



Storytelling in brief-writing

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By the time your brief reaches a judge's desk, he or she has read thousands of motions and oppositions. How do you make yours stand out from the crowd? If your brief is anything like most briefs filed today, by the time it ends up on that desk, it has been sanitized and neutralized. Your brief is also bogged down with legalese and oppressively long sentences so that the very life has been drained from it.

This process occurs because we have forgotten the importance of stories in our lives. Stories educate, communicate and entertain. We often learn through stories, from the early picture books of childhood to adult fiction. Look at the current crop of self-help books. They are filled with case studies. Basically, people are interested in other people.

The secret truth about judges

Judges are people too. And they are probably interested in people because that is how they spend their days, hearing story after story. Even so, most judges are vociferous readers, and their level of interest runs the same gamut of preferences that exist in the general populace. The truth is that no matter how intellectual a judge may seem, he or she probably loves a good story.

We have all been trained to look upon judges as being wise and objective.

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Juries tend to believe the judge knows more than they do. We all share a common perception that judges may be better equipped than jurors to put aside their emotions and biases. New studies suggest judges are not as objective as we think and are ruled by the same biases. (Amsterdam and Bruner, *Minding the Law* (Harvard University Press 2001); Cohen, Patricia, *Judicial Reasoning is All Too Human*, *The New York Times*, June 30, 2001.)

Let's start with the premise that judges like being entertained and have a sincere desire to help. Now work it into your brief. As much as judges may want to do the right thing, they still need to follow the law. Tell your client's story so that the court can see the unfairness of the situation. Then give the court the tools it needs and show how the court can do the right thing *by following the law*.

The chain of events

Here's what happens in the ordinary course of events. It all begins with a client: a person with a problem. When a client first sees an attorney, he or she tells a story. Often their words and gestures are filled with emotion. They've been *cheated, screwed, hurt* or *slugged*. The list

goes on. (Interestingly enough, the defendant may have a similar tale.) Their story is compelling enough to entice us into believing we can help and taking the case.

The first thing that happens is a dehumanization of the client and the problem. This often occurs when we prepare the complaint or answer. The client's name disappears in favor of being labeled a *plaintiff, party, petitioner* or *claimant*. The bad guy, who also had a name, which may have been *dirt* to your client, simply becomes a *defendant* or *respondent*. The problem is then merged into a *cause of action, claim* or *count*.

As we proceed along the path to trial, numerous legal documents will be prepared. Because of time constraints, the attorney will take these dehumanized parties and attempt to fit them into the same format they have used before. Only the names seem to change, but not really, because the words *plaintiff* and *defendant* are interchangeable. Attorneys will rely on their routines and forms, often pirating information from other documents. Oddly enough, the attorney will find writing short, concise sentences that capture his client's point of view takes more time than a longer sentence filled with legalese. After all, most of his or her form documents are filled with the same arcane legalese and boilerplate language. Time is of the essence to the attorney, there are many more documents to be prepared,



and a judge, who is also busy, does not have the time to read the great American novel.

Our education also hampers us. During four years of law school, we spend hours reading cases and statutes that have made no attempt to simplify the language or reduce it to the English actually spoken by real people. These cumbersome words seep into our permanent vocabulary, pushing out the words we use to communicate with our friends and family. In our view, law should be more formal, and our language shows it. Thomas Jefferson was aware of this problem in a letter he wrote to Joseph Carrington in 1817:

... I should apologize, perhaps, for the style of this bill. I dislike the verbose and intricate style of the English statutes, and in our revised code I endeavored to restore it to the simple one of the ancient statutes, in such original bills as I drew in the work. I suppose the reformation has not been acceptable, as it has been little followed. You, however, can easily correct this bill to the taste of my brother lawyers, by making every other word a "said" or "aforesaid," and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means, and that, too, not so plainly but that we may conscientiously divide one half on each side . . .

(From *The Writings of Thomas Jefferson*, Vol. XVII, Definitive Edition, pp. 417-418 (1905).)

Our language also shows a certain superiority. After all, we use language that is not easily understood by laypersons. And with good reason. If we were so easy to understand, perhaps our clients would wonder if an attorney was even necessary. In *TJX Companies, Inc. v. Superior Court* (2001) 87 Cal.App.4th 747, 754, Justice Crosby, quoting from author Howard Posner, wrote:

Lawyers are, on the whole, interesting people who can talk without put-

ting you to sleep. So why are we so dull and pompous on paper? Why do we write things . . . that would make us laugh if someone spoke them? Hearing your words will steer you away from absurdities.

Simply put, most lawyers do not want to sound like regular people. Their superiority is established by their language. Think of how more formal "at this point" sounds when compared to "now." But don't they say the same thing? What about "it must be noted that . . ." or "in order to"? Dead weight, in my opinion, but it preserves the formality that is rampant in our legal documents.

Our desire for formality and superiority leads to what I call "fear of the naked sentence." We are fearful that our simple sentences will be used against us or taken out of context. As a result, we stuff all of our exceptions and conditions into the same sentence. A simple sentence may not look legal, mostly because we've just spent four years learning what a legal sentence looks like, but that is just a false perception.

