TAKING YOUR WRITTEN AND ORAL ADVOCACY TO THE NEXT LEVEL

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Our practice focuses on more complicated or novel litigation (usually involving medical malpractice, business, contracts, and products liability, but our range has gone well beyond these subspecialties), post-trial advocacy, and appellate law—in other words, we do a lot of researching, writing, and arguing. We have, therefore, developed some helpful tips (at least, we think they're helpful) and some strong subjective opinions concerning legal writing and oral advocacy. Through this presentation and these materials, we hope to help you improve your writing and oral advocacy so that you can get better results for your clients. If nothing else, we hope you take away a willingness to try new writing techniques or strategies.

And while these tips and thoughts arise from our experience with briefs or motions, they are equally—if not more—applicable to other areas of legal writing like client communications, correspondence, or mediation statements. Always write and speak plainly, with concision.

I. Why care about good writing or oral advocacy? You are being judged behind the bench.

"One of the most prominent and prolific federal judges, Richard Posner, has observed that the communication skills of the advocates he sees 'are often quite bad, sometimes awful.' . . . Other judges agree. One empirical study found that approximately 94% of both federal and state judges surveyed reported that basic writing problems routinely marred the briefs they read, and that a clear majority of respondents thought that new members of the profession did not write well."

> ~ Mark Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 Drexel L. Rev. 417, 420 (2012).

We are all creatures of habit, lawyers arguably more so. Change does not come naturally for our profession. No offense, but our writing is a prime example of this inertia. We recycle motions, letters, forms, etc., and still draft pleadings, without a second thought, beginning with, "Comes the Defendant . . . ." *Does anyone actually know what that means?* There are better ways—ways that express what you want and need to say directly, concisely, and with more audience engagement.

Because of this innate resistance to change, you may be wondering why we lawyers should even care whether our writing is good. If the judge likes it, that's all that matters, right? And you've no doubt earned some good results over the years. So why the fuss? Sure, but judges are not yearning for commonplace or mediocre writing. On top of that, lawyers are hired literally to do two—and only two—things: write persuasively and speak persuasively. Becoming a better writer will make you a better speaker. Improving your writing is a fundamental building block in improving as a lawyer.

As the odds of reaching trial diminish, especially in the age of COVID, and with the increasing use of technology negating in-person appearances, the importance of legal writing is only amplified.[1] Trials are becoming increasingly rare, replaced with mediations and dispositive-motion practice, both of which rely heavily on writing ability. And do not assume that you can make up for poor writing during oral argument—most judges have already made up their mind—based on the briefs—before you utter a word.

These materials present some tools, ideas, and maybe even some tricks that have been helpful in our practice. By no means is this an exhaustive list of writing advice—it is a starting point for writing improvement.

II. Writing tips

A. Act like a local – follow the local and civil rules.

Both new and experienced lawyers tend to overlook local rules' existence. But the first step in briefing at the trial court level should be to read and follow the local rules on motion practice and briefing. The more you act like a local, the better chance you will be treated like one—or as much like one as possible. In the same sense, when on appeal, read the civil appellate rules and follow them. With many judges and staff attorneys (and it pays to remember that the staff attorney often colors the judge's thinking), you lose credibility right out of the gate by failing to follow the local and civil rules.

Quotes from the bench:

- *Procedural rules "do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated."*
  ~ Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown*

[1] *See* Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing" Trial*, 21 Touro L. Rev. 665 (2005).

v. Commonwealth, 551 S.W.2d 557, 559 (Ky. 1977)).

- [*T]he brief typically is the first impression upon the reviewing court that an appellate advocate makes for himself, or on behalf of his client. On this point, we wholeheartedly agree with the sentiments of Judge Aldisert:*

> *I cannot overemphasize the necessity of knowing and observing the rules governing briefs and the supporting record. . . . Failing to respect these rules may not cause your case to be dismissed, but it may get you off on the wrong foot. The best you can hope for in an appeal is a sympathetic court; at the very least, you want a neutral tribunal, not one that is hostile. You certainly do not want to face a court that has formed the impression: "This lawyer is complaining that the trial judge did not follow the rules of the game, but in taking this appeal, this character isn't following ours!"*
>
> *[A] sort of mental occurrence takes place when we are in the process of acquiring a favorable or unfavorable initial impression[. S]uch a disposition is not necessarily a very long-lived one; it may last only a few seconds. But the advice is clear: do not make an initial bad impression by filing a sloppy brief that fails to follow the court's requirements.*
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> ~ *Hallis v. Hallis*, 328 S.W.3d 694, 697 (Ky. App. 2010) (quoting Ruggero J. Aldisert, *Winning on Appeal, Better Briefs and Oral Argument* 83 (2d ed.2003)).

