The Ten

Commandments of

Brief Writing



Prepared by

Justice Maria Rivera

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THE TEN COMMANDMENTS

OF BRIEF WRITING[[1]](#footnote-1)

*“The secret ambition of every brief should be*

*to spare the judge the necessity of engaging*

*in any work, mental or physical.”**[[2]](#footnote-2)*

1. This is the first, and the greatest commandment: Be ***scrupulously honest*** in describing both the law and the facts. You are not only representing your client; you are building your own reputation with the court and with opposing counsel. In our profession, credibility is the coin of the realm.

2. Know your judge(s). “The effective production of a brief depends, not only on a knowledge of the law and facts involved, but also on familiarity with the background, disposition, and intellectual endowments of the judge. . . . [A] brief to be effective must be written with the reader in mind. A short story intended for readers of *True Confessions* must be written differently from one intended for readers of *Harper's Magazine*. In briefing . . . effectiveness depends upon pleasing or impressing the selected audience.”[[3]](#footnote-3)

3. Never use ridicule or sarcasm. “Regardless of provocation or opportunity, ridicule [and sarcasm] should invariably be eliminated before the brief is submitted to the judge. In ridiculing an opponent’s argument a lawyer may be ridiculing one of the pet notions of the judge—and judges resent ridicule. Who doesn’t?"[[4]](#footnote-4) No matter how ill-treated you may feel, refer to opposing counsel and to the trial court in respectful terms.

4. Avoid attempts at humor. “[T]he danger [of humor] lies in the unfortunate fact that its success depends upon the receiver as well as the sender. Ascension to the bench frequently atrophies a normal, robust sense of humor, and after a period of service—say, two or three days—a juridical sense of humor begins to show: a mysterious, inscrutable, capricious variety which turns into wrath too easily for comfort.”[[5]](#footnote-5)

5. Be a good storyteller. We cannot all be Mark Twain or Ernest Hemingway. Nor is the general subject matter of an appeal—say, the granting of a motion for summary judgment in a breach of contract case—usually the stuff of which riveting tales are made. Nonetheless, the facts of any case can—and should—be related concisely, chronologically and with enough human interest to hold the judge's attention *at least* until [s]he gets to your arguments.

6. Use two kinds of arguments: those that *persuade* and those that *support*. “Persuasive arguments are those which seek to induce a judge to decide a controversy in a certain way; supportive arguments are those furnished as a courtesy to the judge for use in the opinion filed in justification of [their] decision. Persuasive arguments must be sound in order to be effective . . . .  Supportive arguments really supply the decor for the opinion, which usually is a skillful interplay between intellect and unconscious motivation.” In other words, give the judge a very good reason to rule in your client’s favor and then give her something to “hang her hat on.”

7. Base your persuasive arguments in the facts. “If facts can be clarified to the degree that the barber, the grocer, and the shoemaker would consider that a certain result should follow as a matter of common sense, the probabilities are that the judge will arrive at the same conclusion. True, the judge will listen attentively to protracted oral arguments, will diligently read monumental briefs, will spend precious hours in making personal investigations of the evidence and the law—and notwithstanding all that, his carefully considered judgment will concur with that pronounced by the barber, the grocer, and the shoemaker." [[6]](#footnote-6)

8. Embrace—do not duck—the weaknesses in your case. “If there is a single ‘fatal flaw’ that afflicts most lawyers on appeal, it is that they fail to meet the tough argument that is made (or could be made) against their position. By ignoring it, they hope the court won’t see it or be affected by it. Almost invariably, the court sees that this is the turning point in the case. It often decides the case on this issue with no input on it from the losing attorney.”[[7]](#footnote-7)

9. Write from an outline. “The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan. True, by persistently pounding away eventually a written argument might emerge, and a shelter might evolve, but the finished product would probably be bizarre rather than artistic. . . . While time spent in briefing may be wasted, time spent in outlining a brief is never wasted, for a skillfully prepared outline invariably engenders a shorter, clearer brief.”[[8]](#footnote-8) “Your working outline . . . is in many ways the most important paper you will prepare during the appeal. Careful preparation of this Outline will structure your legal analysis of each issue, organize the issues in the most presentable [and logical] form, and—if done diligently—can end up saving you an enormous amount of time.”[[9]](#footnote-9)

10. Take the time to read good *writing* (not just "good books"). You will find that your own writing improves noticeably after you have read excellent writing. Some suggested authors: J.D. Salinger; Ivan Doig; Margaret Atwood; Thomas

Keneally; Anne Lamott.

*Bonus Commandment*: Pick the most brilliant line you have written; the most startling riposte; the most telling argument embellished by your style and soul. Then, cross it out.

