EFFECTIVE LEGAL WRITING IN CIRCUIT COURT

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I. SELECTED OBSERVATIONS ON LEGAL WRITING FROM A SURVEY OF JUDGES ON COMMON PROBLEMS IN THE QUALITY OF LEGAL WRITING

A. "...[O]n what advocates do worst, some of the judges said:

- Ramble on;
- Their briefs are almost invariably too long and frequently repetitious;
- Write for the sake of writing. They do not edit and boil matters down to their essentials;
- Lengthy, rambling briefing in which it is difficult to discern the point;
- Too long, too repetitious and meandering;
- Making the briefs excessively long and incomprehensible;
- Verbosity and over citation;
- Often important and concise points are lost in a sea of irrelevant points;
- Length of virtually all briefs is excessive. Briefs far too long;
- Unfocused, imprecise and verbose writing;
- They write too much and dilute their arguments;
- Repeat arguments ad infinitum;
- Is verbosity a synonym for attorney?
- Write too much;
- Too lengthy and not really doing a good job of addressing the issues;
- Fail to write short, clear, 'to the point' briefs;
- Unnecessary volume;
• In sum, the briefs – usually a misnomer – are too long and do not focus on the critical issues in the case.  

B. United States Supreme Court Chief Justice John G. Roberts on the Danger of Bad Legal Writing

BAG: Can bad writing lose a strong case?

JGR: It sure can – because they may not see your strong case. It's not like judges know what the answer is. I mean, we've got to find it out. And so when you say can bad writing lose a strong case, if it's bad writing, we may not see that you've got a strong case. It's not that, oh, this is poorly written, so you're going to lose. It's that it's so poorly written that we don't see how strong the precedents in your favor really are, because you haven't conveyed them in a succinct way.

C. On the Importance of Clarity

"The overwhelming message from judges is that they want briefs that are concise and clear. Again, because they are so busy, judges do not seem to have enough time or energy to figure out what an advocates [sic] is trying to say; he must argue 'clearly.'"

"The primary goal for any legal writer should be to make things easier for the reader. Clarity 'makes reading effortless.' Some readers may be willing to work to understand what an author is writing, but most are not."

D. United States Supreme Court Justice Samuel Alito on Clear Writing as a Reflection of Clear Thinking

"And I remember something my father would often say about writing. He said, 'Sometimes when you're having difficulty expressing something, it's because you really don't know exactly what you're trying to say.' I think

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2 Bryan A. Garner.


4 Robbins, supra n. 1, at 284.

there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.”

E. United States Supreme Court Justice Ruth Bader Ginsburg on "Plain English"

BAG: Do you think it would be a good thing if lawyers everywhere became more dedicated to trying to use plain English?

RBG: I think it would be a very good idea, yes.

BAG: How would that affect the legal profession?

RBG: For one thing, you would have much shorter documents than we now do. For another thing, the public would understand what lawyers do, what judges do, better.

F. Chief Justice Roberts on the Statement of Facts as a Story

"It's got to be a good story. Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together – that's a story. And you've got to tell a good story. Believe it or not, no matter how dry it is, something's going on that got you to this point, and you want it to be a little bit of a page-turner, to have some sense of drama, some build up to the legal arguments."

G. United States Supreme Court Justice Antonin Scalia on Legalese

"Beyond pure literacy, avoid legalese. There are all sorts of . . . the instant case. I said in one of my speeches or I wrote somewhere: a good test is, if you used the word at a cocktail party, would people look at you funny? You talk about the instant case or the instant problem. That's ridiculous. It's legalese. This case would do very well."
H. Justice Scalia on Judges as an Audience

BAG: Would you say it's pretty well universal that judicial readers are impatient to get the goods?

AS: Oh, absolutely. Judicial readers ... you know ... I want to move on to the next brief and the next case, and I just want the kernel of the argument. I want it there in front of me, I want it clear, and I want it fast. And if possible, I want it elegant.  

I. United States Supreme Court Justice Ruth Bader Ginsburg on the Importance of Honesty

BAG: What would your two biggest tips be to brief-writers on how they could improve?

RBG: First, be scrupulously honest because if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted – the rest of it....My other tip is that it isn't necessary to fill all the space allotted.  

II. THE VISUAL EFFECT OF THE LEGAL MEMORANDA

Subtle choices about the visual aspects of a lawyer's written product (such as font, emphasis, margins, spacing, headings, etc.) can have a psychological effect on the reader, making the reading process smoother – or more difficult. In one article, the author discusses the visual effects of certain aspects of legal memoranda on the reader. The following are some observations.

