By DAVID J. PERLMAN

# The Legal Brief: The New Paradigm

## *Writing Manuals, Volume of Appeals, Electronic Shorthand All Have Influenced Legal Writing*

Legal briefs, like other literary forms, are shaped by the pressures and creative possibilities within the culture from which they arise. Today, manuals on brief writing, the volume of appeals flooding intermediate appellate courts, and our abbreviated methods of electronic communication are just a few of the influences molding legal writing. Over the past few years, such forces have spawned a new paradigm for legal briefs.

The new paradigm has five essential elements. A brief should state a theme at the outset; relay the facts through a flowing, engaging story, creating an initial impression of who should prevail; zero in on the essential legal authority, yet, at the same time, anchor legal argument to underlying policies and principles; display a literary style that is relaxed, conversational, and non-pedantic; and appeal to the eye.


### THE THEME

A succinctly expressed theme accomplishes three objectives. It establishes what the case is about, communicates immediately why you should win, and creates a meaningful context for the facts that follow.

Here is an example of a two-sentence theme. It comes from a case in which a company reduced its insurance coverage but, after a massive loss, sued because the insurer denied its claim made under a predecessor policy with higher limits:

> Insured, seeking a bargain when premiums were on the rise, got exactly what it paid for – reduced coverage. Now that it has incurred a loss, Insured wants the coverage it opted not to buy.

Although, to be effective, the theme must appear at the beginning, finding a place at the start can present a problem. The rules dictating the structure of an appellate, and sometimes trial court, brief are not designed for persuasive effect or literary interest. They're a constraint; we must work within them or perhaps inoffensively around them.

There are two options for placement of the theme in an appellate brief. You can express it either in an introduction created for that purpose or solely within the "questions presented" section. An introduction is desirable since it conveys the theme directly with supporting detail and nuance that the questions do not allow.

The federal appellate rules neither require nor explicitly prohibit an introduction. In jurisdictions where the clerk won't reject your brief for having a section additional to those required, you can insert an introduction either before or after the jurisdictional statement. Alternatively, you can create subheadings within the "statement of the case," the first subheading being the introduction and the second being the required procedural history.

Without an introduction, the questions set the theme. An effective technique for stating a theme through the questions is crafting what legal writing authority Bryan Garner calls a "deep question." Garner's deep question takes the form of a three-sentence syllogism; the first sentence is the major premise or the rule of law, the second is the minor premise or the facts to which the law is applied, and the third is the conclusion couched as a question. In three sentences, the deep question tells what the case is about and why you should win:

42 Pa. C. S. § 5526(1) establishes a five-year limitations period for reviving a judgment lien on real property. Creditor waited 12 years after the original judgment lien expired before filing a writ of revival. Did the trial court err in denying the property owner's summary judgment motion seeking to quash the writ and strike the lien?

In addition to providing a reason for ruling in your favor, the theme provides a focus for everything that follows. It gives the facts a unifying *raison d'être*, conferring a sense of direction, a glimpse of the destination. It plants an expectation the brief must fulfill.

### THE STORY

No rhetorical form is more engaging than a story. It's through stories that we are hard-wired to comprehend our world, and so the statement of facts is

the opportunity to draw the reader in.

To hold a reader's interest, to be compelling, a story must flow. Unfortunately, legal writers have the habit of chopping up stories. Excessive legalese is a common way of undercutting momentum. Another is beginning every paragraph with the date. Perhaps the exact date is intended to signal a lawyer's certitude and precision. But authorial self-assertion is inevitably a distraction. Exact dates should be used only when pertinent, and general temporal signposts – such as "then" or "after" – can provide a forward nudge.

Concrete details, not abstractions, carry a story. In the latest manual on brief-writing, published this year, "Point Made: How To Write Like the Nation's Top Advocates," Ross Guberman advises to "show, not tell." Better not to render judgments or draw conclusions. Let facts speak and the mind conclude. A judge may remember your case years later – to say nothing of decisive moments such as oral argument or a panel conference – because of a striking detail.

Finally, a story artfully told is argument. It has a point, specifically a moral point. A moral skeleton, never visible, never stated, underlies the facts: someone acted badly and caused harm. Someone else suffered. Or perhaps the accused wrongdoer is innocent. He was simply going about his business, acting as expected, and did nothing to create another's misfortune. The skilled legal writer conveys this moral subtext through selection, ordering and emphasis of concrete facts.

### THE ARGUMENT

It's the job of argument to supply the legal justification for the result the moral subtext otherwise compels. In an appellate brief, the argument appears three times: first, in the table of contents, then in the summary of the argument, and finally in the argument section itself.

The most palatable table of contents is vanilla. Too many subordinate topics suggest that your brief will be painfully complicated and mind numbing. The paradigm table should display an argument's ineluctable simplicity, not its elegant complexity.

