Appellate

7 ways to ruin a perfectly good brief

by James J. O'Keeffe

It's easy to find good legal writing advice,[1] and even easier to find good advice about writing in general.[2] But there are vanishingly few resources that tell you how to really screw up a brief.[3]

That's a shame, because legal writing is hard and complicated. What counts as a good brief depends on a host of variables, like the factual and legal issues involved, the procedural posture of the case, the forum, the local rules, and the parties' goals. As a result, it's almost impossible to script hard-and-fast rules for how to write a good brief. Even the best advice – like the advice set forth in the sources listed in footnotes 1-3 – is subject to myriad exceptions.

Luckily, there's another way to approach this problem. As Charlie Munger points out, "the way mental constructs work, problems frequently become easier to solve through 'inversion.'"[4] That is, you can often think more productively about a problem by flipping it around.[5]

An example helps to illustrate this idea. It's difficult to solve complex, multi-variable problems when you approach them head-on. If I ask you to tell me how to succeed in life, for instance, you'll probably have a tough time articulating an answer. But if I ask you how to fail in life, that's much easier to think about. Sloth and unreliability spring right to mind.[6] Even in the most complicated scenarios, there are usually only five to ten truly reliable ways to fail. Learning to identify and avoid them clarifies the path to success.

In that spirit, here are seven ways to ruin a brief. Follow all seven, and you're guaranteed to produce a document that falls somewhere between unpersuasive and incomprehensible. But avoiding these mistakes can save you – and your readers –hours of agony.

1. Just get it done. You can clean it up later.

The first step to truly atrocious legal writing is to remove the steps: Just sit down and bang something out to get it on paper. You can always clean it up later – maybe after you've had a chance to do some more research.

Why is this such a bad idea? As Bill Wheeler observed, good writing is clear thinking made visible. Sitting down at a keyboard and free-associating does not lend itself to transparent – let alone sound – thinking. What does? Taking the time to think hard about a case or problem. That includes consciously brainstorming and working through the issues at your desk, of course. But it also means letting your mind turn the matter over in the background while you sleep or shower or drive to work.

It encompasses talking to colleagues, and even hashing the issues out with your friends and family. A lawyer who can't explain a case to his kids doesn't really understand it. What is more, research and review of the authorities can trigger a cascade of new ideas.[7] This brainstorming is critical to the writing process, and an appropriate system makes room for it before pen hits paper.

After all that researching and brainstorming, it's equally crucial to outline. Outlining a brief will let you spot and eliminate redundancies. It will show how various parts of the argument fit together – and where they're in tension with each other, if not outright inconsistent. Outlining reveals what facts you must set out early in the brief to support the legal arguments that will show up later, and which you can omit. Starting to write without outlining is the worst kind of false economy.[8]

Only after all this work are you prepared to write. And by that point, writing will be the easy part; most of the really demanding work is already done.

Once you've finished writing, put your draft away for a day or two. Then come back, and revise it mercilessly. Stephen King, who writes doorstops for a living, estimates that 50 percent of the words in an average first draft can be deleted. Hemingway counseled to write drunk and edit sober. That's a useful metaphor (assuming that it was a metaphor), but Bryan Garner has an even better one. He summarizes the writing process in four stages – madman/architect/carpenter/judge:

- The *madman* rants and raves and is full of ideas. He doesn't "write" so much as take notes, brainstorming and jotting down thoughts.
- Once the madman has generated plenty of ideas, the *architect* takes them, identifies the connections, and imposes a logical structure. The result of the architect's work is a linear outline.
- Then the *carpenter* steps in, taking the architect's outline and composing a draft. Because the madman and the architect have already done the hard thinking, the carpenter is almost just "filling in the blanks."
- Finally, the architect hands the document off the *judge*, who edits brutally for content, grammar, style, and pretty much everything else.[9]

2. Don't worry about the facts.

It's no exaggeration to say that the statement of facts is the most important part of a brief, and the hardest part to draft. A writer can doom a brief by blowing the facts in at least two ways.

First, he can pay insufficient attention to the facts and focus all his time arguing the law. This is a common rookie mistake. Alex Kozinski, one of our most influential circuit judges, observes that "[t]here is a quaint notion out there that the facts don't matter on appeal – that's where you argue about the law; facts are for sissies and trial courts."[10] In fact, Judge Kozinski explains, the opposite is true: "The law doesn't matter a bit, *except* as it applies to a particular set of facts."[11] Appellate judges thus rely on litigants to help them flesh out the record. This only makes sense. A judge can read the governing authorities every bit as easily as a lawyer, and he's got enough clerks that he probably doesn't really need research help from the litigants.[12] "[W]here the lawyer can really help the judges – and his client – is by knowing the record and explaining how it dovetails with the various precedents."[13] As a result, "[f]amiliarity with the record is probably the most important aspect of appellate advocacy."[14] A lawyer forgets this at his peril.

