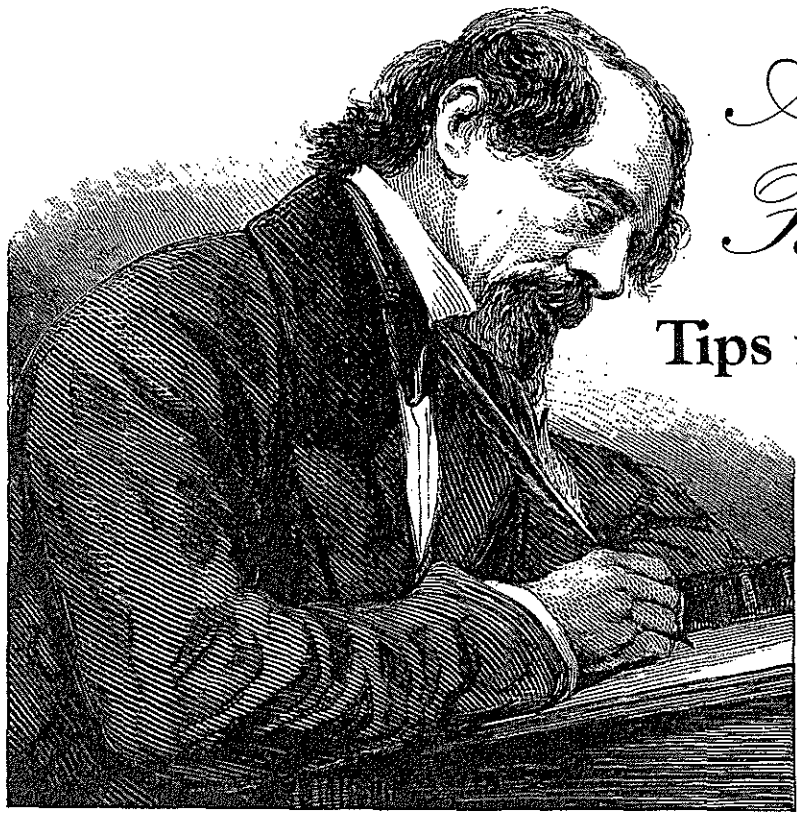

A Few of My Favorite Things

Tips for persuasive writing

By
Robert Olson

When I am having trouble writing or editing a brief, after puzzling for a while, I often fall back on an informal list of tips for persuasive writing that I have compiled over the years. The list is by no means comprehensive. Other people may have equally good or better ideas. Nor is it original. I have taken the ideas liberally from my partners, Bryan Garner (who teaches legal writing courses), and others. But the list helps me focus on the problem I am having with a particular brief or passage. Perhaps others will find it useful too, so here it is. The list starts with broader points addressing approach and moves to the more specific details of wordsmithing.

Analysis

Synthesize. The lawyer's job is to take the jumble of (sometimes inconsistent) information, whether facts, theories, cases, or statutes and to make it simple and understandable. When an outfielder makes an over-the-shoulder catch, when a receiver catches the ball on his fingertips, when a ballerina does a perfect pirouette, when a musician plays a passage flawlessly, it is high praise to say "they made that look so simple." That is our job - not to oversimplify, but to bring order out of chaos, to make reaching a decision in our client's favor seem simple and effortless. Simple arguments win, complex ones rarely do. Garner teaches, "good legal writing makes the reader feel smart, bad legal writing makes the reader feel stupid." Making things simple lets the reader feel smart; making things complex may help the writer's ego, but it is likely to make the reader feel frustrated or confused, not smart.

Discriminate. Discriminate is a good word that has been tarnished by being associated with bad acts. It used to be a good thing to be discriminating. A lawyer's job is to *discriminate* between what is important and what is not. For example, a good factual statement should contain every piece of information that the reader needs to know to decide the case or

the issue, but nothing more. As a general matter, everything that doesn't advance the argument, every tangent, is a distraction that detracts from the effectiveness of the argument.

Stay on target. Lawyers often want to impress people with how much we know, especially if we have just learned a new area and all of its complexities. But if readers don't need to know it, don't burden them with it now. A brief is not a comprehensive law review article on all aspects of an area of law. The purpose of a brief is not to demonstrate how smart or knowledgeable the lawyer is, but to persuade the reader. Three pages on the exceptions to a rule followed by a comment that none of the exceptions have been raised is unnecessary, and, worse, distracts the focus from what is important. If you fear not being comprehensive enough, "with exceptions that do not apply here," will do. (This doesn't mean that historical or legal context is always unimportant. Oftentimes it is critical. But make sure it *advances the argument* at hand.)