A. All Capital Letters in Headings Dramatically Slow Reading Speed and Frustrate the Reader

"Contrary to what many people might think, the use of capital letters in a heading ("all caps") actually dramatically decreases speed of reading as compared to sentence case letters.

... 

During repeated tests on adults, the studies indicated that the use of all caps lengthens the reading time by 9.5% to 19%. The average reader took about 12-13% more time to read all caps.

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10 Id. at 74.

11 Garner, supra n. 7, at 136-137.
We should retire the use of all caps in our documents. Using all caps adds nothing to the document and, in fact, detracts from the overall effect."\textsuperscript{12}

B. Italics also Slow Reading Speed; Boldface Is the Recommended Device for Emphasis

"Italics also retard reading speed, up to 10\% in situations that also included poor lighting and small type size. Normally, however, the use of italics slows reading time up to 4.5\% in a five-minute reading span."\textsuperscript{13}

"Boldface, on the other hand, does not appear to seriously slow reading speed. Based on these results, the psychologists recommend boldface as the cueing device of choice when the writer wishes to add emphasis."\textsuperscript{14}

C. Serif Fonts (\textit{e.g.}, Times New Roman) Are Easier to Read than Sans Serif (\textit{e.g.}, Arial).

"A 'serif' or 'wing' is the extra little line dangling on the bottom of letters. A common sans serif font is Arial.

...\textsuperscript{12}

The popular view among graphic design experts is to use serif fonts, like Times or Garamond, for large blocks of text. Those designers conclude that serif fonts read more easily in blocks of print text. They reason that reading is easier because the serifs 'lead the eye from one letter to the next.' But there is only minimal science to support the theory."\textsuperscript{15}

D. Proportionally Spaced Fonts (\textit{e.g.}, Times New Roman) Are Easier to Read than Monospaced (\textit{e.g.}, Courier New)

"[C]ourier font is a 'monospaced' font, which means that each letter takes up the same amount of width regardless of the natural letter shape. The letter 'l' and 'l' use the same width space as the letter 'w.' In contrast, Times New Roman is a proportionally spaced font, so the 'l' and 'w' have different widths.

...\textsuperscript{12}


\textsuperscript{13} \emph{Id.} at 118.

\textsuperscript{14} \emph{Id.} at 119.

\textsuperscript{15} \emph{Id.} at 119-120.
The bottom line: proportionally spaced fonts are easier to read."\(^{16}\)

E. Organizing Information through the Use of Roadmaps, Summaries, and Headings Facilitates Memory

"Advance organizers such as roadmaps or summaries create a learning base that the reader can call upon as pre-learned material when later introduced to the material in more depth.

…

Breaking information up into 'chunks' under headings also makes sense from a memory standpoint. Cognitive psychologists have long known that 'chunking' information raises recall rates.

…

Chunking information can help increase the likelihood of retaining the information in the working memory. Without it, the reader is overloaded and may completely stop processing the information."\(^{17}\)

F. Text that Is "Left Aligned" May Be Easier to Read than Text that Is "Fully Justified"

"Design experts have some disagreements when it comes to justifying text, but the majority seems to favor leaving the text left aligned rather than fully justified. Text that is 'fully justified' is lined up at both the left and right sides. The legibility danger is the odd spacing that can result between letters or words."\(^{18}\)

III. ADDITIONAL SUGGESTED READING


\(^{16}\) Id. at 121.

\(^{17}\) Id. at 124-125.

\(^{18}\) Id. at 130.

NINE SHORT HINTS FOR MORE EFFECTIVE WRITING
Judge Robert W. Dyche III

1. Don’t use two words when one word will do.
2. Don’t verb nouns.
3. Don’t use contractions in formal writing.
4. **FOR GOODNESS’ SAKE, DON’T OVEREMPHASIZE ! ! ! ! ! ! ! ! ! !**
5. Write in short, easy-to-understand sentences, not long ones that seem to go on and on, never ending, and telling your reader little additional information which might be useful to that person’s task, if he or she ever gets around to it after reading interminable sentences.
6. If passive voice is used, it is not as effective as using active voice.
7. Myself is very careful with reflexive pronouns.
8. What good are rhetorical questions?
9. Use parties’ names, not their status in the litigation.
Legal writing is a process that continually requires attention and maintenance. Although the formula for success on either endeavor is not complicated, perfecting the desired results involves a multi-layered approach, attention to detail and a constant commitment to hard work.