Unbearable weight of the legal sentence

Editors often talk in terms of a story being a slow or a fast read. As an example, you can take the same story and depending on the writing, it may take forever to slog through it, or you can read it quickly and still hunger for more. The way we write may give the illusion of being a fast read so that the same 30-page document is consumed as if it were five pages long! The principle is fairly simple: long sentences slow the pace while short sentences speed them up. You need go no further than watch a Terminator or Rambo movie to visualize this principle. Action films will never include long soliloquies.

Attorneys are guilty of harnessing their sentences and slowing them down, making a document seem much longer than it really is. How do we do that? We

use BIG words, long sentences and paragraphs that appear to go on forever. Have you ever looked at a page of legal text that is one solid paragraph and fills the page border to border? How intimidating! The reader approaches the task with a sense of trepidation as if he or she might get lost in that page and never come out on the other side.

We rely on legal jargon and *marshmallow* construction, such as "in order to" or "for the purpose of," when simpler words would work just fine. We insert titles, such as *plaintiff*, rather than names, often rendering our documents confusing because the judge may not remember whether Mr. Jones is a plaintiff or a defendant. We select dull verbs, including the infinitive form "to be" and pack in extra adjectives or adverbs. F. Scott Fitzgerald wrote, "All fine prose is based on the verbs carrying the sentence." Adjectives and adverbs are excuses for weak sentences. Often these extra words only increase the risk of ambiguity. The subject and verb may be separated by unnecessary phrases, requiring the reader to search for the sentence. We may also discuss a case when we only need to cite a principle.

One common complaint among judges is the use of dates that have no relevance to start a sentence, such as, "On July 19, 2002, plaintiff filed his motion." Since the expectation is that we are not including unnecessary information, the court is led to believe the date has some relevance and pays attention to it. The court is later disappointed when it discovers the date is not important to your argument.

Legal writers currently focus on the use of *passive* versus *active* voice. Simply put, the passive voice slows down a sentence while the active voice tends to speed it up. For instance, you might write, "The motion was granted." No one appears to be performing the action; the motion is granted without an active role taken by anyone.



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On the other hand, if we were to say, “The court granted the motion,” we now have an actor, i.e., the court, who is actually doing something.

Howard Posner describes our dependence on the passive voice:

There’s nothing like a trim, buff verb, alluringly flexing its muscles on the page . . . But, alas, I labor in a profession with a heavy puritanical streak where verbs are concerned. Like sexually repressed Victorians who covered piano legs so as not to incite indecent thoughts of human limbs, lawyers clothe verbs elaborately, or conceal them altogether, in unnecessary phrases that make for flabby, dull sentences. It’s rare that anyone *does* anything in a legal document; they’re too busy engaging in conduct, choosing, electing, or being in the process of doing whatever it is they ought to be just doing.

(Posner, *The Naked Verb*, (June 2001) 21 Cal.Law. 25.)

We also tend to give the court too much information, and we do it in such a way that the judge cannot stop to take a sip of coffee. Packing a sheet of paper with a single paragraph of long, cumbersome sentences is simply not restful. Seeing a lot of white (generous margins and frequent paragraphs) is welcoming. Inserting frequent periods after short sentences provides an opportunity for the judge to pause and absorb the information you have given him or her. But make sure that, that information is relevant and important to the motion or issues under consideration.

What is missing?

You could absorb all the rules of legal writing and produce a slick docu-

ment that reads quickly. That does not necessarily mean that it will come to life. What is missing is the humanity of the situation. Often that translates to a lack of storytelling. All the short sentences in the world do not always add up to a compelling story.

My goal in writing is to promote some understanding by the judge as to what has happened to my poor, unfortunate client. I want the judge to believe that what happened is simply not fair, and the judge is the one that can do something about it. This goal is the same for a motion to compel discovery as it is in a trial brief. Judges generally want to do the right thing. They want to wake up in the morning and face themselves in the mirror believing they have made a difference. You want to help them by giving them the authority and legal bases to make those right decisions.

We need to get back to basics

Start at the beginning. This mess started with a client who had a problem. Tell your client’s story. Make that story come alive for the reader. After I have completed a brief, I often ask a layperson to read it. After all, it’s quite likely that another attorney would understand what I am saying. But I am more concerned about a layperson’s reaction to the story. If you cannot find a layperson, read your brief out loud and see if you stumble over the words.

My briefs, even my demurrers and motions to strike, have a theme. I am always trying to tell the client’s story, even in pieces, because we usually have the same judge hearing all the law and motion matters before trial. Educating the

court as to our client’s point of view begins with the filing of the complaint or answer and our first appearance at the status conference.

Taking a conversational tone helps in telling a story. After all, how many people talk in terms of *vehicles* or *collisions*? It is much better to describe the car and give some details of the accident, such as, “Mr. Jones’s Ford pickup smashed into Ms. Smith’s Honda Civic.” Give the reader something to visualize. If the reader can visualize the impact of a huge truck smashing into a little car, you will have achieved your goal.

Make the story come alive. Okay, so not everyone is a dramatic writer, but we are all capable of passion. And we should have passion for our client’s plight. If we believe our client has been wronged – and we see our client as a real person, not just a billable event – we should be

able to communicate that passion to the written page.



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