

LEGAL WRITING FUNDAMENTALS

Presented By: Stephen F. Deatherage

Good legal writing can win cases; but it's hard work to be a good legal writer. To be effective, the writer must write clearly and persuasively about complicated matters to readers who have short attention spans—and who are sometimes hostile to the ideas articulated. So like any learned skill, good legal writing takes practice and a mastery of certain fundamentals.

“Writing is the art of creating desired effects.”¹ For legal writers, the desired effect is usually a favorable legal ruling—but a judge may find it hard to focus on the merits of a particular argument if the words used to express it show that the writer is wasting the judge's time, or is advocating a position that will get the judge reversed. In other words, poor legal writing often results in failed attempts at persuasion.

With that in mind, the following discussion offers a few simple rules that will help make your legal writing more clear and persuasive.

1. Show the judge that you won't waste her time.

The first rule any legal writer should learn is that nine-tenths of all writing is rewriting. The purpose of rewriting is to create a written product that efficiently transfers your ideas to the reader. For busy readers like judges, the quicker you can make that transfer, the better.

So write as clearly and simply as possible; relentlessly striving for clarity. To do this, legal writing expert Timothy Terrell advises you to build “containers” to hold the ideas that you are trying to transfer. Your fifth-grade teacher put it another way: Use topic paragraphs and topic sentences to help your reader follow the flow of your argument.

A. Use topic paragraphs.

When you build a container for your main ideas, first reference old information—which is what your reader already knows, plus what you've already told her. Then add new information with the understanding that each time you do, the “new” information itself becomes “old” information. Consider the following paragraph:

In Oregon, parties resisting summary judgment must produce admissible evidence showing that there is a need for trial. Here, to recover on his claims against HamCo, Sam Walton must show that HamCo's asbestos-containing joint compound was used by Lakes Drywall while he was present. But Walton's testimony—the only evidence offered against HamCo—failed to

¹ John R. Trimble, *Writing with Style: Conversations on the Art of Writing* 6 (2000).

do that. Can Walton meet his burden of showing that there is a need for trial?

This 73-word paragraph assumes that the judge is familiar with the summary judgment concept (old information that the reader already knows), and it builds on that familiar concept by articulating what a party must do to avoid summary judgment (new information). This “new” information now becomes “old” information, and is followed by still newer information (the identity of the parties and specific legal issues presented). By constructing your paragraphs this way, your presentation is coherent; this, in turn, eases the burden on your reader.

Your topic paragraph (or paragraphs) can also be used to explicitly map out your argument—although you should be sure to follow that map in the main body of your argument. Consider the following paragraph:

Two established legal principles are dispositive here. First, in opposing this summary judgment motion, Smith must offer evidence that is admissible under the Oregon Evidence Code. Second, Smith’s admissible evidence must be such that an objectively reasonable jury could conclude, without impermissible speculation, that Jones had actual or constructive knowledge of a hazardous condition at his property.

This paragraph sets out two concepts, which are later incorporated as argument headings in the main body of the brief. In the next paragraph, the writer applies the pertinent facts to the legal principles identified in the first paragraph:

The bulk of the evidence offered by Smith in opposition to Jones’s motion is *not* admissible. And, the scant admissible evidence offered by him proves only that a Jones customer unsuccessfully tried to use the pump in question 28 minutes before Smith used it. Based on this record, no objectively reasonable juror could find in Smith’s favor—and Jones’s summary judgment motion should be granted.

Together, these two paragraphs quickly identify the three things the reader must decide: what is the question (should Jones’s summary judgment motion be granted?); what is the answer (“yes”); and what are the reasons for the answer (most of the evidence offered in opposition is inadmissible, and the admissible evidence doesn’t show that Jones had actual or constructive knowledge of the hazardous condition)? And the paragraphs do so in a way that quickly tells the judge that the writer won’t waste her time.

B. Use topic sentences.

Now that you’ve built a container for your arguments, you need to develop supporting paragraphs that give the reader the information she needs to understand—and be persuaded

by—those arguments. Each supporting paragraph should be introduced by a topic sentence that relates the paragraph to the core ideas that you are trying to communicate. Writing strong topic sentences will help you develop unified and coherent paragraphs.

A topic sentence serves two main functions: It forecasts the arguments that the reader can expect in the paragraph; and it builds a bridge between the arguments developed in the previous paragraphs with those to be developed in the new paragraph. The topic sentence is the foundation upon which the rest of the paragraph is built.

(1) Forecasting.