B. Write in plain English.

"[S]ome [compound prepositions] are much worse in their effects upon English style than others, in order that *being perhaps at one end of the scale and* in the case of *or* as to *at the other; but, taken as a whole, they are almost the worst element in modern English, stuffing up what is written with a compost of nouny abstractions."*

~ H.W. Fowler, *A Dictionary of Modern English Usage* 102 (Ernest Gowers ed., 2d ed. 1965).

Using complex words, phrases, or sentence structure is often a good way of adding variety to your writing. To achieve the desired effect, however, complexity should be used in moderation. Too much and the reader gets confused or grows skeptical that you are attempting to hide a weak argument. Bryan Garner explains it as, "In good

writing, you'll typically find mostly small, ordinary words deftly fitted together. But then you'll hit upon the one or two choice words that make all the difference—a slightly offbeat, piquant phrasing that most average writers would never hit upon."[2]

Examples of complexity that can easily be simplified without losing any meaning:

aforementioned	previously stated
utilize	use
at the present time	now/currently
subsequent to	after

Simply put, don't use a $5 word when a 50-cent word will do. This eliminates extraneous words that bog readers down, while also making it easier to be assertive and write with a good pace that keeps the reader engaged.

C. Use names, not party designations. Avoid acronyms.

"Whenever you can, write about people. In fact, adding people to your sentences may do more to make them clear than any other writing habit you could develop."

~ Maxine Hairston, *Successful Writing* 115 (2d ed. 1986).

"It is easier for us, or at least me, to remember parties by name. . . . *I have difficulty in remembering who is petitioner, respondent, appellant, relator, and the like."*

~ Joe R. Greenhill, *Advocacy in the Texas Supreme Court*, Tex. B.J., June 198, at 624, 628.

Lawsuits are disputes between real people or entities. Using traditional designations like Appellee, Defendant, or even worse, an acronmym, sanitizes the case, making the narrative far less compelling. As defense lawyers, we are often already subjectively behind the 8-ball because we represent companies and entities—buildings and not people—further desensitizing a judge to our clients' position. Calling your client "Defendant" or "ABCD" fosters more desensitization. Instead, lean into the human element of the case.

Which is more gripping: "Defendant's nursing staff provided excellent care" or "Nurses Jones and Smith provided excellent care"? The answer is obvious. Narrative storytelling is not exclusive to the plaintiff's

[2] Bryan A. Garner, *Advanced Legal Writing & Editing*, p. 40 (LawProse Inc. 2014).

bar.

In this vein, avoid allowing your client to be reduced to an acronym. "Beaver Lake Hospital" or "Beaver Lake" sounds much better than "BLH." A set of letters does not paint an accurate picture of your corporate client or the employees—the people—who work there.

Beyond writing a more compelling narrative, using names is less confusing. There is no good reason to force judges to remember who the appellant or defendant is, when you can simply call them by their name—forcing a court to remember an alphabet soup is even worse.

D. Tell the court what to do. The heading or first sentence of your argument should inform the court of the outcome you are seeking and the reason you win.

Directly tell the court what to do right out of the gate. If the first or second sentence of your introduction/summary of the argument and argument sections are not doing this, consider changing your style.

Examples:

- The Court should dismiss this case because all of the Jones's claims against Adams & Washington PLC are time-barred by KRS 413.245.
    - (If your argument is based on a rule/statute, cite the rule).
    - Under CR 37.01, the Court should compel Microsoft to respond to and produce the discovery requested by Apple.
- The Court should affirm the judgment below because the trial court correctly instructed the jury in accord with Kentucky's bare-bones doctrine.
- The Court should enter judgment in the amount of $53.7-million for compensatory damages because Branham has met Kentucky's relaxed reasonable certainty standard, proving his loss as a result of the Bluestone's fraud.
- The Court should dismiss all actual and ostensible agency claims asserted by James Bond against Beaver Lake because no genuine issue of material fact exists on those claims, warranting judgment as a matter of law.
    - Broken down further under each argument subsection as:
        - Kentucky's summary judgment standard supports dismissal of Bond's agency claims against

Beaver Lake.

- The Court should grant Beaver Lake's motion because Drs. Indiana and Jones were not actual agents of the hospital.
- The Court should grant Beaver Lake's motion because Drs. Indiana and Jones were not ostensible agents of the hospital.

Your goal should be to inform the judge of the relief you want in the first two sentences of your introduction/summary of the argument and of your argument sections. The judge should be able to have the motion sitting in front of him/her during the hearing and know what you are asking without having to dig through the motion.

E. End each (or most) argument subsections reiterating the relief you want.

Examples:

- Therefore, the Court should grant Bond Dental's motion and dismiss it as a matter of law.