Many CLE opportunities involve legal writing as a topic because (1) it is a rare attorney who has no room for improvement and (2) many attorneys need to improve their writing skills for efficiency and economy of resources. Writers who need little improvement cause no trepidation to most judges and attorneys. Writers who need much improvement, however, may achieve a degree of undesired fame. Take the following examples:

**In re Shepperson, 674 A.2d 1273 (Vt. 1996):** For a period of seven years, one attorney repeatedly submitted legal briefs to [the Supreme Court of Vermont] that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantiated legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric. The briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases.

*Id.* at 1274. The Supreme Court of Vermont ordered this attorney to complete a six-month writing tutorial program as a sanction. When he refused, the Court indefinitely suspended him from the practice of law.

**Henderson v. State, 445 So.2d 1364 (Miss. 1984):** Here, an English teacher was called as an expert witness. As the Supreme Court of Mississippi summarized:

This case presents the question whether the rules of English grammar are a part of the positive law of this state. If they are, Jacob Henderson's burglary conviction must surely be reversed, for the indictment in which he has been charged would receive an “F” from every English teacher in the land.

Though grammatically unintelligible, we find that the indictment is legally sufficient and affirm, knowing full well that our decision will receive of literate persons everywhere opprobrium as intense and widespread as it will be deserved.

*Id.* at 1365.
In re Disciplinary Action Against Hawkins, 502 N.W.2d 770 (Minn. 1993): An attorney was publicly reprimanded for poor writing. The Supreme Court of Minnesota stated: "Public confidence in the legal system is shaken when lawyers disregard the rules of court and when a lawyer's correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible." Id. at 771.

As an appellate judge, I read hundreds of pages weekly. Briefs often include mistakes impacting attorneys' credibility and the quality of their case. Mistakes also waste judicial resources. The impact of poor writing skills should cause attorneys to take an inventory of whether their skills are negatively bearing on the outcomes of their cases.

There is no silver bullet method that will change poor legal writing into perfect legal writing (if there is such a thing). However, I have included some basic rules in this article that I believe will dramatically improve your chances of communicating successfully, communicating professionally, and avoiding having your writing used as a sample in a writing workshop.

I. PAY ATTENTION

In a medical malpractice case I reviewed, the issue argued was whether a directed verdict was properly granted based upon a plaintiff’s failure to prove the element of duty. Both parties devoted no less than fifteen pages of their respective appellate briefs to this issue. The directed verdict, however, was premised upon the plaintiff’s failure to prove the element of duty and the element of causation. The appellant never addressed whether he failed to prove causation, so the appellee never addressed it either.

This is an example of what my chambers calls "reactive briefing." Too frequently, a party responding to an argument responds only to that argument without presenting alternate valid arguments. Certainly, the appellee in the above example could have argued that the appellant's failure to discuss the issue of causation was fatal to her appeal of the directed verdict, irrespective of any issues regarding the element of duty. See R. E. Gaddie, Inc. v. Price, 528 S.W.2d 708, 710 (Ky. 1975) (“Failure of appellant to discuss the alleged errors in

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1 Kathleen Elliott Vinson, "Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge," 21 Touro L.Rev. 507, 518 (2005) (quoting Debra R. Cohen, "Competent Legal Writing – A Lawyer's Professional Responsibility," 67 U.Cin.L.Rev. 491, 492 (1999) (quoting David Marllinkoff, Language of the Law VII (1963)); see also Devore v. City of Philadelphia, No. Civ. A. 00-3598, 2004 WL 414085, at *2 (E.D.Pa. Feb. 20, 2004) ("At the outset, the court ordered the Plaintiff to file an amended complaint because paragraphs and pages were missing from that filed with the court and sent to defense counsel. Moreover, although we recognize the complicated nature of this case, lying at the crossroads of §1983 and Title VII, some of the Amended Complaint was nearly unintelligible. In ruling on the Motion to Dismiss the Amended Complaint, the Honorable Stewart Dalzell, to whom the case was assigned prior to its referral to the undersigned, noted that the court was "puzzled" by some of the Plaintiff's arguments in opposition to the motion to dismiss and found others "odd." See Order on Motion to Dismiss (Jan. 30, 2001, Dalzell, J.). "[Counsel's] lack of care caused the court, and I am sure, defense counsel, to expend an inordinate amount of time deciphering the arguments and responding, accordingly.")
its brief is the same as if no brief had been filed in support of its charges.

However, the appellee missed this issue for the simple reason that he was not paying attention to anything other than what the appellant had presented.

