeed prologue." (*People ex rel. Lacey v. Robles* (2020) 44 Cal.App.5th 804, 822, *citing*, *The Tempest*, act II, scene 1, line 289.)
- Every "dog will have his day." (*State Farm Mutual Automobile Ins. Co. v. Grisham* (2004) 122 Cal.App.4th 563, 565, *quoting*, *Hamlet*, Act 5, scene 1.)
- "Much ado about nothing." (*Office & Professional Employees Union v. Sea-Land Service, Inc.* (1979) 90 Cal.App.3d 844, 848 [analyzing a disagreement no "more substantial than the difference between Tweedledum and Tweedledee"].)
- "The purest treasure mortal times afford / Is spotless reputation." (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th

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793, 795, fn. 1, *citing*, Shakespeare, *Richard II*, act I, scene 1, lines 177-178; accord, *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1430; see also, *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 938, *quoting*, *Othello*, act III, scene 3 ["Good name in man and woman … It is the immediate jewel of their souls"].)

- "O it is excellent to have a giant's strength; but it is tyrannous to use it like a giant." (*Lewis v. Bill Robertson & Sons, Inc.* (1984) 162 Cal.App.3d 650, 657, *quoting*, *Measure for Measure*, act II, scene 2.)
- That a declarant at the point of death "must lose the use of all deceit" *People v. Smith* (1989) 214 Cal.App.3d 904, 910, *quoting*, *King John*, Act 5, Scene 4.)
- "Men are men; the best sometimes forget." (*Lindros v. Governing Bd. of the Torrance Unified School Dist*. (1973) 9 Cal.3d 524, 540, *quoting*, *Othello*, Act 2.)
- The "short and long of it." (*People v. Olmsted* (2000) 84 Cal.App.4th 270, 275, *quoting*, *Merry Wives of Windsor*, act II, Scene 2, line 62.)
- That wrongly admitted evidence was "an exercise in painting the lily." (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 467, *citing*, *King John*, act IV, scene 2, line 11.)
- "Give every man thy ear," a favorite of amici. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1347, *quoting*, *Hamlet*, act I, scene 3.)
- That even the "sharp quillets of the law" do not justify the relief sought. (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 829, *quoting*, *Henry VI*, pt. 1, act II, scene 4, line 17.)
- That courts should not seek to fashion a remedy for every "heartache and the thousand natural shocks that flesh is heir to." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 150 (Arabian, J., concurring) *quoting*, *Hamlet*, Act III, Scene 1.)
- "[M]en may construe things after their fashion/Clean from the purpose of the things themselves." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 406 (Werdegar, J., concurring in part), *quoting*, *Julius Caesar*, act I, scene 3, lines 34-35.)
- "The first thing we do, let's kill all the lawyers." (*In re Marriage of Wagoner* (1986) 176 Cal.App.3d 936, 943, *quoting*, 2 *Henry VI*, act IV, s. ii.)
- Even "[t]he devil can cite scripture for his purpose…" (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666, *quoting*, *Merchant of Venice*, act I, scene 3, line 99.)

In the right circumstance, one of these court-sanctioned quotes from Shakespeare may amuse a reader. But, for appellate lawyers, the most broadly applicable literary reference originates in Sir Arthur Conan Doyle's Sherlock Holmes novels. In popular culture, the most famous Sherlock Holmes line is "when you have eliminated the impossible, whatever remains, however improbable, must be the truth." The quote is semi-apocryphal: Holmes never said it, though Doyle once misattributed it to Poe. (O'Toole, G., *Quote Investigator*, 5-2-2024.) That has not, however, stopped courts from invoking it. (See, *Mix v. Superior Court* (2004) 124 Cal.App.4th 987, 995 ["the solution is the improbable that is left after the impossible has been eliminated"].)

The more consequential concept from Holmes is the "dog that did not bark." This is "a literary allusion often invoked but seldom explained." (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 282, fn. 5.) It can be traced back to the classic story *Silver Blaze*, where Holmes investigates the disappearance of a racehorse from its trainer's barn. He surmises that the thief must have been the trainer himself, since during the abduction his watchdog remained silent. (See *The Annotated Sherlock Holmes* (Baring-Gould ed. 1967) pp. 277, 280.)

Adapted for our purposes, the dog's failure to bark becomes a metonym for the proposition that absence of what is expected is evidence that something else occurred. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191 ["Just as the silence of a dog trained to bark at intruders suggests the absence of intruders, this silence speaks loudly."]; see e.g., *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 [applying the rule to absence of legislative action]; *Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 210 [absence of estate-planning documents]; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380 [absence of public comment]; *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [absence of expected evidence for a murder prosecution].)

Personal favorites

Once you start looking for memorable lines to include in your briefs, you will find numerous examples that defy easy categorization. Do not wait until you need one of these quips to write it down. Start listing memorable passages whenever you encounter them – whether in an appellate opinion, the newspaper, or a novel. The more varied your reading habits, the more opportunities you have to encounter noteworthy turns of phrase, and the more comprehensive your personal catalogue will become.

I will conclude with two of my own personal favorites, which do not quite belong to any of the categories listed here.

The first is the almost universally misunderstood concept of "the exception that proves the rule." This proposition originated in the jurisprudence of Ancient Rome. What it means, when properly construed, is that the need to specify an exception in certain cases implies the existence of a contrary general rule in all other cases. In Latin, "*exceptio probat regulam de rebus non exceptis* – an exception proves a rule concerning things not excepted." (*Nicholl v. City and County of San Francisco* (1927) 201 Cal. 470, 471.)

The second is the story of the husband who asked his wife why she always cut off the ends of the meatloaf she served for dinner. She told him that it was a sacred family recipe, handed down generation-to-generation. When he inquired with his wife's mother, she could not provide any explanation. So, he asked her grandmother, who explained that

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when she wrote down the recipe she simply didn't have a serving tray big enough for the meatloaf.

Normally, appellate courts do not mindlessly repeat rules that serve no purpose. But if you encounter a case where you must ask one to depart from years of stare decisis, you may ask the court "to question why the ends of the meatloaf must still be cut off." (*Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660, 668-669.) You might also throw in a footnote asking whether the story itself makes sense, since meatloaf is typically served in the same dish in which it is baked. A roast would have been a better choice.

Conclusion

The norms of appellate advocacy are conservative for a reason. If you adopt the ideas in this article overzealously, the resulting brief will be "an indiscriminate hotchpot discussion and dissertation upon law, mythology, Shakespeare, and the Bible." (*Duncan v. Times-Mirror Co.* (Cal. 1898) 52 P. 651, 652.)

I have given you a set of matches. Use them to light a candle rather than to burn down your house.


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