F. Please stop with "Clearly."

If it was clear, we would not be briefing this issue for the third time, after two prior hearings. Try some other synonyms. Go here:

Onelook.com

Thesaurus.com

G. Don't highlight in technicolor—use one form of emphasis and be consistent.

You all have this lawyer in your firm, the one who not only uses *italics* to emphasize a point but will also <u>underline</u>, use ALL CAPS, and **bold** to emphasize points in his or her brief. He or she would use color highlights and emojis, too, if available. Don't be that law yer—use only one and be consistent. (We prefer italics.)

H. Exhaust all viable alternative arguments.

Example:

- Even if the Court were to somehow determine that A did

not apply, the Court should still grant Beaver Lake's motion because of B. (Repeat as needed.)

If the argument is not made, it is not preserved for appeal. Do not assume you will lose on an argument not based on mandatory precedent—sometimes, you are just building a record for appeal, which also leads to . . .

I. Attach exhibits—evidence—for the judge to read and for your record on appeal.

Show your math, and yes, attach the whole deposition, regardless of what you think the judge or clerk will think. If you have previously attached the deposition or evidence, you can refer back to it in the record. Again, though, if you do not attach the exhibit into the record, it cannot be used on appeal.

Also, if court rules don't prohibit, consider attaching as exhibits the most important one or two cases cited in your brief because "a good many judges read briefs while sitting in easy chairs, and it is therefore going to advance your case if you . . . satisfy their curiosity without discommoding them and making them get up."[3]

J. The possessive form is a lawyer's best friend.

Traditional legal writing seems to rely heavily on "of." The expert disclosures of Defendant. The ruling of the Supreme Court. The motion for summary judgment of Plaintiff. Of. Of. Of.

Changing those of's to possessives deletes needless words (more on that later) and makes the writing snappier. Defendant's expert disclosures. The Supreme Court's ruling. The Plaintiff's motion for summary judgment. Those are all *much* better—and with an extremely easy fix.

When reviewing your writing, be vigilant for places to use the possessive form—it gives the writing pace and tightens the prose. A simple, but highly effective edit.

K. Don't go overboard with case quotes.

Sometimes we lawyers believe that our argument is strengthened if we cite a case for everything. Or we believe that a judge will find our argument more persuasive if we include quotation after quotation

[3] Frederick B. Wiener, *Briefing and Arguing Federal Appeals* 242 (rev. ed. 1967).

from cases. While certainly good to support arguments with precedent, excessive citation usage has the opposite of its intended effect. Rather than persuading the reader, it distracts the reader and disrupts the argument's flow.

Use quotations selectively. There's no need to quote everything. Emphasizing a case's key point in your own words is often more powerful than trying to shoehorn someone else's words into your argument. If a quote is great for your position, use it by all means; but avoid the pressure to fill a paragraph with case quotes or citations.

L. Don't use block quotes (says Joey). Don't overuse block quotes (says Chad).

Block quotes are a neon sign telling the reader to skip ahead. Avoid them at all costs. If you *must* use a block quote, put the quote in context. Give the reader an indication of what the quote will say before the block quote and provide a summary of what you want the reader to get from the quote after it. That way, when the reader skips the block quote (and they will skip it), they have received the information you wanted to convey.

To eliminate—or greatly reduce—your use of block quotes, be ruthless when reviewing the quote you intend to use. Cut all unnecessary words. If that editing does not get the quote below 50 words, look for a segue or a natural breaking point in the quote where you can essentially cut the quote roughly in half. Add your own linkage between the two quotes and now you have two 25-word quotes within a paragraph, making it much harder for the reader to skip ahead.

M. Delete needless words.

Conveying your point concisely is the goal. Getting there requires repeatedly reviewing your draft with a merciless eye for any unnecessary words. This is not easy work—speaking in a shorter or simpler manner is, counterintuitively, more difficult. But there are always words to cut.

Historically, lawyers are a verbose lot. A host of wordy phrases have become routine in legal writing. They are often "throat clearing" at a sentence's beginning—removing them when you find them is a good start:

It is Smith's position that . . .
We respectfully suggest that . . .
It would be helpful to remember that . . .

It should be noted that . . .
It should not be forgotten that . . .
It is important to note that . . .
It is apparent that . . .
It is interesting to note that . . .
It is beyond dispute that . . .
It is clear that . . .
Be it remembered that . . .[4]

Bryan Garner has outlined additional wordy phrases and alternatives:

during the time that	while
for the period of	for
as to	about
the question as to whether	whether
until such time as	until
the particular individual	[Name]
despite the fact that	although
because of the fact that	because
in some instances	sometimes
by means of	by
for purpose of	to
in accordance with	under
in favor of	for
in order to	to
in relation to	about
in the event that	if
prior to	before
subsequent to	after
pursuant to	under[5]

To be clear, we are not suggesting that you sacrifice your message—clarity comes above all. We *are* suggesting, however, that conveying that message concisely will only benefit you and your client.