The Court might raise certain deficiencies *sua sponte*, such as the one in this example. Ultimately, however, the risk and consequence of not raising a deficiency or an argument falls squarely upon the shoulders of counsel, whose duty it is to zealously advocate on behalf of the client.

II. BE PROFESSIONAL

Good legal writers are always professional. They do not use unprofessional adjectives, personal attacks or name calling; they advocate zealously for their clients with integrity; and they are the attorneys judges enjoy having before them. I liken them to superheroes: they can deflect daggers and lasers, without having their superhero cape torn or tattered. They come out of the fray without looking like they have been through it.

Most attorneys act professionally most of the time. But occasionally one uses language, pettiness, and name calling that reflects badly on themselves and the practice of law. Attorneys who are professional do not retaliate, and their writing does not waste time pointing out the inherent non-legal flaws in opposing counsel’s briefs. These attorneys quickly gain credibility with the judiciary and other attorneys.

Attacking the other side will not advance your cause.² Rather, unprofessional conduct in legal writing "distracts readers and leaves them wondering whether your substantive arguments are weak,"³ and it may lead to sanctions or lower attorney fee awards.⁴ Judges know that the parties and their attorneys are involved in a controversy once a case is filed. Personal attacks are not necessary to illuminate this; and rather than advance a case, they impede it.

An attorney’s choice of words, whether professional or unprofessional, is a memorable indication of his style and the way he practiced the case. Two recent examples of an unprofessional choice come to mind: A response filed in the trial court that was entitled "Response to Plaintiff’s Ridiculous Motion," and an appellate brief that repeatedly referred to the opposing party’s arguments as "asinine." If a motion or argument is not well grounded in fact or law, the court will deal with it appropriately. Counsel need not label it.

Similarly, how an attorney responds in the context of personal attacks, pettiness and name calling is also a memorable indication of professionalism. Those attorneys who have mastered responding professionally gain enormous respect by the courts and their colleagues, and their writing advocacy skills are the better

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² Gerald Lebovits, "Do’s, Don’ts, and Maybes: Legal Writing Don’ts – Part I," 79 N.Y. St. B.J. 64 (July/August 2007).

³ See id.

for it. But, those attorneys who respond in kind gain nothing and waste time. For example, the attorney responding to the use of the word "asinine" in the above-referenced appellate brief actually squandered two pages of a response brief just to express his indignity about it.

III. WRITE ABOUT EMOTIONS; DON’T WRITE EMOTIONALLY

Be measured in what and how you write; let the tone of your writing show emotion, not how the words are written. Writers should not highlight, bold, underline, capitalize, use exclamation points or use other ways to put emphasis on words. I reviewed the appellate brief of a litigant who stressed her fear of a suit for "reimbursel" by including the word "reimbursel" five times in one paragraph, boldfaced, italicized, and underlined. This emphasis added nothing to her argument. And, because "reimbursel" is not actually a word, this example lends itself equally to my final guideline: Proofread.

Good legal writing will convey the proper emotion. Avoid words that patently convey your personal feelings, i.e., "I feel" or "I believe."

Good writers avoid using facts not germane to the case to seize on judicial emotional capital. For example, in a workers’ compensation case, the fact your client worked two jobs to get through college is not relevant and should not be included in your brief. Judges see through these transparent emotional pleas. Save them for a jury. In legal writing, these attempts weaken your credibility as an advocate.

IV. BE FOCUSED

Mystery novels build up to a surprise ending. By contrast, newspaper articles include the most important information first, the supporting information in the body, and the least important details last. Your brief should have more in common with a newspaper article than a mystery novel. From the beginning of your brief, let the reader know what the case is about and what the issues are. "Readers absorb information best if they understand its significance as soon as they see it."

Raise an issue clearly, concisely and then build a foundation prior to discussing it. Stress issues and arguments, not citations. Following this rule will logically lead you to stating your view of a legal precept and then supporting it with citations to case law.

Being focused will also reveal trivial issues, which should be avoided. They weaken your strong arguments and make you appear as if you are just using a shotgun approach. Shotgun approaches leave the reader with the impression that you are desperate to make your case.

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7 Lebovits, supra note 5.
Staying focused on convincing points keeps your case strong and keeps the reader from drifting away from your arguments and analysis. Keep the reader engaged by presenting focused arguments and points that are compelling.

V. USE A LOGICAL STRUCTURE

It recently took me a good amount of time to render an opinion, not because it was a technically or legally complicated matter, but because of how the brief was written: the argument contained in the appellant’s brief consisted of one paragraph twenty-five pages in length, and that paragraph tried to address five unrelated issues at once. Only two headings were used in this brief: The word "argument," located above the beginning of the paragraph, and the word "conclusion," located underneath it.