Structure

Organize. In effective legal writing one idea needs to lead to the next. Basic principles, e.g., for every wrong there should be a remedy, one should not be liable for an injury not caused by one's conduct, are usually not at issue. The skill is in moving from broad propositions to the specifics of the particular case. If the ideas do not flow smoothly, there will be holes in argument. The transitions between ideas define the cohesiveness of the argument. When editing a brief, my own or someone else's, I start with the table of contents (insist that your secretary give you one with your draft; this is not just a final step before filing). Many courts do, too. The table of contents should read as an outline of your argument. It is a brief within a brief. The arguments should flow from one to the other in the table of contents itself. I find that the draft table of contents is where I am most likely to identify structural or organizational problems that often affect the substance of the analysis itself.

Make your case first. Make your arguments first, *then* address opposing arguments or cases that have to be distinguished. If you start by distinguishing, the argument comes across as too defensive. As an advocate, you need to provide some *affirmative* reason for the reader to agree with you. Just saying that the other side's position is weak is not very persuasive unless you first present the affirmative reasons supporting your position.

Don't have too many headings of the same level. I once heard that the human mind can easily only comprehend 3-to-5 subdivisions of any subject and, therefore, any analytical work should have no more that 3-to-5 major headings. I don't know about the human mind, but I think that is true of the judicial mind. Courts turn off to laundry lists of 20 headings (objections, requests, etc.) That doesn't mean that one may not have 20 valid points to make. To do so, *group* the points under more general headings, e.g.:

I. There was no valid cause of action.

A. Defendant owed no duty on which a negligence claim could be based.

B. Spoliation of evidence is no longer a cause of action.

II. The trial was infected with numerous, prejudicial, evidentiary errors.

A. The trial court improperly allowed prejudicial hearsay testimony.

B. The trial court erred in allowing improper expert testimony. . . .

The corollary is that there is probably something wrong with the organiza-

tion if you have to go too deep into the outline form. Section III.C.4.b.ii is probably getting too detailed, especially if it is not addressing the central point. There is only so much complexity that one can absorb.

Avoid tangents: if it doesn't help, it hurts. Ask how every point, fact, or case helps or is necessary to the argument. If it doesn't help, or is not directly on point and thus needs to be distinguished, generally it is a distraction. (A corollary is that it is not necessary to discuss every fact about cases cited. You don't need to mention that the plaintiff in the cited case was a widow if you are citing the case for when an argument is waived.) The overall persuasiveness of a brief directly correlates with the *average* persuasiveness of its arguments, not with the total number of arguments. Contrary to what law school exams suggest, the side with the most arguments does not necessarily win. The one with the *best* arguments wins. Weak arguments dilute strong ones.

Move from the general to the specific. This allows the reader to get familiar with the argument and not be buried in detail before knowing what the big picture is.

Generally start with the strongest arguments. You may well have lost your readers by the time they get to your dynamite argument in Section III. C.

Draft your headings to encapsulate everything discussed underneath them. Headings are important. They become the table of contents discussed above. There is case law that if an argument is not identified *in the heading* it is waived. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830 fn. 4.) The arguments made under the heading should directly support and relate to the heading. If an argument does not fall directly under the heading but is important, you need to either revise the heading or create a new one. Likewise, the heading should not be broader than the ensuing discussion under it. Used this way, headings create the discipline necessary to make sure that the argument truly does proceed simply and logically from one idea to the next.

Keep separate thoughts separate. One place where arguments break down is by trying to say too much all at once. Take for example: "Nothing links defendant's conduct to plaintiff's speculative damages." Is the issue lack of causation or is it the speculative nature of damages or is it both? If the critical issue is speculative damages stick to that issue.

Sometimes you may not be able to make a strong argument on one aspect, but you throw it in, wistfully hoping that it will color other issues. Usually, this tactic merely weakens the stronger argument. If each point is independently persuasive, say that, e.g.: "Plaintiff's damages are speculative. But even if they were not, there is no evidence that anything defendant did caused them." This way, if the reader doesn't accept one argument (speculative damages), the other (lack of causation) doesn't fall with it. It also assures that each argument will be fully developed.