N. Use active voice.

We've all been told this relentlessly, but lawyers don't always have a clear understanding of passive voice. It sneaks into our writing without us realizing. The technical definition of passive voice is when the subject *receives* the verb—active voice, on the other hand, is when the

[4] Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, State Bar of Texas 9th Ann. Adv. Bus. Law Course Ch. 13 at p. 9 (Oct. 13–14, 2011).
[5] Bryan Garner, *Legal Writing in Plain English* 35 (2011)

subject *performs* the verb.

> "The claim was dismissed by the Court."
> "The Court dismissed the claim."
>
> "The statute is interpreted broadly by the courts."
> "The courts broadly interpret the statute."

See the difference? The active voice effectively uses the verb—it's strong, persuasive, and clear. But the passive voice is ambiguous and weak.

There are rare circumstances when the passive voice is appropriate. But generally speaking, avoid the passive voice at all costs. By doing so, you will use fewer words, be clearer, and give your writing some color. And most importantly, the reader won't lose attention.

O. Tread carefully with adverbs.

Too often lawyers use adverbs to spice up their writing, ignoring whether they actually contribute to the argument's substance. We're all guilty of it at one point or another—claiming the other side "blatantly" does something incorrect or "wildly" misstates the record. This rhetoric is rarely helpful.

Adverbs always have a playing-with-fire quality because it's easy to fall into a hole of hyperbolic, inflamed rhetoric that does not actually add anything to your argument. Will the judge really agree with you because you said the "contract plainly states . . ." instead of simply "the contract states . . ."? Doubtful, but the judge may very well be irritated because if the contract were as plain as you claim in your motion, why is litigation happening?

Don't avoid adverbs altogether, but do be mindful about how you're deploying them.

P. Watch your tone.

If it helps to blow off steam, be a smartass in your first draft—*but not the final draft*.

Q. Use lists and bullets.

Legal writing often has an air of formality that largely stems from

anachronistic rules or traditions. Because of this, the use of bullet points seems frowned upon. But bullet points are a fantastic tool for both clarity and persuasion. They are a great way to present, for example, the elements of a cause of action, a timeline of relevant events, or the components of an argument.

R. Use a table of contents (sometimes at the trial court level).

For lengthy motions, *e.g.* summary-judgment motions, create a table of contents to help the judge quickly and easily see your argument and the important chunks of factual information. Judges are busy and anything that makes your argument more accessible to them is worthwhile. Tables of contents are also invaluable during a hearing because they allow the judge to reference a portion of your motion quickly without losing attention.

S. Do not use specific dates unless relevant to your argument.

When drafting a factual recitation in a motion or brief, it is very easy to use a lot of specific dates. But they are distracting and they interrupt your prose, unnecessarily confusing and exhausting your reader.

For example: "On February 6, 2021, the Joneses purchased a house from the Smiths. On February 13, 2021, the Joneses discovered a water stain on the ceiling of their hallway closet. On February 17, 2021, Ceiling Repair Company inspected the home and informed the Joneses that significant repairs were necessary. On March 22, 2021, the Joneses paid Ceiling Repair $10,000 to perform the necessary repairs."

These dates are bothersome and they're all irrelevant. Even worse, they make the reader think that they are important, forcing the reader to try and retain them. By the time they reach the factual recitation's conclusion, they are mentally exhausted and frustrated to realize that the dates they worked so hard to remember were not important.[6]

A better approach would be: "After purchasing a home from the Smiths, John and Jane Jones discovered a water stain on their

[6] *See* Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 Tul. L. Rev. 187, 192 (1995) ("When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to diver our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring.").

hallway closet's ceiling. Ceiling Repair Company inspected the water stain and determined that significant repairs were necessary. The Joneses paid $10,000 to repair the ceiling."

To be sure, specific dates are sometimes necessary. Perhaps the statute of limitations has expired, or plaintiff's counsel has been dilatory in seeking relief. But even in those circumstances, the specific dates used should be placed in context—explain why they are important when you provide them.

For example: "Adam Smith was injured on March 1, 2020, triggering Kentucky's one-year statute of limitations. Smith waited until March 25, 2021 to file this lawsuit, over three weeks after the statute of limitations expired."

If several dates are material to the argument you're making, create a list or timeline so that they are easily digestible.

T. Use complete sentences for your headings. Do not sleep on headings—they are a very important part of your brief.

"Remember that the court usually gets its basic impression of the nature of your legal argument from these headings because the usual practice is to turn to the index [or read through the headings] . . . before reading the brief."

> ~ Raymond E. Peters, *The Preparation and Filing of Briefs on Appeal*, 22 Cal. St. B.J. 175, 179–80 (1947).

"State and federal judges routinely emphasize . . . that headings and subheadings help them keep their bearings, let them actually see *the organization, and afford them mental rest stops. Another advantage they mention is that the headings allow them to focus on the points they're most interested in."*

> ~ Bryan A. Garner, *Legal Writing in Plain English* § 4, at 14 (2001).