But there is a second, and more insidious, way to bungle the facts: By ignoring the standard of review.[15] In reviewing different legal issues, the court is required to view the record through different lenses. These lenses often favor one party over the other. For example, in passing on a demurrer, a court must take as true all material facts explicitly alleged in the complaint, as well as all facts implicitly alleged and all reasonable inferences that may be drawn from them.[16] And it must view those facts in the light most favorable to the plaintiff.[17] Similarly, in reviewing a motion to set aside a verdict, an appellate court will give the verdict winner the benefit of all substantial conflicts in the evidence, and all fair inferences to be drawn from it.[18] In these and other instances, one party simply does not get the benefit of an even-handed view of the fact – let alone the sort of shaded "litigation position" that often creeps into the fact section of a brief.

An effective advocate must appreciate this limitation and present the facts through the appropriate prism. When an appellant fails to do so, for instance, he hands the appellee an opportunity to point out – or, more likely, to quote, revel in, and savor – the contrary record evidence. That's a direct attack on the appellant's credibility. Worse, it immediately puts the appellate judge on the defensive, and poisons her view of the remainder of the appellant's brief.

And it's not over yet. Having scored the easy credibility points, the appellee can note that the appellant is just rearguing the facts rather than contesting any purported legal error or abuse of discretion. She can argue, quite correctly, that the appellant's position is based on a faulty reading of the facts; even if the appellant's logic is sound, his premises – and, by extension, his conclusion – are incorrect. For all intents and purposes, the appellant is arguing a different case.

Only then, after landing two crushing shots with zero thought or effort, must the appellee explain why the appellant's legal reasoning fails. By then,

it almost doesn't matter.

How can a writer avoid this trap? By keeping in mind that the statement of facts is there to help the court. The whole point of that section is to give the court an objective account of what happened before getting into the argument. It provides the foundation for that argument. As such, it must be unshakable.

3. Drown the reader in information.

Another way to guarantee that a brief fails is to dump a ton of information onto the reader without providing a way to process it. This is a perspective on legal writing that I picked up from a talk that Professor Timothy Terrell gave at an appellate CLE.[19] Professor Terrell argues that most technical writing (including legal writing) fails at the macro level because it dumps too much information onto the reader without offering any context or structure. His basic analogy is that the information in a writer's head is like a precious liquid. Too many legal writers just pour that information directly onto their reader, without giving the reader a container to collect it.

Thus, Professor Terrell stresses the need for "meta-information" in legal text – signposting, structural cues, and the like. The trick to good technical writing, in his view, is to make complicated information seem straightforward and accessible. One of his mantras is "focus before detail": Let the reader understand what we're discussing before going in for a deeper dive.

What does this advice look like in practice? Professor Terrell suggests doing three things in your introduction, and really throughout your document:

1. Make your reader *smart*.
2. Make your reader *attentive*.
3. Make your reader *comfortable*.

First, make your reader smart: Before digging in, forecast the information that you're about to provide. This can be done in several ways:

- *Label*: Tell the reader what the document is about, so she can put it in context. For example, "This is a breach of contract case that turns on a single issue: Whether the trial court erred by admitting parol evidence of blah blah blah . . .."
- *Map*: Preview the document's structure. For example, "Summary judgment is appropriate for three reasons. First, blah blah blah. . .." Lists can be particularly helpful here.[20]
- *Point*: Let the reader know what he should be looking for as he makes his way through the document.

Second, keep your reader's attention. Professor Terrell offers two basic tricks here:

- *Bottom Line*: Tell the reader how your document will help her in real life. Your powerful, syllogistic reasoning compels a certain result. Help the reader to understand why that result is important. Connect it to her circumstances. For example, "If the Court upholds this sanction, it will effectively eliminate blah blah blah . . .." Courts tend to share some basic fears that you can manipulate for this purpose. These include the fear of (1) misconstruing a doctrine or statute; (2) creating new duties or rules; or (3) reaching an unfair result.[21]
- *Efficiency*: Show the reader that you will not waste her time. Don't be repetitive or verbose. Don't present irrelevant information, like dates that have no bearing on the basic story or argument.