If the argument is truly the cumulative impact of errors (e.g., although the trial court's error in admitting one piece of evidence might have been trivial, when viewed in the context of similar errors, the overall effect was not trivial), try to make each subpoint independent and then make a *separate* argument that the cumulative weight of the arguments means that you should prevail.

Watch for repetition. If you are arguing the same thing under different headings something is wrong. Either there is only one argument, you are mixing supporting ideas that should be separate, or you have not gotten to the heart of one

of the arguments. I am very wary any time the same quotation is used, unless it is *the* critical evidence or *the* defining legal standard.

Edit. Edit your own work and have someone else edit it as well. An intelligent layperson - a spouse, a secretary - is often an excellent judge of the persuasiveness of a brief. If a word, sentence, or argument is hard to understand, the problem is not with the reader, but with the text. By definition, if the editor doesn't understand it the first time through, it needs work.

Make it look nice. Take a moment to look at the final product and make sure it looks nice. How it looks is the first impression the reader is going to have. Minimal margins, crammed typing, multiple fonts, are going to discourage the reader from the very outset. Have someone proofread the document. (See Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325.)

Paragraphs/Flow

Pay attention to flow. One of my partners, Irv Greines, goes by the head-nod rule. The reader's head should start nodding in agreement at the beginning of the brief and should continue nodding throughout the brief. If and where the head stops nodding, there is a problem, a rough spot, that needs to be addressed. Sometimes the problem is an awkward sentence. Sometimes it is the logic of the argument or skipping an important logical step.

Avoid overly long paragraphs. As a rule any paragraph longer than 1/2 to 2/3 of a page (even in big type) is too long. Readers need some open space to rest their eyes.

Learn to connect sentences and paragraphs. Remember that the purpose of the first sentence or paragraph is to get the reader to read the second sentence or paragraph. Here are some techniques to accomplish this (many of these are taken from Bryan Garner's writing course):

1. *Generic connectors* - Further, Accordingly, Moreover, Thus, - are the *weak* connections. (But and And can be effective, however.) Avoid these connections, they do not necessarily reflect any logical connection between the ideas. For example, "The Dodgers are in first place. Further, the stock market is down. Moreover, there is a great new movie out." Your ideas may not be so disparate, but using generic connections will not tie them together any more strongly.

2. *Pointing words* - words that inherently reference a prior statement, e.g., pronouns, this, that, those, provide a much stronger connection. For example: "John said 'x.' In context *he* meant 'y.'" The use of "he" instead of repeating "John" in the second sentence links the sentences. The second sentence does *not* stand on its own, but that is the whole idea, to make the sentences interconnected. The same effect can be accomplished with "this" and "that." For example: . . . "The full-credit-bid rule is . . . . Applied to the facts here, *this* rule dictates . . . ." Again, "this" connects the two sentences.

3. *Connections* can also be made stronger with repetition or parallelism. For example: "John testified 'x.' His *testimony* was critical." "Testimony" in the second sentence repeats the verb "testified" in the first. It links the two sentences together. The Gettysburg Address is widely recognized as a masterpiece of English prose. Examine it. It uses just this sort of connection. "Four score and seven years ago our fathers brought forth, upon this continent, a new *nation, conceived* in liberty, and *dedicated* to the proposition that 'all men are created equal.' Now we are engaged in a great civil war, testing whether *that nation,* or any nation *so conceived,* and *so dedicated,* can long endure...." The italicized words connect the sentences. If you look at the whole Address, you will discover that it is replete with such pointing words and repetition. You will discover that they pull the reader (or in that case listener) through the text.

4. *Foreshadow* in the concluding sentence of one section what will be coming next. "Thus, foreseeability is necessary, but not sufficient to establish duty. For a duty to exist other public-policy factors must favor imposing a duty." The reader is left with the question - what are those factors, how can we examine them? That leads into the next sentence, paragraph or section, which answers those questions.

5. *Check overall argument flow* by reading just the first sentences of paragraphs. If they flow and seem to make sense, the argument is pretty good. If they seem disjointed, the flow, and often the argument, needs to be worked on.

Introductions. Introductions are particularly hard. The tendency is to simply abbreviate the arguments in the brief. It's more effective to try and distill the issue to some common-sense level where the reader's gut reaction will be on your side. If you get the reader to decide in the introduction that you *should* win, you have the whole brief to explain why. For example: "Does a homeowner owe a duty to a roofer to provide a safe roof to repair?" is much more persuasive than, "The issue of duty involves considering many factors. Among those factors are . . . ."