The first job of the topic sentence is to forecast the arguments that will be presented in the new paragraph. This gives the reader a quick preview of the direction that the paragraph will take. Consider the following paragraph:

MergeCo bought the Citibank stock so that it could “take control” of 7-Eleven. This point was made clear by Kit Carson, who testified that MergeCo’s objective in this lawsuit is to take control of 7-Eleven and explore “liquidity alternatives,” to be achieved by putting the company up for sale. Likewise, MergeCo’s CEO, Scott Bayo, testified at his deposition that MergeCo has been damaged in this case by not being able to exercise control over 7-Eleven. MergeCo intends to use that control to put 7-Eleven up for sale, enter into agreements that benefit MergeCo to the detriment of 7-Eleven’s minority shareholders, and take other actions that 7-Eleven’s board has determined to be adverse to the company and its minority shareholders.

The topic sentence of this paragraph introduces the argument that the paragraph will develop—MergeCo’s plan to take control of 7-Eleven—but provides few details about that argument. Instead, the remaining sentences develop the “take control” argument, which in turn supports the core idea presented in the brief: MergeCo’s purchase of 7-Eleven stock was a hostile takeover attempt. And by forecasting the “take control” argument, the topic sentence makes the remaining sentences easier to understand.

(2) Bridging.

The second job of the topic sentence is to build a bridge between the arguments developed in the previous paragraphs with those that will be developed in the new paragraph. Consider this paragraph, which follows the one set out above:

Without the Citibank shares, which MergeCo obtained through misconduct related to its claims here, MergeCo would not own a majority of the 7-Eleven stock—and would not be in a position to take control of 7-Eleven. But in Oregon, a litigant’s

misconduct precludes it from obtaining equitable relief if the misconduct is related to the transaction giving rise to the litigant's claim. *N. Pac. Lumber Co. v. Oliver*, 286 Or. 639, 653 (1979). Similarly, a litigant cannot obtain legal relief if its losses are related to its misconduct. *McKinley v. Widner*, 73 Or. App. 396, 401 (1985). Here, since MergeCo acquired the Citibank stock so that it could "take control" of 7-Eleven, MergeCo's misconduct in acquiring that stock is related to its previous acquisition of 7-Eleven's stock.

The topic sentence of this paragraph continues the theme from the prior paragraph—MergeCo's desire to take control of 7-Eleven—while introducing the next argument: MergeCo's misconduct in acquiring the 7-Eleven stock is related to its claims. In this way, the topic sentence eases the reader into the new paragraph, continues the old-new-old pattern developed in the topic paragraph (or paragraphs), and lets the reader know how the information presented in the paragraph logically relates to the writer's main arguments.

C. Reduce your brief to its barest essentials.

Unnecessary length shows the reader that you are unconcerned about wasting her time. So don't write to the page limit as if it's a goal. Instead, cut your sentences and paragraphs down to their barest essentials—with no extra baggage.

2. Show the judge that you won't get her reversed.

Credibility is the most important attribute of a good writer. You lose credibility, and ask the judge to wade in risky legal waters, if your brief has typos or is based on faulty legal analysis. So boost your credibility—and show the judge that you won't get her reversed—by doing two things: First, make sure that your brief is free of typos and major grammatical errors, and second, make sure that the legal authority you cite is good law.

Rid your brief of typos and major grammatical errors. Those mistakes not only distract the reader from the points you're trying to make, but they also call into question your attention to detail. And since details are where legal arguments are won or lost, you give your opponent a big edge—and badly weaken your arguments—if you let typos and major grammatical errors slip through.

But even if your sentences and paragraphs are error free, and are constructed in a way that clearly and persuasively communicates your arguments, you will still lose if the judge feels that your position would require her to take legal risks. So make sure that the legal authority you use to support your arguments is good law, and that what you say about that authority is accurate. Of course, you can still make creative legal arguments—just be sure to clearly explain why it's likely that an appellate court would adopt your reasoning and conclusions. That way, you build credibility with the judge and give her comfort that adopting your client's position won't get her reversed.

3. Show the judge that she will “do justice” by adopting your client’s position.

The art of persuasive writing requires not only a mastery of the technical writing skills just discussed—but also an ability to make a deeper connection with your judge. Judges want to know that they will “do justice” if they adopt your client’s position. So be sure to present your client in the best light that you can.

But what if your client is not particularly sympathetic? Then find something about your legal issue that you can use to convince the court that justice will be done if your client’s position is adopted. For example, insurance companies are rarely sympathetic litigants—but if you can show the judge that the person seeking coverage has not been forthright with the insurer, then the judge may conclude that a “no duty to defend” finding is just.

4. Conclusion.

Good legal writing isn’t an inflexible endeavor, and technical rules—such as the passive-voice rule—must sometimes be broken for the sake of clarity and concision. But those rules must first be learned so when they are broken, they’re done so mindfully. So learn the rules. Break them. And strive for relentless clarity and concision in your writing.