THE NUTS AND BOLTS OF BRIEFS AND TRANSCRIPTS ON APPEAL

or

“Restating the Obvious and Pet Peeves”

The following list of items was created after talking with appellate judges and their research attorneys who, combined, have about 250 years of appellate experience.

1. Identify *and apply* the standard of review.

2. Limit your recitation of contextual facts.

3. Use precise record cites (CT: 24, 35, 67, 88; *not* CT: 24-88).

4. Include record cites in your Summary of the Case.

5. Cite-check your brief. Twice.

6. Check all transcripts and appendices *after copying* for legibility.

7. Bind the record so that it does not fall apart after two uses.

8. Include an index in *each* volume of your transcript or other record.

9. When you cite to a multi-volume index, include the volume number.

10. Footnotes have their place in a brief, but do not overuse them.

11. Spelling and grammar count; misspellings and bad grammar are distracting.

12. Avoid string cites.

13. Use short words and short sentences.

14. Use the active voice.

14. Your section Headings (which become your Table of Contents) should tell the whole story. If they cannot tell everything, they should, *at least*, be informative.

ANNOTATIONS TO NUTS AND BOLTS

“What briefs need most in this world is readability.”[[10]](#footnote-10)

1. The standard of review will often determine whether you win or lose an appeal. This will be the judge’s first question, because it provides the analytical context for evaluating the arguments. It tells the judge “how to think about” the case. Sometimes it is not clear what standard applies. Sometimes there is a “mixed” standard—one for reviewing the factual findings and one for reviewing the related legal decisions. Both appellant and respondent need to focus on this issue with great clarity, before the brief is drafted, because it will also tell the writer “how to think about” the case. If there is a dispute about which standards apply, be sure to argue your case under both.

2. Lawyers have a bad habit of simply regurgitating all of the information they have when writing the statement of facts. To be effective, the writer should first take some time to think about what the issues are on appeal, and which facts are relevant to these issues. The recitation of facts should be limited to only those facts that (1) are directly relevant, or (2) help to persuade the judge to reach a certain result. Blatant appeals to prejudice are unhelpful, but important facts such as the youth of an injured plaintiff, the particular vulnerability of a victim, or the historical context showing a pattern of behavior should be included.

3. Using “global” record cites forces the reader to work far too hard in order to verify the factual assertions made in the brief. Precision in record citation saves the judge an enormous amount of time, and inures to your benefit in building your credibility and reputation. This means citing not only to the appropriate *page* in the record, but also to the specific *lines*.

4. The section of your brief entitled “Summary of the Case” will, of necessity, contain only the core facts and arguments. Because these are the *key* facts and arguments you are asking the court to focus upon, they should be tied to the record, even though the record cites are repeated in the more detailed Statement of Facts. The Summary of the Case is the court’s “quick reference” section. If there are no record cites you have lost an opportunity to refer the judge immediately to your strongest evidence.

5. (Almost) nothing is more annoying than pulling a book from the shelf to find a cited case, turning to the cited page, and finding an entirely different case. Not only does this cause you to lose the reader/researcher’s momentum in the middle of your argument, but it also forces the reader to spend extra time tracking down the correct case cite—which [s]he usually finds in your opponent’s brief.

6. You would be surprised to learn how many pages of unreadable record are filed with the court. Check legibility both before and after the record has been copied. (This means you need to copy the record more than one day before it is due to be filed.)

7. Judges and their research attorneys *do* read the record, and often look at key pages in the record *several* times. If, during that process, the transcript starts to fall apart, the frustration level of the reader increases geometrically in proportion to the number of additional uses. Keep in mind also that the readers of the record would appreciate being able to open the volume and have it lie flat enough so that it does not roll closed while in use.

8. In multi-volume records, it is just plain cruel to place the index or table of contents in only the first volume. Forcing the judge to look at two volumes of record every time [s]he wants to find a single document is not a good idea.

9. Ditto for citing to the record. If you cite to “CT 459” the reader has to look at least one or two volumes in order to find page 459 of the record. Remember, one of your guiding principles is to make it easy on the reader, so provide the volume number too: “CT: IV-459.”