Conclusions. The most important function of a conclusion is to tell the reader in no uncertain terms what result you want, including alternatives. "For all these reasons, summary judgment should be entered in the defendant's favor. In the alternative, this Court should summarily adjudicate each separate cause of action in the defendant's favor." Conclusions are also a place where you can make a *very short* policy plea: "Any other result would open the law to repeated, unwarranted claims."

Sentences

Write in active, not passive voice. Avoid both formally passive construction (e.g., "the judgment was reversed") and wishy-washy verbs, when there are good real, live action verbs available. Compare, for example, "There was an altercation between Smith and Jones" with "Smith punched Jones." (There is a role for passive voice; use it when you want to disguise who the actor was, e.g., if you are defending Smith.)

Shorten, shorten, shorten. As a general rule, I question *any* sentence over three lines in length. Break up the ideas into multiple sentences. Remember, everything said before need not be reincorporated into the present sentence so that the sentence stands alone. Lawyers tend to cram every aspect of the issue into one sentence. This leads to sentences that read like old West headnotes. (West has recently abandoned its format in favor of shorter sentences.) Just as speaking slowly conveys more information than speaking fast, writing in short sentences conveys more information than writing long, supposedly comprehensive, sentences.

Be careful with prepositions. Eliminating prepositions is a good way to shorten sentences (and to reduce length in these days of word limits). Prepositions such as "of, by, with," are targets for scrutiny. For example, compare "considerations of public policy" with "public policy considerations"; "as a result of" with "resulting from" (or even just "from"); and "the statement by Smith" with "Smith's statement."

Watch for words ending in "ment" or "tion." They often replace active verbs. For example, compare "Johnson gave an assignment of rights to Smith" with "Johnson assigned the rights to Smith" and "he gave the matter consideration" with "he considered the matter."

Don't put substance in footnotes. Someone once asked a federal judge his view on footnotes. He responded that he really did not have one because he doesn't read them. That is probably true for many judges. Footnotes are useful places to store *supporting* information - e.g., record citations, string cites, surveys of cases in related areas or across the country. They are *not* places to

make any substantive arguments. A court may deem arguments made in footnotes *waived.* (*People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502 fn. 5.) A substantive argument in a footnote should go either in the text or be deleted. Often writers put arguments in footnotes out of laziness. The writer believes it likely that the point is worthwhile but has not taken the time to figure out whether it really belongs in the argument, and if so, where. Footnotes, by definition, are distractions. They should not be homes for loose-end arguments. If you use footnotes, do so only at the end of a sentence, preferably at the end of a paragraph.

Paraphrase material in indented quotations. Readers' eyes naturally skip over indented quotations. (Admit it, you've done this.) Don't let the point get lost. Paraphrase what the indented quote says in the text immediately before it. Compare "*Smith* held:" with "*Smith* held that no cause of action for negligent spoiliation of evidence exists:" If readers' eyes glaze over or skip the indented quote, they still know what is there.

Avoid legalisms. Leave "hereinaforementioned," "said document," etc., to amateurs.

Describe *parties by name or status.* Busy judges have an easier time grasping Smith, Jones, the employer, the insured, the painting subcontractor, etc., than figuring out who is the plaintiff, defendant, appellant, etc. in the particular case. This becomes particularly important when there are cross-complaints, cross-appellants, and in situations (e.g., declaratory relief actions) where the person claiming injury is not immediately apparent. (See Fed. R. App. Proc. r. 28(d).)

Limit Acronyms. Sometimes they are helpful in naming parties, e.g., IBM, the SEC. Rarely are they helpful in identifying documents and even less so in identifying ideas. If the demurrer is to the third amended complaint, there is nothing wrong with "the third amended complaint ('complaint')" rather than "TAC." No one is going to be confused. (Is the FAC the first, fourth, or fifth amended complaint?) Does anyone really think that "the SAC alleges NIED and BCGFFD claims against FMC" is plain English? Would you talk that way?

Admittedly, it is harder to apply these tips (and to consistently do so) than to state them. But the next time you feel stuck when the brief you need to get out the door just isn't working, take a look at this list. Maybe one of these tips will do the trick. Maybe one of my favorite things will become one of yours too. ▼

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