Cases and the law are often convoluted. Your writing should not be. Physically structuring your brief in a logical format helps the reader follow your analysis to a sound conclusion. When the structure of your brief is scattered and lacks logic, it is difficult for the reader to grasp your overall argument and comprehend a logical outcome. Furthermore, it is difficult for the reader to comprehend everything in any lengthy brief or pleading, so breaking it into logical pieces is very beneficial. Think of it like a meal: break it up into bite size pieces. The reader can absorb each point before moving on to the next.

I cannot overstate the importance of using the IRAC format (Issue, Rule, Application, Conclusion) for legal memoranda because it is a proven and reliable way to structure a complete and logical argument. In my experience, a surprising number of practitioners have abandoned IRAC. However, briefs that do not employ this format often transition into stream-of-consciousness writing, i.e., they stray onto tangents, raise a point of law without applying it to the facts, or state facts for no discernible reason.

Headings and subheadings are also helpful to direct the reader to the substance of the analysis. Subheadings are especially helpful when there are multiple facts or issues under a main topic. They help the reader focus and quickly find the information again when necessary.

Subheadings are particularly helpful when there are multiple expert opinions, eyewitness testimony or multiple witnesses. For example, in a disability case involving multiple doctors’ opinions, set out each doctor’s opinion under a separate subheading. Or, in an employment discrimination case where there are multiple events leading up to a cause of action, set out the events separately. This helps the reader identify the elements of your case.

Physical structure is helpful, but the way you structure arguments, issues and facts is equally important. Start with your strong arguments and then work to the weaker arguments. When constitutional interpretation and statutory interpretation are at issue, start with the constitutional issues, then go to statutory issues. And if there are local ordinances at issue, finish with them.

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8 See id.
However, facts and authority must support every argument – especially at the appellate level, where unsupported arguments often go unreviewed. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006). In this regard, if the first argument contained in a legal memorandum is weak, unsupported, and consequently ignored, it can detract from the entire memorandum. One extreme example I have come across involved an appellant who offered, as his first argument, that he was entitled to a new trial because he suspected that the jury was hungry during his closing arguments. As it turned out, neither I, nor the appellant, could find any authority equating a hungry jury to a trial court’s abuse of discretion. Ironically, however, a review of the record revealed that the trial court offered to give the jury a lunch break prior to the appellant’s closing arguments. It was the appellant who elected to forego that option.

VI. CLEARLY AND CONCISELY STATE THE FACTS

Including trivial facts in your brief can rob you of space that could have been used to develop the relevant issues. Another brief I reviewed included a statement of facts and procedural posture so long that it caused the brief to exceed the page limitation allowed under Civil Rule 76.12, warranting a show cause order. Yet, after reciting this information, the total argument presented in that brief consisted of three pages, only relied upon a small fraction of that information, and cited no authority in support.

The disposition of your case rests on information. “Therefore, you need to marshal information that common sense suggests will be relevant to an intelligent decision.” Assume your reader does not know anything about your case. Then analyze the facts to determine which facts the reader needs to know to make a decision.

Not all facts are relevant, however, even when they put your client in an empathetic light. Respect your reader’s time. Many briefs include minute details; sometimes these details occurred before the incidents leading up to the litigation. Remember the courts and opposing counsel read hundreds of pages weekly. What facts do you need to present to persuade them to agree with your arguments?

VII. CAREFULLY READ AND ANALYZE THE CASES YOU ARE CITING

This sounds so overtly simplistic, why include it? Because frequently attorneys cite to a case that, when read in full, actually supports the opposing party. The ease of going online to locate a case citation for a proposition of law is the most likely culprit. Finding a headnote that cites to your proposition and then citing the case is very dangerous. In context, the headnote or the holding of the case

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10 *Id.*

11 See *United States v. Detroit Timber and Lumber Co.*, 200 U.S. 321, 337 (1905) (“[T]he headnote is not the work of the court, nor does it state its decision.... It is simply the work of the
may actually go against the point you are advocating. Opposing counsel will seize on this and point it out to the court. This can be fatal to your case. Read the cases you cite carefully, analyzing whether they actually advance your case or impede it.