Your headings should not be an afterthought. When done correctly, the judge should be able to skim your motion and understand your argument from the headings alone. Again, judges are busy—headings offer a way to communicate quickly and effectively with the judge both before and during a hearing. They give the judge quick access to the information.

When drafting headings, do not feel pressure to keep them to a single sentence. They should be simple, yes, but that does not mean they

have to be generic: "Headings are most effective if they're full sentences announcing not just the topic but your position on the topic."[7]

For example: "Jones failed to file her complaint timely; no matter what date is used to for when Jones's claim accrued, the actual date of filing was late."

U. We are lawyers, so please cite some law.

Surprisingly, we see this from time to time, particularly for discovery-type motions. Almost every conceivable motion is based on a civil rule or statute. A brief without law is just an essay.

V. Buy a style book and a citation manual—and use them.

Here are some recommendations of excellent, easily searchable books to have close at hand:

- *Chicago Manual of Style*
- *Bluebook*
- Bryan A. Garner, *The Redbook*
- *Garner's Modern English Usage*
- *Garner's Dictionary of Legal Usage*

W. Citations: footnotes or textual?

No set rule here—our rule is to be consistent. Chad footnotes in the facts section because he believes it helps the reader stay with the text but then uses in-body citations for his argument. Judges' preference is across the board here, but does favor in-body citations. The key is to pick a team and stay consistent with it in your brief.

Joey clerked for Chief Justice Minton who is decidedly pro-footnote, as is Bryan Garner. Hence, Joey is pro-footnote for all citations. If you're unwilling to adopt footnotes for all your citations, Joey agrees with Chad to footnote record citations at the very least. A couple reasons for that: those cites are often much more cumbersome than a cases, so they are more jarring or distracting; and avoiding that clutter allows the reader to focus on and absorb your narrative.

X. Edit your draft—please.

Being a good writer requires being a good editor. Simple as that.

[7] Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 108 (2008).

There is, after all, no "good writing, only good rewriting."[8] Regardless of how long you work on it or how good it is, a first draft needs revising and polishing. There is always room for improvement. There are always words that can be excised. We all know lawyers only operate with deadlines, so be sure to build in time for editing.

1. Read your draft out loud.

This method is beneficial on multiple levels. First, reading aloud involves a different part of your brain, allowing you to notice mistakes or stilted prose that went overlooked when reading silently or while writing. Right away you will notice any sentences that do not flow well, need a pause, are too long, or simply have clumsy language. When you read these sentences silently, your brain automatically "corrects" them and it's very easy to gloss over errors.

William Zinsser, the famous journalist and literary critic, explained that when you read your work aloud, "you'll hear a dismaying number of places where you lost the reader, or confused the reader, or failed to tell him the one fact he needs to know, or told him too much—the loose ends of every first or second draft."[9]

Second, reading aloud has the added benefit of making you familiar with expressing the argument for any upcoming oral argument.

2. Change the font and review.

This may seem like a gimmick, but like most editing techniques, it tricks your brain to expose errors you might otherwise miss. By the time you are ready to edit your draft, you have been staring at the same words in the same font for a long time. Your brain, in other words, has gotten used to how your draft appears. Changing the font presents an entirely new document to your brain, allowing you to discover new errors.

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[8] James D. Yellen, *Securities Arbitration 2005: Telling Your Story—Plain English in Securities Arbitration Pleadings*, PRACT. L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 41, 48 (Aug. 2005).
[9] William Zinnser, *On Writing Well*, p. 191 (5th ed. 1994).

3. Read the document backward.

Yes, read it backward. Read the last sentence. Then move to the next-to-last sentence. Then the next, and so on. Doing this focuses your attention to each individual sentence in isolation, allowing you to catch errors you may otherwise miss.

4. Beware of spellcheck.

Spellcheck is a wonderful tool, but it is not a replacement for editing. Sure, it will catch misspelled words, but it will not catch correctly-spelled-but-incorrect words or phrases like "trail court" or, more embarrassingly, "pubic record."

Spellcheck giveth and spellcheck taketh away. User beware.

Y. Some brief (no pun intended) points about formatting:

You may think this is out of place because formatting is not writing. Or perhaps you believe that formatting does not matter. Science, however, disagrees. The importance of document design cannot be overstated. Bryan Garner, in fact, dedicates an entire section to it in *The Redbook*.[10] That section discusses in depth many of the illustrations mentioned briefly below. For more information on legal document design, the following resources are great places to start:

- Matthew Butterick, TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED AND PERSUASIVE DOCUMENTS (2d ed. 2015).
- Linda Berger, *Document Design for Lawyers: The End of the Typewriter Era*, 16 GA. B. J. 62 (Feb. 2011).
- Linda L. Morkan, *Appellate Advocacy, The Gestalt of Brief Writing: Visual Rhetoric in the Appellate Brief*, DRI For the Defense 27 (July 2008) (available at: http://www.rc.com/documents/FTD-0707-Morkan.pdf).
- Raymon P. Ward, *Writer's Corner: Good Writing, Good Reading: Advice on Typography*, DRI For the Defense 60 (Jan. 2005).

