Writing Persuasively at the Trial Court Level

by Helen E. Hoens

PRACTICAL TIPS ON STYLE AND SUBSTANCE

The report that accompanied the recommendations now known as "best practices" in the Civil Division observed that "the civil division is awash in motions."1Whether that concept is expressed in terms of the number of motions assigned to each trial-level judge on an average motion day, or in terms of pounds of paper or linear feet in the stacks of briefs and certifications piled on the bench, the sheer volume of paper confronting each of us is breathtaking.

If you consider that each of those briefs must be read and analyzed, and often re-read in the course of preparing for an oral argument or as part of the more complex process of preparing a statement of reasons or writing an opinion, and if you consider that hearing and deciding motions is but a small part of the work of a trial judge, you can begin to appreciate just how overwhelming this part of our work has become. Keeping this in mind, however, can help you become a more effective brief writer. While the material in this article is by no means everything that you need to know to become an effective writer, the following suggestions, at least in the view of this trial-level judge, should help you get your point across more effectively.[2]

Rule Number One—Less Really Is More.[3] One of the easiest tasks for any lawyer is expressing an argument at great length and in complete detail. One of the hardest tasks, in comparison, is writing clearly and concisely, expressing arguments with precision and without wasted words or thoughts. If you learned in high school, as I did, to write lengthy complicated sentences, then referred to as compound-complex sentences, which were filled with twists and turns of thought that I, for one, was certain were a sign of great wisdom, then what you actually learned was to make your writing so complicated that it lost its effectiveness. Heavy, dense, intricate writing may be acceptable in a novel, but it is not effective or persuasive when foisted on a trial judge.

Consider, if you will, the very different style of writing used in two classic novels, *Moby Dick* by Herman Melville and *The Old Man and the Sea* by Ernest Hemingway. Each is widely regarded as great literature; each is a timeless tale of a man and his great battle with a fish. One, however, is heavy, weighty, dense with detail and rich with complexity, while the other is direct, declarative, compelling. The point is not that one book is better or even better written than the other, but rather that one style requires more focus and attention from the reader than the other, and will likely be read with less comprehension than the other in light of the volume of other materials to be read. Effective brief writing uses a style that is direct, declarative and compelling, rather than one that is rich in detail and complex in structure. Put another way…

Rule Number Two—It's Not the Law Review. If you were fortunate enough to have been selected to serve on a law review or law journal,[4] you undoubtedly mastered a writing style which is neither persuasive nor compelling. Rather, the formula used

requires density and weight of phrase, with overwhelming supporting references to primary and secondary sources. That style of writing, while well suited to scholarly discourse, is not one that is calculated to get the point across to a judge.

Compare the analysis you would undertake of the standard for summary judgment in a law review with the explanation of that doctrine which you should include in a brief. The former would examine all published precedents, discuss historical antecedents and explain in detail the evolution of the doctrine up to *Brill v. Guardian Life Ins. Co.*[5] and beyond, with each concept amply supported by footnotes and references. The latter need only demonstrate to the trial judge that the motion is seeking summary judgment and set forth the standard, referring to the Brill decision, in a concise fashion that demonstrates familiarity with the concept and identifies its application to the matter at hand. Which reminds me of...

Rule Number Three—Edit, Edit, Edit. There is no substitute for learning to edit your own work. Even if you have the luxury of having others who can and will do so, at some point all of us need to learn to look at our own writing with an editor's eye. If you are very lucky, you may have a colleague or, better still, a mentor who writes clearly and concisely and is willing to edit a piece of your writing that you think is already well written. This process can help you identify weaknesses in your style and learn how to edit your own work. Editing can help you avoid common pitfalls, such as redundant arguments, disjointed thoughts and run-on sentences. Editing can also help you learn useful and persuasive writing techniques, such as parallel construction and the use of transition sentences to link thoughts and themes effectively.

Even if you have no one to help you learn to edit, you can apply a few rules that will automatically make your writing better and more persuasive to a trial judge. Work from an outline to help you create an organized brief. This is particularly important if you dictate briefs, in order to help you avoid the stream of consciousness brief. I once received such a brief consisting of 50 pages of text on the history of an industry with no legal points at all. It was interesting and entertaining, but not as persuasive as the opponent's brief, which discussed a relevant statute that gave rise to a summary judgment argument. Had the writer taken the time to edit the brief, one can only hope that he would have noticed that he had not included any legal arguments.

Another common editing trick is to put your brief aside for a day or two after you think it is finished, and then read it with fresh eyes to detect weaknesses and errors. Look at your brief as well from a purely visual appearance perspective, bearing in mind the volume of material that the reader is wading through, to avoid a product that is visually dense. Consider how much effort it takes to read pages of text without paragraph breaks or pages of singlespaced text representing block quotes. Consider how much less effort it takes to read short, direct sentences and paragraphs and text punctuated by shorter quoted materials. This applies even more so, by the way, to point headings. Your point headings are just that—headings. They are not the entire point. Every day I read briefs with point headings that fill half of the page and attempt to capture the entire point, subpoint and nuances of the point. Visual density aside, it is not necessary and it is distracting to a reader to encounter lengthy point headings.