Third, make your reader comfortable.

- *Language*: Using plain English and a classic prose style will show your reader that you are a normal person who occasionally interacts with other humans. This is surprisingly important.
- *Ethos*: Show why the result you seek is just and fair; this is far more compelling than bare legal argument.[22] Also, show by your content, tone, and word choice that you are not a jerk. These steps will suggest to your reader that you share some basic assumptions and world views, and help to put her at ease.

Or you could just skip all of that and ask the reader to drink from a firehose.

4. Ignore the other side's best points.

Another classic briefing failure is the refusal to engage the other side's best arguments. Typically, a lawyer will try to justify this decision by arguing that she doesn't want to emphasize the other side's points by giving them space in her brief. Early in my career, I worked with a lawyer who took this approach to extremes. He was dead-set on ensuring that each of our briefs was as persuasive as possible within the four corners of the document. If this meant leaving out bad facts or counter-arguments, so be it. His approach extended to every aspect of the document, to the point that his briefs would abandon *Bluebook* conventions to make citations more compelling.

This approach misses the forest for the trees. A brief writer is not trying to draft the document that is most persuasive in the abstract; she is trying to draft a document that is most persuasive within the context of the case – and in that context, "persuasive" means "helpful to the court." The court has access to the other side's arguments. It has access to the bad facts from the record. And it has access to the case law. It's looking for you to tell it what to do with them. The court can't hide from the bad facts or counterpoints, so neither should you.

Some lawyers don't dodge their opponent's arguments altogether. Instead, they caricature or reframe those arguments to make them easier to handle. If anything, this is even worse. It naturally leads to one of two inferences: Either you were too

dumb to understand the opposing arguments, or you were too dishonest (or scared) to engage them fairly. Neither impression is helpful.

Instead of playing with straw men, a compelling brief presents and then tackles the strongest possible version of the opposing argument. This is, after all, the version that the court must address.

5. Argue everything.

Bad briefs have something else in common: They tend to be unnecessarily long. "[W]hen judges see a lot of words, they think: LOSER, LOSER."[23] An overlong brief buries any potentially winning point under a pile of also-rans, and dilutes the force of the brief's best arguments. It wastes the writer's credibility by pressing every point, no matter how unreasonable or inconsistent with the overall theme of the case. As Justice Scalia and Bryan Garner explain, this sort of scattershot argument is just not effective. "It gives the impression of weakness and desperation, and it insults the intelligence of the Court. If you are not going to win on your stronger arguments, you surely won't win on your weaker ones."[24] It's your job as a lawyer – and as a writer – to figure out which is which.

6. Show the court how smart you are.

James Joyce spent 17 years writing *Finnegan's Wake* and reportedly expected people to spend at least that long reading it. A truly awful brief makes similar demands on its readers. How does it achieve such nightmarish inefficiency? We've seen a few ways already: It repeats itself. It drowns the reader in information without context. It argues every position, no matter how unreasonable.

But to inflict maximum pain upon the reader, a brief needs to show the reader how smart its author is. I think of these as "smarty-pants briefs." ("Smarty-pants" isn't the precise term that I use, but you get the idea.) The smarty-pants brief comes loaded with Latinate legalisms – not to mention as much actual Latin as possible. Nominalizations and pointless passive-voice constructions cram extra words into the text without adding meaning.

The smarty-pants brief cites every possible case, giving authority for even utterly noncontroversial propositions. It hides arguments in parentheticals, rather than stating them explicitly in the text, to make the reader work to follow its reasoning.

Typically, these briefs give everyone in the case a defined name: "Appellant Andrew Smith ("Appellant" or "Mr. Smith") argues . . ." And then they increase the pain factor by using meaningless and unfamiliar acronyms. Consider this example that Ross Guberman pulled from an actual brief: "LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RPT and TIP conformity to SIP."[25] The amazing thing about this sentence is that you can't tell if I've transcribed it correctly. Neither can I. It's meaningless without a glossary. And there's almost no chance that, 50 pages into a brief, a judge will be flipping back to that glossary (or, worse, the statement of the case) to translate each sentence.

Acronyms are bad, but block quotes are worse. The reader's eye naturally skips over the quoted text, so she must work harder to read it. One of my favorite block quotes sums up the issue well:

> Block quotes, by the way, are a must; they take up a lot of space but nobody reads them. Whenever I see a block quote I figure the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer. Let's face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.[26]

The simplest possible solution to this problem? Here you go:

> You can avoid block quotations by using quotations of fewer than 50 words. If necessary, use a quotation that is 49 words long. Then say: "the Court went on ..." Then use another 49-word quotation. This will trick the judge into reading the quotation. This trick is not simply permitted; it is required at this law firm.[27]

The only time to use block quotes is when quoting controlling language from a statute or contract, or key testimony.