Another adverse result of failing to carefully read a case is that it is easy to overlook what the majority holding is in split decisions. In United States Supreme Court cases, the opinions are often splintered; it is difficult to determine what the majority holding is. Sometimes you have to identify the narrowest opinion joining in the judgment of the Court because it may be regarded as the controlling opinion.\(^\text{12}\)

There is an ethical obligation to cite binding authority. However, beyond the ethical obligation, it is just smart to do so. Opposing counsel will cite to it. If not, the court will locate it. It is better to take the opportunity to address binding cases against your theory and explain relevant factual distinctions. If it is factually too similar, then take the opportunity, when ethical, to explain to the court why the case may no longer be good law or why it should be narrowed or even overturned. Regardless of how you decide to handle binding on-point cases, you should not ignore them.

**VIII. CITE THE RECORD CORRECTLY AND ETHICALLY**

The following was written in a recent brief: "A review of the thousands of pages of documents produced by the defendant will show that there is no document that limits the defendant's representation of the [plaintiffs]." Seriously, this is an actual statement taken from a brief. There was no citation to a specific document or to a page in the trial court's record. Even if courts had time, it is well settled that courts are not charged with searching through the record to find errors or facts.\(^\text{13}\) It is incumbent upon counsel or pro se litigants to correctly cite the record.\(^\text{14}\)

Courts check the cited portions of the record (and, as a general rule much more of the record) for accuracy and to validate that a portion of the record is not taken out of context or misstated. Failure to comply may result in having your brief stricken.\(^\text{15}\) Additionally, misstatements of the factual record violate an attorney's duty of candor toward the court.\(^\text{16}\)

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12 See Marks v. United States, 430 U.S. 188, 193, (1997) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.").

13 See Garvey v. Garvey, 161 S.W. 526 (Ky. App. 1913); Ventors v. Watts, 686 S.W.2d 833 (Ky. App. 1985); see also CR 76.12(4)(c)(iv) and (v).

14 CR 76.12 (4)(c)(iv) and (v).

15 CR 76.12 (8)(a).

16 SCR 3.3.
IX. USE PLAIN LANGUAGE AND AVOID LEGALESE, JARGON AND COLLOQUIALISMS

One of my staff attorneys keeps a picture of his wife next to his computer because she is dear to him and, importantly, because she is a non-lawyer. Seeing her picture reminds him that some people do not speak Latin.

Your writing should be written in a way that your client can understand it. Using legalese and jargon makes legal writing particularly difficult to comprehend. Use foreign languages only if a word or phrase is "deeply ingrained in legal usage . . . and when no concise English word or phrase can substitute." Instead of using Latin legal terms, use plain English words. Just say it – clearly and concisely.

X. KNOW AND FOLLOW THE RULES

Courts have specific rules to follow for the filing of pleadings and briefs. The importance of following these rules cannot be overstated. Pleadings and briefs can be stricken. For example, the rules specify page limitations, so you cannot cheat on the margins or fonts to gain more space. Courts may strike briefs for extending page limitations without leave of court when margin and font restrictions do not comply with the rules.

A substantial failure to follow rules for motions, pleadings and briefs submitted to the court is not really excusable. Most rules are straightforward and easy to follow. For example, the rules for submission of briefs to the appellate courts in Kentucky are well written and reasonably easy to incorporate into a brief.

XI. PROOFREAD

Failure to proofread is one of the most frequent problems in legal writing and often not given the credence it deserves for improving legal writing. It should receive high importance because of its negative impact on the practice of law.

One author posits that:

[typos tell readers you don’t care. No one will take your writing serious if you make obvious errors in grammar, punctuation, spelling, or syntax. Typos distract readers from the substance of your writing and make you appear unprofessional. No typo is subtle. Readers give typos greater weight than they deserve. Readers who see small typos assume that the writer didn’t get the big things right. The solution is to proofread.]

17 See Gerald Lebovits, "Do's, Don’ts, and Maybes: Legal Writing Don’ts – Part II," 79 N.Y. St. B.J. 64 (September 2007).

18 See CR 76.12(4)(c)(iv) and (v).

19 CR 76.12.

20 See Lebovits, supra note 17.
Another author writes that "[t]ypos get attention – negative attention – like a blemish on the tip of your nose on prom night. But there is a difference between our blemishes and our typos: While our blemishes may seem more prominent to us than to others, our eyes usually slip right past our own typos."\(^{21}\)

Judges have even taken to admonishing\(^{22}\) or sanctioning lawyers\(^{23}\) for failure to proofread carefully or for filing poorly written briefs. And at times, appropriate or not, the lack of proofreading resulted in unleashing a judge’s wrath by publicly humiliating attorneys in written opinions.\(^{24}\)