Proofread your work, particularly if you dictate. I have actually received a brief that asked me to dismiss a complaint because it was "raised due to cotta" in place of "*res judicata*," and have seen a reference to a "baloney amputation" in place of a "below-knee amputation."[6]

Proofread your work to correct errors in spelling and grammar. Poor spelling and poor grammar detract from the brief and distract the reader. Notice I did not suggest that you run the brief through the computer's program for checking spelling or (if there is such a thing) grammar. The computer cannot substitute for the human mind, and relying on it as if it does can lead to some interesting spelling substitutions. If you don't believe me, run your own name, whatever it may be, through such a device. Unless you have a name such as "Brown" or "Miller," you will get some interesting results that will illustrate the danger of relying on such a program.

As for grammar, if you do nothing else, get a copy of the classic writer's aid, *The Elements of Style*,[7] and read it. Then, read it again. While not strictly a guide to good grammar, it will help you learn how to be a better and more persuasive writer. Now, lest you think this is all about style and not about substance, here are a couple of rules to help with the substance of your brief.

Rule Number Four–Define the Field of Battle. A trial lawyer for whom I worked a long time ago insisted that creating the field of battle was a critical substantive guideline. He was convinced that if he could define the terms of the debate effectively, he could materially increase the likelihood of success on any issue. He worked long and hard to create the terms of every debate so as to always fight on his own terms. If his adversary moved for summary judgment, he might re-frame the debate in terms of rights to be heard or depriving his clients of their day in court. If the adversary took that approach, he would re-frame the argument in terms of the rule of law, the need for finality, judicial economy or equal protection. He was a master of this skill, but only because he recognized the concept and worked to perfect it. His principal weapon in this endeavor was the use of an introductory statement at the outset of every brief. No matter that the rules at the time did not permit one, he just wrote it anyway, and inserted it at the start of his brief–a page or two of pithy, persuasive prose that set the stage for the points that would follow. Few of us are able to master that skill, but you can effectively define the terms of the dispute without trying to do so by following...

Rule Number Five–Make It Your Argument, Not Your Adversary's. The legendary samurai Miyamoto Musashi expressed the idea as follows: "In contests of strategy it is bad to be led about by the enemy. You must always be able to lead the enemy about."[8] This advice applies as much to your brief writing today as it did to warfare in the 17th century. It is, however, difficult advice to follow.

Consider as you begin to write how best to organize your points. Determine which argument is your strongest and lead with it, following that with your less persuasive arguments. Abandon weak arguments entirely because they may undercut your overall position.

Do not make the very common mistake of over-anticipating your adversary. By that, I mean that while you should generally be aware of the arguments your adversary will raise in response to your motion, remember that your brief is your opportunity to make your points, not to rebut in advance your opponent's points. For example, write: "The plaintiff is entitled to summary judgment because...," and avoid writing "The plaintiff is entitled to summary judgment in spite of the fact that the defendant will argue..." While it is rare that anyone presents an argument phrased precisely in the latter fashion, it is common for brief writers to overanticipate their adversary's points, and as a result they make the mistake of worrying so much about rebutting the expected arguments that their own points are lost. In fact, it is quite common for brief writers who are trying to meet their adversary's expected arguments to state those points more persuasively than their adversary would have.

An equally common mistake, however, is based on the notion that some arguments should be "saved for the reply," as if holding the best argument back will in some way lull one's adversary into filing a weaker brief, or perhaps give the moving party the opportunity to have the last, and apparently, best word. Apart from the fact that dispositive motions, as to which oral argument is ordinarily entertained, will afford the adversary the chance to respond orally to the point made in the reply, having the last word in the briefing process pales in comparison to simply presenting one's strongest arguments first and being able to set the terms of the debate from the outset. All of which brings me what to me is one of the most important substantive rules...

Rule Number Six–Give Me a Place to Hang My Hat. Whatever it is you want the trial judge to do in a case, you cannot anticipate getting it unless you give the judge a reason. Perhaps that sounds self-evident, but actually it is not. The issue in this regard is not simply one of presenting case law or statutory references, although a surprising number of briefs lack both. It is more a matter of providing for the judge a basis, a ground, a reason for reach-

ing the result you desire in spite of whatever your opponent is arguing.