To be clear, document design *is* worth your time. A well-designed document increases readability and decreases reader fatigue. For busy judges, this is

[10] Bryan A. Garner, *The Redbook*, § 4 p. 87–107 (3d ed. 2013).

invaluable. And the transition to reading virtually exclusively on screens rather than paper makes document design even more critical.

In fact, the Seventh Circuit, among other courts, has recognized that better formatting makes the court's job easier because, argument merit aside, it helps "judges grasp and retain your points with less struggle."[11] So "everyone benefits from a visually effective document."[12]

1. Font Choice.

Font choice is an important aspect of any legal document. Yet is a choice attorneys often—*too often*—delegate to their word processor. Virtually every legal document, as a result, is drafted in Times New Roman. No offense, but this is "not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color."[13] No doubt Times New Roman's staying power is magnified by lawyers' general reticence to change; but more importantly, because it was designed for newspapers, it's *purpose* is to fit as many words as possible on the page.[14] This is not good news to a reader, especially in long documents like appellate briefs or motions for summary judgment.[15]

In any event, lest you think we are making a mountain out of a mole hill by talking about fonts, of all things, the world's leading legal typographer, Matthew Butterick, has this to say: "In every case, good typography supports and reinforces the message. Good typography makes the text more effective."[16]

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[11] Seventh Circuit Practitioner's Handbook for Appeals, at p. 173 (2020 ed.), available at: http://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf. As an aside, the Seventh Circuit's typography suggestions are worth reviewing—they are an effective roadmap for better formatting.

[12] Ruth Anne Robbins, *Painting with Print: Incorporating concepts of typographic and layout design into the text of legal writing documents*, 2 J. OF ASS'N OF LEGAL WRITING DIRECTORS 109, 111 (2004).

[13] Matthew Butterick, *Times New Roman Alternatives*, https://practicaltypography.com/times-new-roman-alternatives.html; *see also* Bryan Garner (@BryanAGarner), Twitter (Jan. 16, 2017, 11:05 A.M.), https://twitter.com/bryanagarner/status/821070976570060801?lang=en("Times New Roman is a minimally acceptable serified font.").

[14] Matthew Butterick, *A brief history of Times New Roman*, https://typographyforlawyers.com/a-brief-history-of-times-new-roman.html ("It was designed for a newspaper, so it's a bit narrower than most text fonts—**especially the bold style**. (Newspapers prefer narrow fonts because they fit more text per line.)").

[15] *See* Frank H. Easterbrook (Seventh Circuit Judge), Speech, *Challenges in Reading Statutes* (Chi., Ill., Sept. 28, 2007) (available at http://lawyersclubchicago.org/docs/Challenges.pdf) ("Desktop publishing does not imply a license to use ugly or inappropriate type and formatting—and I assure you that Times New Roman is utterly inappropriate for long documents. . . . It is designed for narrow columns in newspapers, not for briefs.").

[16] Matthew Butterick, *what is good typography?*, https://practicaltypography.com/what-is-good-

And we all can agree that more effective text is in both the court's and lawyers' best interests—after all, isn't effective text what we all want? Our clients certainly do.

We encourage you to try different fonts. The United States Supreme Court, for example, requires briefs be drafted in a Century family font, with good reason—it is a generally well-regarded font. The Kentucky Supreme Court has historically (at least the last decade) used Bookman Old Style for its opinions. These materials use Charter for the body and Gill Sans MT for headings.[17] For more recommendations, see https://practicaltypography.com/system-fonts.html. Turning to Butterick when in doubt is a good rule of thumb.

If you are doing appellate work, a word of unfortunate caution. The Kentucky Supreme Court has so far refused to move away from page limits and adopt instead word counts, despite all federal courts and at least 24 states having done so. Many fonts better than Times New Roman are more expansive, and therefore will eat into your page limits mandated by CR 76.12. Hopefully the Kentucky Supreme Court will eventually change CR 76.12 and adopt word counts, but until then your font choice's effect on your brief's length requires attention.

2. White space and margins.

White space is just that: any blank, *i.e.* white, part of a page.[18] "Effective use of white space—the margins and the amount of text on the page—also affects legibility."[19] The rule in publishing and graphic design is to devote no more than 50% of the page to text.[20] Increasing white space has been proven to improve readability and overall reading pleasure.[21]

Increasing the document's margins is an easy way to increase white space. Doing so has the added effect of reducing reader fatigue by making lines of text shorter. Eyetracking studies show that shorter paragraphs perform better than longer

typography.html

[17] If you are curious about mixing fonts in this manner, see https://typographyforlawyers.com/mixing-fonts.html.