The summary of the argument may be the only section that a judge on an intermediate appellate court, swamped with briefs, reads. And if he does read the entire brief, it would be the one section he would likely re-read. Invariably, it is best written after the full argument since writing the argument supplies the perspective for summarizing it.

For the argument section, the trend is toward brevity and concision. The obvious – even if once customary – can be omitted. For example, there is rarely a need to recite the evidentiary standard for a motion to dismiss or summary judgment. As to legal authority, only the most pertinent should be cited. The brief is not a vehicle for signaling to a client that substantial time was indeed spent doing legal research.

### THE STILL DEEPER ARGUMENT

While brevity is highly valued, the new paradigm calls for a deeper understanding and explication of the law. Too often we skitter along the surface of elements and tests – as if reaching an incontestable result were simply a matter of mechanically entering data into a formula. More is required to withstand thoughtful challenges, whether from opposing counsel or an appellate panel. We should finally recognize, in our daily practice, that deeper principles of law or policy underlie every rule and deeper ones still underlie those.

Perhaps no one has raised awareness of the depth of the law more than the great legal philosopher Ronald Dworkin. His insights are to law as plate tectonics is to geology, illuminating the foundation while explaining its daily phenomena. He deserves special mention in the context of the new paradigm because his latest book, "Justice for Hedgehogs," is a monumental and compelling achievement that propels our thinking forward and secures his eminent place in history.

In general, Dworkin describes legal reasoning as a form of interpretation, a style of inquiry distinct from scientific inquiry. The latter has erroneously served as the model for truth-seeking in non-scientific venues, including law. Importantly, the distinction between interpretive and scientific methods does not mean that law is arbitrary or subjective or that there are no right answers to difficult legal problems. Interpretation, including legal interpretation, can be done well and it can be done poorly; science is

not the exclusive model for accurate, productive thinking. Especially in his latest book, Dworkin steers us away from the sinkholes of cynicism and distrust in legal processes.

The lesson for appellate lawyers lies not so much in philosophy itself but in the realization that we should prepare ourselves to plumb the depths – down to the Constitution and then perhaps further down to theories of politics and morality supporting the structure of our society. These are productive, not vain, avenues of thought. For understanding a rule's place in a larger web of rules and how the web fits within a yet larger system is the surest way to construct an unassailable argument.

### THE WRITING STYLE

As Dworkin and many others have demonstrated, one can discuss profound ideas in a relaxed, even conversational style. The new paradigm presents itself without airs – without pretense or false dignity. Its style is attuned to the talking voice, suggesting genuineness and authenticity, holding a reader's attention. No off-putting ponderous prose.

As a matter of style, it's time to liberate ourselves from the writing lessons of middle school. Contractions are acceptable. Sentences can begin with conjunctions, such as "but" and "and." You can use the second person, that is, "you." But one can also use the third. Even a sentence fragment – like that ending the last paragraph – can convey an idea.

The best legal writing, while recognizing the necessity of specialized terms, such as "fiduciary" or "promisee," avoids their overuse. If not required for a precise legal idea, legal terms can impede communication, as do legalisms such as "herein," "prior to," or "and/or." We have outgrown the need to erect a semantic barrier between lawyer and laymen in order to justify our profession.

### THE LOOK OF IT

Reading is an activity of the eye as well as the mind. Appearances also persuade. With so much at stake, now more than ever, lawyers are tapping the computer's potential to produce easier reading documents. The undisputed authority on visual presentation is typographer-turned-lawyer Matthew Butterick. He has expanded his website with his 2010 book of like title, "Typography for Lawyers: Essential Tools for Polished and Persuasive Documents."

Butterick sounds the death knell to old customs such as using all caps for headings, or worse, emphasis. All caps, having proven to be harder to read, should be used only for the broadest topic headings, such as "argument" or "statement of facts."

The absence of kerning is another anachronism, rooted in the typewriter. Kerning compresses the spacing between certain letter-pairs, impossible with a typewriter's single-letter strike. Butterick recommends overriding Word's default setting by opting for kerning.

Finally, Butterick asks that we reconsider Times New Roman as our preferred font. Designed for newspapers with the objective of squeezing more words to the column-inch, it is neither the most readable nor most aesthetic. Butterick prefers "professional" fonts, which one must purchase. But of the "system" fonts, which are part of Word, among those having serifs, he offers an approving nod to Hoefler Text.

### THE NEW FREEDOM

The new paradigm is dynamic, not static, not only because cultural influences keep shifting but also because writing, legal writing included, is creative. The pronouncements from the manuals and articles – including this one – are not absolute. Indeed, there are contradictions even within a single manual; in the superlative book "Making Your Case," co-authors U.S. Supreme Court Justice Antonin Scalia and Garner, battle on several fronts.

The new paradigm is, in one sense, new to every writer on every occasion. For ultimately one's only limits are your own knowledge and skill. ■

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