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"Legal Writing Just Means It's Not Against the Law, Right?"

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Legal Writing

The mistake most commonly made in writing briefs and other legal documents is the writer believing that legal writing must differ from regular writing. It doesn't. It shouldn't. Some lawyers think why did we go to law school if not to use phrases like "Wherefore, premises considered…" But such worn-out phrases are just blank spots on the page for appellate judges. Write as you would talk. Make every word count.

Delve Deeper

Court of appeals justices work with two competing pressures. On most such courts the justices have a quota of two opinions a week they have to issue. In addition, they sit in three-judge panels and a majority have to agree for the opinion to issue. So a judge has to write or review closely six opinions a week. Plus there are the day to day functions of ruling on motions, supervising staff, meeting with all the judges, hearing oral arguments, and so forth. Meaning if yours is one of the cases submitted to that judge, it will get perhaps half a day of attention. So your brief will get about half that time. At best. Sometimes the judge will want to issue a concurring or dissenting opinion, using up even more time.

That last part is a clue to the second pressure. No lawyer runs for an appellate court because she wants to sign an endless stream of opinions about whether the evidence is sufficient. A court of appeals justice wants to come out with a landmark opinion, one that addresses an issue in a way it hasn't been addressed, or sets a precedent that will be followed for a generation.

This can't be done in every case, of course, and is not only unnecessary but burdensome in the great majority of appeals. But once in a while a judge wants to delve deeper into an issue.

We have the same conflicting urges as appellate lawyers, or should. Who wants to cut and paste the same brief over and over? Sometimes you want to research and write like a real lawyer.

So we can help. We can be the justices' guides deeper into the jungle of particular issues. How?

What Appellate Judges Want

I've appended to my paper a survey recently done of court of appeals justices by the Appellate Practice section of the State Bar. If you're interested in preferred methods of emphasis, headings in the table of contents, and so forth, it's very detailed. But to summarize, brevity and honesty. Many, many of these judges said the average brief is

too long and the average appellant's brief raises too many points of error. As one put it, if you haven't convinced me the case needs to be reversed in ten points of error, do you think you're going to do it in points of error eleven through fifteen? Most recommended three points of error, maybe five at most. Many complained about repetition. It's not a jury argument. If appellate judges want to see an argument repeated they can re-read it.

The best advice from one of these appellate justices was essentially, I want to see a brief that makes it easy to write the opinion. How do we as appellate practitioners do that? The goal should be for the court to be able to change a few words in your brief and issue it as the opinion. Instead of "This Court should hold" the opinion will say "We hold…" So read the opinions, especially from the court in which you usually practice. Most opinions seem to fit a template. The opinion states the issue at the very beginning. Here's a recent example from the Court of Criminal Appeals:

> Daniel Thomas Barnes was convicted of burglary of a habitation in a bench trial. The question before us is whether the erroneous admission of two out-of-state misdemeanor convictions during the punishment phase of Appellant's trial was harmful. In light of the properly admitted punishment evidence – including victim impact evidence, evidence of Appellant's membership in the Aryan Brotherhood and evidence of his multiple felony convictions – we hold that it wasn't. Consequently, we reverse the judgment of the court of appeals.

Barnes v. State, No. PD-1072-19 (Tex. Crim. App. delivered February 10, 2021).

This puts the question and answer at the very front. I propose as practitioners we add a "Statement of the Issue" at the front of every brief, right after (or before) the Statement of the Case. Rule 38.1 of the Rules of Appellate Procedure says what's required in a brief, but it doesn't say we can't add a section. It should look similar to the opening paragraph above, stating in one sentence the offense and outcome of the trial, then the primary issue of the case, with its resolution. With the inclusion of such a paragraph, an appellate judge seeing the brief will know from the very beginning what to look for in the rest of the brief.

Statement of Facts

Then opinions set out the facts – briefly. There's nothing extraneous to the resolution of that initial statement of the issue. No "Officer Josiah Stillworth received a call at 10:08 p.m., went to an address on the southwest side of Fort Worth…" And then did nothing having to do with the issue of the case. If witnesses didn't address any issue in the case, leave them out. Never do what one appellate judge called "the deadly witness by witness recitation of the trial evidence." Far too many appellate briefs do this. When the case is on appeal is the time to re-imagine how to present it, which starts with not

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