In response to poor brief writing, one judge wrote

> [w]hen submitting briefs to the court, attorneys should strive to set forth thoughtful, well-crafted arguments through established principles for writing and citation. Although the court does not demand perfection, it does expect attorneys to reach a minimum threshold of proficiency. The brief filed by plaintiff’s counsel fails to meet this threshold. Despite the document’s label as a "response," it fails to respond to the arguments set forth in the defendant’s motion. In addition to innumerable spelling and grammatical errors, the document demonstrates counsel’s considerable misunderstanding of the proper rules of citation as set forth by the Bluebook. As counsel inartfully states in her brief, "a more investigative examining" of all briefs submitted to a "Untied States" [sic] Federal Court is required.\(^{25}\)

There are a number of reasons for poor proofreading. One of the biggest offenses is writers’ heavy reliance on spell check programs. Honorable William O. Bertelsman, Senior Judge, Eastern District of Kentucky, a prolific writer and a stickler for details in legal writing, has written several entertaining articles pointing out the serious problems with poor proofreading and the lost art of writing. He particularly takes aim at spell check programs illustrating how they can produce bizarre results. The articles illustrate the humorous, but frustrating, result of


\(^{24}\) See, e.g., Bradshaw v. Unity Marine Corp., Inc., 147 F.Supp.2d 668 (S.D. Tex. 2001) (Including a statement, among many others that “[a]fter this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties’ briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant’s Motion for Summary Judgment is GRANTED.”).

relying too heavily on spell check programs. These articles were written several years ago; unfortunately, however, there are still numerous mistakes caused by spell check appearing in briefs and pleadings. I see them daily, as do other judges; see for example, the following from another jurisdiction:

As previously mentioned, [counsel’s] filings are replete with typographical errors and we would be remiss if we did not point out some of our favorites. Throughout the litigation, [counsel] identified the court as "THE UNITED STATES DISTRICT COURT FOR THE EASTER [sic] DISTRICT OF PENNSYLVANIA." Considering the religious persuasion of the presiding officer, the "Passover" District would have been more appropriate. However, we took no personal offense at the reference. In response to the attorneys’ fees petition, the Defendants note that the typographical errors in [opposing counsel’s] written work are epidemic. In response to this attack, [opposing counsel] writes the following:

As for there being typos, yes there have been typos, but these errors have not detracted from the arguments or results, and the rule in this case was a victory for [plaintiff]. Further, had the Defendants not tired [sic] to paper Plaintiff’s counsel to death, some type [sic] would not have occurred. Furthermore, there have been omissions by the Defendants, thus they should not case [sic] stones.26

Over reliance on spell check programs is not the only evil in proofreading. Improper punctuation and grammar harm the quality of briefs and pleadings. In Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation written by Lynne Truss,27 the author illustrates the unintended consequences of poor punctuation in a lighthearted manner. A panda went into a bar, ordered something to eat, ate it, fired a gun, and walked out. As the panda left, he handed the puzzled bartender a book opened to the page describing pandas. "Panda," it stated, "a large black and white bear-like mammal, native to China. Eats, shoots and leaves." The panda performed according to its description. Poor punctuation can leave your reader just as confused.

There are numerous examples beyond those given of poor proofreading. To avoid these potholes in legal writing, proofread each document at least three times, including having someone not familiar with the material review it. Complete your proofreading when and where there are few distractions. And, use a word by word overview or read the document out loud to help locate errors. Given the busy schedule of the bar (and judiciary), it is difficult to find time to do thorough proofreading. But the time allotted for preparation of a pleading or brief should include adequate time for proofreading.

These are only a few guidelines. There are many more that will improve legal writing, and there are many outstanding resources available. My chamber’s library includes *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* by Stephen V. Armstrong and Timothy P. Terrell. This resource is excellent but is somewhat time consuming to evaluate and implement into your writing if you have not participated in the authors’ workshops.

Every office in my chambers has a copy of *The Redbook: A Manual on Legal Style*, Second Edition, by Bryan A. Garner. This book contains answers to many questions about punctuation, grammar, capitalization, citations, footnotes, editing and style. It is an excellent source to rely upon when pondering whether a hyphen is necessary.

But one need not rely on these two sources; there are many other excellent resources. In this article, I have cited to several legal writing articles; these articles provide outstanding suggestions and guidelines to follow.

A notable author on legal writing is Honorable Gerald Lebovits, New York City Civil Court Judge. He has written numerous articles appearing in various editions of the *New York State Bar Journal*, some of which are cited herein. His writings pinpoint clearly and concisely ways to improve writing, giving a list to follow of what to do, what not to do and some “maybes.” His articles include samples to explain each item. I highly recommended incorporating his suggestions into your writing.