[18] Robert Hoekma, Jr., *Designing the Obvious: A Common Sense Approach to Web Application Design*, 214 (2007).

[19] Robbins, *supra* at 124.

[20] *Id.*

[21] *Id.*

paragraphs.[22] "Those seeking to maximize readability of extended texts in English aim for a line length of 18 to 24 picas (3 to 4 inches), which accommodates 10 to 12 words."[23]

Contrast is also important to increase readability—it "helps the reader chunk the information because the writer can control where the reader looks first."[24] This is accomplished in several ways, including headings, bold typeface, differing fonts; but, at bottom, it is accomplished through the manipulation of white space. "A little extra spacing between groups of text elements helps distinguish the different parts of the whole document and understand its organization."[25]

For example:

> End of subsection
>
> **Heading**
> Start of new subsection

Extra spacing throughout the document will "enhance[e] a document's appearance and readability."[26]

3. Visual aids.

Put simply: use them!

Multiple studies have proven that understanding or persuasion are increased when visual elements are incorporated.[27] In the past, it may have been difficult to incorporate such visual elements. But with the advent of computer word processors, this is no longer true. Visual aids should be encouraged. Place

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[22] Steve Outing and Laura Ruel, *The Best of Eyetrack III: What We Saw When We Looked Through Their Eyes*, http://poynterextra.org/eyetrack2004/main.htm

[23] Derek H. Kierman-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. OF ASS'N OF LEGAL WRITING DIRECTORS 87, 110 (2010) (internal citations omitted).

[24] Robbins, *supra* at 128.

[25] Bryan A. Garner, *The Redbook*, § 4.6 p. 90–91 (3d ed. 2013).

[26] *Id.* at 90.

[27] *See, e.g.*, Sebastian Kernbach, et al., *The Use of Visualization in the Communication of Business Strategies: An Experimental Evaluation*, 52 Int'l J. Bus. Comm'n 164 (2015); Lynn Oppenheim, et al., *A Study of the Effects of the Use of Overhead Transparencies on Business Meetings*, Wharton Applied Research Center (U. of Pa. 1981); Douglas R. Vogel, et al., *Persuasion and the Role of Visual Presentation Support: The UM/3M Study*, Management Information Systems Research Center (U. of Minn. 1986).

charts, pictures, diagrams, etc. in the body of the text to help your reader understand your point. Do not, however, place a useful visual aid at the end of the document as an exhibit or appendix: "Never tuck the diagram into a back-of-the-brief appendix, which forces the reader to flip back-and-forth and defeats the purpose of the image in the first place: to make life easier for the reader."[28]

III. Oral Advocacy

Oral argument is critical in obtaining successful results for your clients. It is the only opportunity you have as a lawyer to speak directly to the court without the filter of a written brief or motion. Some attorneys wrongly think that oral argument is not important, or at least not as important as the written brief. Regardless, "[t]he brutal hard fact is that some cases are won and lost on oral argument."[29] Sometimes "the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference. It makes the difference because it provides information and perspective that the briefs don't and can't contain."[30]

Like writing, oral advocacy is a skill that must be continually honed. After observing and participating in hundreds of oral arguments and motion hearings, these are the aspects we find important.

A. Preparation is key.

You only have a few minutes to persuade a judge that your client's position is correct. This compression of time makes preparation *very* important.

Review your brief or motion and update the case law you cited. It is imperative that you know the state of the law before you enter the courtroom.

When you're drafting your brief or motion, make notes to yourself about potential oral argument questions or issues. Doing this when the law is fresh and you're deeply invested in its nuances will save you considerable time (and frustration) when it's time for oral argument.

Learn the cases cited in your papers and your opponent's papers. For the principal cases, go beyond a superficial understanding—know

[28] Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 81 (2013).
[29] Frederick Bernays Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 58 (1948).
[30] Scalia & Garner, *supra* at p. 139.

those cases' facts so that you can easily distinguish them if necessary. The point is that you should feel comfortable discussing the important cases very thoroughly when asked.

During your preparation period (at least several weeks out from your argument), it's important that you become extremely comfortable with your theory of the case, *i.e.* the "broad, overarching principles that encapsulate your factual and legal arguments into a short statement, usually expressed in a few sentences."[31] You should have crafted this theory when you were drafting the brief or motion, but now is the time to focus on it.

In addition, return to your case theme—"a succinct and easy explanation of your overarching theory. Think of it as the slogan or bumper sticker of your argument."[32] As we'll discuss later, your case theory and theme are what guide your oral argument performance.

B. Know the record.

Admittedly, this seems obvious. But its importance precludes its omission. When you rise for your argument, your "knowledge should be utterly complete and meticulously organized."[33] Oral argument is also a unique opportunity for the court to have direct access to the lawyers and seek answers to any thorny procedural or factual issues. You must be prepared for these questions.