The simplest illustration of this concept, of course, arises in the context of relief you seek which would require an extension of existing law to a new situation. Some lawyers ignore the fact that the law has not yet been interpreted the way they hope it will be, and imply that precedent (whether cited or not) supports their position. Some lawyers concede that the law has not yet been applied as they hope, but simply assert that it should be. Some lawyers even boldly declare that the existing precedents are squarely against their position, and challenge the trial judge to cast all precedent aside and strike a blow for whatever cause they are pressing. None of these is likely to be a winning strategy, because it simply is insufficient in this circumstance to assume that the judge will go where you ask unless you can come up with a reason.

If you want a judge to extend the law to a new situation, check to see if the law in that field has been evolving in the direction you hope it will, or argue by analogy to a similar field of law that is helpful to your cause. Simply put, give the judge a reason, preferably a good one, to decide in your favor.

Giving the judge a good reason to do what you want is a vitally important concept. The easier you make the task of finding for you, the greater the likelihood that you will prevail. The harder the judge has to work to understand your point or ferret out some basis to find for you, the less likely it is that you will get the result you are hoping for.

I recently received a brief on a motion to vacate an arbitration award that did not once acknowledge that there is a statute that governs such an application.[9] Perhaps this oversight was due to the fact that the statute was not particularly helpful to the moving party, and the lawyer thought I might not be aware of the existence of the statute, but the application would have had a better chance of succeeding if the lawyer had come up with a reason why the statute did not or should not apply. As it was, I was left to wonder whether the lawyer was even aware of the statutory problem with his application.

Another, perhaps more stark, example of this concept comes from a briefreading experience I had recently. The brief in question was devoid of any point headings, and completely lacking in any reference to any published decision or statute. I quite literally had no idea what the moving party wanted. The adversary, apparently in an effort to respond but obviously having a clue what the issue was all about, filed an equally incomprehensible brief. Reading the two briefs together was a little like walking into a movie theater partially through the film–the other people knew what the plot was, but I certainly did not. I could not even determine what the movant wanted from reading his proposed form of order, which simply stated that the motion was granted. I eventually learned, by requiring the lawyers to appear for oral argument, which they had waived, what the dispute was about. It would have been far more efficient for everyone involved, and certainly more cost effective for their clients, if the briefs had been well written.

Which brings me to my final thought. Effective brief writing is not easy to learn. Concise and persuasive writing is a pursuit, and a challenging one at that. If you compare the effort you put into a brief that you file with the Appellate Division[10] with the effort you put, or more likely do not put, into the many briefs you file with trial judges, you may begin to appreciate the kind of dedication excellence in writing demands. While the press of your caseload and the realities of the relative costs of that excellence may lead you to conclude that not every brief is worth the effort required to turn a mediocre product into a great one, with practice you can become a more effective and more persuasive writer. If you have read this far, at least you are interested enough in the subject of effective brief writing that this trial judge's views and suggestions may in some way help you toward that goal.

Endnotes

1 Summary of best practices, reprinted in "Surviving Civil Best Practices," compiled by Jane F. Castner, assistant director, Civil Practice Division AOC (ICLE 2000).

2 The views expressed in this article are solely the views of the author. They are based upon the author's experiences both as a litigator and as a judge, and upon the author's training, both formal and informal, and education, before and after law school.

3 The author first learned this rule from the Honorable John J. Gibbons, then serving on the United States Court of Appeals for the Third Circuit. Fresh from law school, and armed with law journal training (*see* Rule Number Two, *infra*), the author had no idea what the judge meant when, after reading her first bench memo, he stated that "less is more." To the extent that the author has managed to master this rule, she owes Judge Gibbons a great debt of gratitude because he took the time to explain it and cared enough to explain it more than once.

4 Eighth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1977–1978, 67 *Geo. L.J.* 317 (1978).

5 142 N.J. 520 (1995).

6 The first example given in this section came from a brief filed with the court several years ago. The second example actually came from a transcript provided to the court, but it illustrates effectively the pitfalls of dictation.

7 William Strunk Jr. and E.B. White, *The Elements of Style* (1972).

8 Miyamoto Musashi, *A Book of Five Rings 72* (Victor Harris trans., Overlook Press, Woodstock, N.Y. 1974).

9 N.J.S.A. 2A:24-1 *et seq.* The particular statutory reference concerning vacating, altering or modifying an arbitration award is found at N.J.S.A. 2A:24-8.

10 Rule 2:6-2. The author would be truly remiss if she did not pay homage to the late Robert E. Guterl, assignment judge for Vicinage 13, who longed for the day when the trial bench would enjoy the benefit of a page limitation on briefs similar to the one which governs briefs filed with the Appellate Division.

Hon. Helen E. Hoens has recently concluded her service as a justice of the New Jersey Supreme Court. This article was written when she was a superior court judge and was serving as the presiding judge of the Civil Division for Vicinage 13, comprising Somerset, Hunterdon and Warren counties.

(Originally published in August 2001.)