Another helpful article is by Eugene Volokh and J. Alexander Tanford entitled "How to Write Good Legal Stuff." This article lists signs of bad legal writing and how to improve them. It likewise is a first-rate resource for improving legal writing.

And, one need not look outside of Kentucky for good resources. There are a number of good articles on improving writing skills written locally. For example, Salmon P. Chase College of Law Professor Barbara McFarland published several in the KBA’s *Bench & Bar* over the past year, including "Five Tips on Writing to a Judge," which appeared in the January 2008 issue. Professor McFarland, who has extensive experience teaching legal writing and working for judges, writes about common sense and practical ways to improve legal writing and includes examples in her articles.

Remember your writing is a reflection of who you are as an attorney. Do not let a hectic schedule or carelessness result in a poor reflection of your true ability.

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28 See supra note 6.


30 See supra notes 2 and 5.

31 See supra note 9.
Form is a necessary component of legal writing. Equally necessary is the ability to see the trees through the forest. Be careful not to miss the “trees” by...

I. ALLOWING THE OTHER SIDE TO FRAME THE ARGUMENTS

Example 1-A: How the plaintiff/appellant framed the argument

“While the general rule is that where defects are discovered in a completed home, the measure of damages is cost to remedy those defects, there was no evidence presented at the trial as to any cost to remedy the defective foundation[.]”

“The Defendant presented no evidence that the [Smith] house will not fail [and] no evidence that there are repairs which could be made to the house which would stabilize the foundation.”

“There was no evidence by either party that there was no damage to the Plaintiff.”
Example 1-A: How the defendant/appellee responded

Near the end of a footnote on page 13 and continuing to page 14 of the appellee’s brief, located in the statement of facts, the appellee states:

“It is also worth noting that Appellants presented no evidence at trial regarding the cost required to correct or remedy any of the alleged defects.” [Emphasis added.]

What issue or issues should be addressed in an appeal of the following order?

“The court GRANTS the Defendant’s motion for Directed Verdict on the basis of duty and, alternatively, on the basis of causation.”

II. MISSING THE GRADUAL CHANGE
Smith’s complaint stated:

- Plaintiff is the owner of real property in [Harwood] County.
- Such property is adjacent to a county road.
- Said road is maintained by the defendants.
- Said road is deteriorating along plaintiff’s property.
- Parts of said road are flowing onto plaintiff’s property.
- The flow of said road parts constitutes a nuisance.
- Defendants have refused and continue to refuse to abate such nuisance.

Smith’s appellate brief argued:

1. “The trial court’s holding that private property may be taken by a county as long as the taking does not prevent the owner from reasonably using the property is contrary to law.”

2. “The trial court erred when it held that a county could maintain a nuisance or failed to address the issue.” [Emphasis added.]

III. Forgetting to put your best foot forward
Example 1: An unfavorable standard of law

Appellant seeks a new trial following an unfavorable jury verdict. The first sentence of Appellant’s brief reads:

“Denial of a new trial is reviewed for abuse of discretion and the trial court will be reversed only if the reviewing court is left with the definite and firm conviction that the trial court committed a clear error in judgment.”

Example 2: Starting your brief too casually and with irrelevant facts

The first sentence of an appellant’s statement of facts reads:

“February 16, 2008 had started out to be a pretty good evening for [John Smith] and his wife, [Jane]. They had enough money to buy a 30-pack of beer.”

Example 3: Not making your strongest argument first

Appellant’s brief argues eight separate bases for error resulted from a wrongful death trial spanning five years of litigation. His first contention of error is:

“[Smith] acknowledges the trial court’s discretion over the length of closing arguments, but the trial court abused it here. Closings began late on Friday morning before a jury finishing its third week of jury service, having already stayed an extra week. Timing was important because the attorneys had discussed it the day before closing. [Harwood, Inc.] said it needed an hour and fifteen minutes at most. It took an hour and fifty one, approximately 50% more time than it reserved. The jury had not had lunch. [Smith] was placed in an untenable position of speaking to an extremely hungry jury anxious to conclude its deliberations after serving an extra week.”
Example 4: Impugning the integrity of the Court, *e.g.*, The “Sandwich Bag Error”

For his second contention of error, the Appellant argues:

“Although its Order claims to rely on the record, the [Harwood] Circuit Court did not review anything other than the pleadings when undertaking its determination. This is the logical analysis, as matters contained in the Court record had never been removed from the plastic in which they were originally filed and stored.”