Being able to point directly to the record in response to a judge's question inspires confidence

C. Practice your argument, *i.e.*, conduct moots.

There's only one way to get the feel of an oral argument: do one.[34] The importance of doing at least one moot oral argument cannot be overstated. Nothing else is as effective in presenting new issues that may not have occurred to you or revealing flaws in your responses to issues you were aware of.

Search out a number of willing colleagues to serve as judges. Encourage your colleagues to read the briefs and to oppose your positions

[31] Stetson Univ. Inst. for Advancement of Leg. Commc'n et al., *Oral Argument: The Essential Guide*, p. 8 (2018).
[32] *Id.*
[33] Scalia & Garner, *supra* at p. 151.
[34] *Id.* at p. 158 ("No preparation for oral argument is as valuable as a moot court in which you're interrogated by

and develop good hypotheticals. Follow any court-mandated times for argument to make the moot as realistic as possible.

Admittedly, it can often be difficult to find colleagues who have time to read the briefs and prepare for a moot argument. We are always happy to help in these situations, so please feel free to contact us.

It is equally important to watch oral arguments, if possible. The Kentucky Supreme Court's oral arguments are archived on KET's website at https://www.ket.org/ky-supreme-court/. The Sixth Circuit has audio available for past arguments at https://ca6.uscourts.gov/audio-files-completed-arguments. Familiarize yourself with the respective court's procedures and operation.

D. Make an outline.

Make a "cheat sheet" of all the important cases and facts for your case that you can quickly look at during oral argument. You will not have a lot of time to review the document so it needs to be concise and meticulously organized.

We each have slightly different approaches to this in our practice:

- Chad creates an outline in 11-point font and tapes multiple pages together, almost like a college football coach's playbook. He then has that in front of him during the argument.
- Joey uses a "classification folder" that has 2-hole punch at the top and a divider in it (they're available on Amazon). Like Chad, he creates an outline and then places it in that folder and has it open in front of him during the argument.

If your case revolves around a statute or a series of statutes, have those in front of you or within easy access at counsel's table so that you can quickly reference the exact statutory language at issue.

E. Be flexible.

Take advantage of the first 90 seconds or 2 minutes. This period may be the only time you get to speak to directly to the court and frame the issue presented.

Your case theory is really critical. It is your home base. When you get interrupted with a question or are otherwise thrown off your planned argument track, always return to your case theory. We all dream of being great on our feet and quick with a clever response, but that's just not realistic. So for those of us who do not possess superhero on-

the-spot thinking, the case theory provides a lifeline.

Oral argument is a conversation. Don't panic when faced with questions—embrace them. They are an opportunity for you to explain your position in greater detail and the judge is expressing interest in your position through the question. A "hot" bench with active questioning is much better than a "cold" bench that says nothing during your argument.

Answer the judge's question directly and succinctly and then return to your theory and theme of your case. Reference your outline and return to your argument roughly where you left off when the question interrupted you.

Do not go into any oral argument expecting to get through every possible point you want to make. Answer any questions and then return the focus to the overarching principles of your position.

F. Bringing handouts for show and tell (trial court, not appellate court).

For more involved trial-court hearings, highlight and tab important case law, sort it in the order you plan to address it, and make copies for the judge, their staff attorney (do not forget this person—learn their name and use it), and counsel. Hand these out as you're arguing. It helps emphasize your points and puts the law in front of the judge. You may not always use the handouts, but for a larger motion, it's a good idea to have them ready.

G. Do's and Don'ts

Don't interrupt or talk over judges. They can interrupt you, but that is a one-way street.

Do concede points if necessary. Your position cannot appear overly rigid—acknowledge its limits and don't try to overreach.

Don't miss the softball questions. Doing moot exercises of your argument can help you recognize these questions, but this is a critical skill. Pay close attention to the question and recognize that it's favorable to you. Trust your instincts; judges do not generally attempt to trick you. If the question feels favorable, it likely is. Pounce on it, but don't try to do too much. Sometimes the right answer is simply, "Yes."

Do know when to sit down or rest your case. There is no requirement

that you use all your allotted time. Again, pay close attention to the questions you and your opponent are receiving. If the questions have been favorable to you and you have covered your primary points, it is sometimes in your best interest to end your argument.

Don't keep talking after your time has expired. If you have additional points you would like to make and you are out of time, ask the judge for a *brief* moment to wrap up and make it quick.

Don't try to ignore case law that is bad for your position. This is simply untenable. Acknowledge the case head-on and explain why it is distinguishable from your position.

Do remain calm and professional in demeanor. Theatrics will get you nowhere—save those for your closing argument to the jury.

Do answer the judge's question. This seems straightforward, but often advocates respond with what they *want* to say rather than actually answering the judge's particular question. If you don't know the answer, acknowledge that, but then attempt to retreat to your overall case theme/theory.