Another hallmark of the smarty-pants brief is the insistence on calling the other side names. After all, judges love nothing more than a good slap fight between lawyers, right?[28] But the smarty-pants brief goes further, casting aspersions in a way meant to signal the author's moral and intellectual superiority. For instance, it doesn't call opposing counsel a "liar," as if it had been written by some unschooled ruffian. It calls him "disingenuous," and tells the court that his argument is a "pretext." Because that's how educated people debate, I suppose? None of this, of course, is remotely helpful to the court. By extension, none of it is persuasive.

7. Let the little stuff go.

Finally, one of the last – and easiest – ways to ruin a brief is to let the little stuff go. Typos, bad citations, formatting errors, and poor typography are among the least important sins that an author can commit. But they're also among the easiest to catch. And once you have shown your reader that she can't trust you with the little things – the stuff that is easiest to get right – you've lost the right to ask her to trust you with weightier matters.

Endnotes

1. Matthew Butterick, *Typography for Lawyers* (2d ed. 2015); Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial & Appellate Courts* (3d ed. 2014) [hereinafter Garner]; Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (2d ed. 2014) [hereinafter Guberman]; Mark Herrmann, *The Curmudgeon's Guide to Practicing Law* (2006) [hereinafter Hermann]; Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008) [hereinafter Scalia & Garner].
2. Stephen King, *On Writing: A Memoir of the Craft* (2001); Stephen Pinker, *The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century* (2015); William Zinsser, *On Writing Well: The Classic Guide to Writing Nonfiction* (2016).
3. *But see* Alex Kozinski, T*he Wrong Stuff*, 1992 BYU L. REV. 325 (1992) [hereinafter Kozinski].
4. Charles T. Munger, USC Gould School of Law Commencement Address, in *Poor Charlie's Almanack* 428-29 (Peter T. Kaufman, ed., 3d ed. 2011).
5. *Ibid*.
6. *Id*. at 429.
7. Scalia & Garner, *supra* note 1, at 69.
8. *Id*. at 70.
9. Garner, *supra* note 1, at 13-14. Garner borrowed this framework from Dr. Betty Flowers. *Id*. at 12.
10. Kozinski, *supra* note 3, at 330.
11. *Ibid*.
12. *Ibid*.
13. *Ibid*.
14. *Ibid*.
15. This section is adapted from James O'Keeffe, "Good Ideas That I Stole from Smart People: Narrate the Facts Found, Not the Evidence Presented," *De Novo: A Virginia Appellate Law Blog* (Dec. 31, 2010), available at http://www.virginiaappellatelaw.com/2010/12/articles/appellate-practice/good-ideas-that-i-stole-from-smart-people-narrate-the-facts-found-not-the-evidence-presented.
16. *E.g.*, *Assurance Data Inc. v. Malyevac*, 286 Va. 137, 145 (2013).
17. *E.g.*, *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 486, 488-89 (2011).
18. *E.g.*, *Bussey v. E.S.C. Rests., Inc.*, 270 Va. 531, 534 (2005).
19. This section is adapted from James O'Keeffe, "Legal Writing Tip: Focus Before Detail," *De Novo: A Virginia Appellate Law Blog* (June 15, 2015), available at http://www.virginiaappellatelaw.com/2015/06/articles/writing/legal-writing-tip-focus-before-detail (crediting Ruggero J. Aldisert).
20. For examples of the effective use of lists, *see generally* Guberman, *supra* note 1.
21. *Id*. at 27-38.
22. *See, e.g.*, Scalia & Garner, *supra* note 1, at 26-30.
23. Kozinski, *supra* note 3, at 327; *see also id*. at 326 (noting that "simple arguments are winning arguments").
24. Scalia & Garner, *supra* note 1, at 22.
25. Guberman, *supra* note 1, at 289.
26. Kozinski, *supra* note 3, at 329.
27. Hermann, *supra* note 1, at 8.
28. *See, e.g.*, Travis J. Graham & James J. O'Keeffe, "Have You Made a Last-Ditch, Desperate & Disingenuous Effort to Subvert the Legal Process Today?" 57 VA. LAWYER 32 (Feb. 2009), available at http://www.vsb.org/docs/valawyermagazine/vl0209_legal-process.pdf.

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