10. “Footnotes can be very useful to help make the text of your brief concise. Your main arguments should flow smoothly through the text of your brief, so the reader can easily follow your chain of analysis. Interruptions to discuss incidental points [such as distinguishing out of state cases cited by your opponent, or adding citations that give historical context to your argument] should be kept to a minimum. . . .  None of these incidental items may be important enough to insert in the middle of your text . . . [but] omission of this discussion might also cost you something. The answer to this dilemma is the footnote. . . . Some people say that they dislike footnotes. ‘Too distracting’ is one criticism. Footnotes can be distracting, but they are not nearly so distracting as including the same information in the text of your brief, where it intrudes directly into your main argument. Others say ‘If it is important enough to appear in your brief, it is important enough to put in the text.’ This is true in some situations, but not all. Some topics are important enough to warrant discussion but not important enough to warrant interrupting your main argument.” (Moskovitz at pp. 65-66.)

11. “The effectiveness of an argument can be accentuated or dissipated by the mode of presentation. An unshaved, dirty-collared, baggy-suited salesman handicaps himself in selling, no matter how superior the merchandise. A carelessly typed, poorly arranged page does the same thing, no matter how excellent the argument. A small gob of jam on a single page can destroy completely the effectiveness of the brief—even if the gob is genuine [Smuckers]! Misspelled, misplaced, and misused words create almost as much havoc with the selling of the argument as the gob of jam. True, a word is a word even when slightly misspelled; the difficulty is that the reader’s attention lingers on the mangled word rather than on the thought intended to be conveyed. Misplaced and misused words distract attention and may suggest vagrant ideas far removed from the argument intended.” (Levitan, p. 308.)

12. “Never cite a case without a purpose and make that purpose clear in the text surrounding the citation. . . . Similarly, do not string-cite without a purpose, and that purpose should be apparent from the brief. A brief which cites ten cases for an undisputed point of law simply looks cluttered, not impressive, and this clutter tends to interfere with the chain of thought you are trying to get the reader to follow. If the point of law you are stating is not disputed, it is enough to cite one or two cases, preferably from the highest court in your jurisdiction [or from the panel of judges who has the case]. Where, however, the point of law is not clearly established, or the point is disputed by your opponent, a string-cite may help persuade the court that there is substantial authority in support of your position.” (Moskovitz, at pp 44-45.)

13. “Minimize jargon and technical terms. This doesn't mean that you should adopt a Dick-and-Jane style, but merely a straightforward style that [readers] can understand. . . . Strive for an average sentence length of 20-30 words. Doing this involves following a maxim that, unfortunately, makes some legal drafters nervous but needn’t do so: ‘if you want to make a statement with a great many qualifications, put some of the qualifications in separate sentences.’ [citing Bertrand Russell]” (Garner, Bryan, *Advanced Legal Drafting*, LawProse, Inc. 1997, p. 6 [Garner].)

14. You already know this, but it bears repeating: The active voice is more powerful and clear. “The contract was breached” compares poorly to “Defendant breached the contract” because the former does not tell the reader who breached the contract. “The contract was breached by the defendant” uses twice as many words than are needed. (Garner, at p. 6.) Sometimes the passive voice must be used to avoid an unsupported factual inference; however, try to minimize its use.

15. "[G]uiding signs placed at strategic spots throughout the brief . . . facilitate reading and comprehension . . . . Not exactly the same kind of signs used on highways, . . . although some of those signs have possibilities of adaptation, *viz*., “Winding Argument Ahead” or “Muddy When Wet or Dry’ or “Unreadable Until Repaired.” Much more dignified, and probably better, than the highway type of signs are synopsis-of-synopsis headings—headings that trenchantly state the essentials of the argument, both factual and legal. Headings that simply enumerate, or vaguely refer to some fact or argument, or just mumble in type, should be eschewed; the headings should actually *tell* something to the judge.” (Levitan, at p. 317.)

1. These commandments address appellate brief-writing; however, you will find that most apply as

well to writing memoranda of points and authorities in the trial court. [↑](#footnote-ref-1)
2. Levitan, Mortimer, "Confidential Chat on the Craft of Briefing.” Reprinted in *The Journal of*

*Appellate Practice and Process*, Vol. 4, No. 1 (Spring 2002) 305, 310 [“Levitan”]. [↑](#footnote-ref-2)
3. Levitan, at p. 306. [↑](#footnote-ref-3)
4. Levitan, at p. 313. [↑](#footnote-ref-4)
5. Levitan, at p. 313. [↑](#footnote-ref-5)
6. Levitan, at p. 314. [↑](#footnote-ref-6)
7. Moskovitz, Myron, *Winning an Appeal*, Revised Edition, The Michie Company, 1985, p. 57 [Moskovitz]. [↑](#footnote-ref-7)
8. Levitan, at p. 306. [↑](#footnote-ref-8)
9. Moskovitz, at p. 7. [↑](#footnote-ref-9)
10. Levitan, at p. 305, fn. omitted. [↑](#footnote-ref-10)