WRITING TO JUDGES... PERSUASIVELY

HON. LIDIA STIGLICH AND ZELALEM BOGALE, ESQ.

Painters paint. Musicians play. Actors act. As far as conventional wisdom goes, lawyers talk. In truth, lawyers write, and good lawyers write well. Words are the building blocks of the law and language is the central tool of the legal trade. Think of it this way: Like a tepid performance on the silver screen, an impertinent fact, an improper citation or a misstatement of the law in a legal brief can distract your audience and detract from your purpose as a zealous advocate for your client.

This is particularly true in persuasive brief writing. To be sure, your audience with a persuasive brief is a judge or a panel of judges, not your client, not opposing counsel. And, just as painters paint and lawyers write, judges read. As seasoned readers, all judges (and their law clerks) appreciate good writing. That's why when Chief Justice John G. Roberts was asked, during an interview with Black's Law Dictionary's Editor-in-Chief Bryan A. Garner, if he enjoyed reading briefs, he responded, "If they're good." And judges know good writing when they see it.

So, if all goes well, we will provide some useful suggestions to make your next persuasive brief, at the trial or appellate level, more effective.

Tell the Truth

Nearly 20 years ago (in this same publication, no less), District Judge Brent T. Adams also led with this advice in an article on legal writing. Judge Adams confessed, "After twenty years in this profession, I have come to believe that [a reputation for truthfulness] may be the only important thing."

As officers of the court, lawyers are bound by the rules of professional responsibility to be candid with the tribunal, but telling the truth is less about the absence of candor than it is about ensuring your written and oral communications with the court are accurate and reliable.

Of course, deliberately misinforming the court as to the facts of your case or the law is a violation of your duty of candor. Beyond that, though, an honest misunderstanding or inaccurate representation of the facts or the law – no matter the reason – will prompt the judge to scrutinize

the rest of your brief closely. Rather than being swept along by the substance of your arguments, the judge will become a detached observer, looking for your next mistake.

So take the time to know your case and deliver your information accurately. In a close case, the court is more likely to adopt your reasoning if you have proven to be a reliably honest advocate for your position.

Plan (then Plan Again) Before You Write

It is more difficult to write poorly if you have planned. Plotting your course before you embark is essential for many reasons: it promotes brevity and clarity, and it saves time.

Brevity

For centuries – even millennia – writers have agreed that shorter, if possible, is better. And readers agree. "I have yet to put down a brief," says Chief Justice Roberts, "and say, 'I wish that had been longer.'"

However, we all know cases can be complex. A three-page motion for summary judgment in a water rights case spanning several counties and involving multiple parties might be insufficient for persuasive purposes. Brevity for its own sake isn't necessarily favored as much as unnecessary length is disfavored. So, tighten up your statement of facts. Declutter your string citations if one case will do the trick. Pare down your rule statements. Judges know the legal standards for a motion for summary judgment – you don't need three pages to explain them. Strive for economy in your language and you will produce a hard-hitting brief.

Further, with approximately 2,200 pending cases at any given time, the Nevada Supreme Court is one of the busiest appellate courts in the country. Each district judge in the Eighth Judicial District Court is assigned an average of 1,400 cases, while each district judge in the Second Judicial District Court is assigned an average of 1,200 cases. With these caseloads, getting to the point quickly cannot be overvalued.

Clarity

Upon the co-author's appointment to the bench, Justice Ruth Bader Ginsburg provided her with this sage advice: "In speaking and writing, aim for clarity so that others may grasp your meaning at once." In brief writing, as in judicial opinion writing, clarity is nearly synonymous with readability, and readability is a function of good organization and planning. There is no right way to organize a persuasive brief; every case is different, but there must be some organization.

Going from big to small is an effective way to organize your brief. Begin with the big picture and, before you write, try to articulate the distilled version orally in language that a non-lawyer could understand. Then, break up the brief by stating the issues and carry it out in stages, issue by issue. (If this reminds you of outlining in law school, it's not a coincidence.) Within each issue, decide which facts are relevant and use them to propel your analysis. If certain facts are relevant to more than one issue, be sure to recast them (accurately) using greater or lesser detail to fit each issue.

As to your statement of facts, you can't plan enough. Because the legal principles are usually well settled, the facts and how you apply them will drive the legal analysis. An introduction with a theme of the case is a good tool for setting the stage before you begin disclosing the facts. The refined version of the big picture you articulated at the outset is good here. When you begin to lay out the facts, be sure to "tell" not "state" them. A well-paced narrative containing some degree of drama is much more readable (and more clear) than a series of sterile, numbered sentences. Indeed, a good brief writer is a good storyteller. Again, Chief Justice Roberts:

> [E]very 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.... [N]o 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 building up to, you know, the legal arguments.

continued on page 18

WRITING TO JUDGES... PERSUASIVELY

continued from page 17

Clarity speaks for itself. It requires no introduction **or** assurances. In his first play, "Oedipus," Voltaire writes, "Virtue debases in justifying itself." Don't detract from your narrative or analysis by stating that something is "clear." Simply stating that something is "clear" does not make it so. State it declaratively and provide authority for the proposition, then move on.

More often than not, the act of writing a brief will actually change how you think about your case.

Saving Time

From Cicero to Pascal, from Jefferson to Orwell, it is well settled that shorter works take longer to produce. Why? Saying the same thing in one page instead of two requires planning, and planning takes time.

But as a lawyer, you can't spend your time more wisely. Though it eats up time on the front end, it will save you hours (even days) of reorganizing later on when your time would be more effectively used preparing for oral argument or for trial.

Great Writing Doesn't Exist

Though planning is of utmost importance, it is no substitute for revisiting your work after a period of reflection.

"There is no great writing, only great rewriting." This quote, often attributed to Justice Louis Brandeis, captures the essence of a good persuasive brief. When asked how many edits an opinion typically goes through in his chambers, Justice Antonin Scalia had another way of putting it, "Oh my," he responded. "It depends on how much time I have."

More often than not, the act of writing a brief will actually change how you think about your case. Seeing your arguments on paper tends to give them more definition. Once written, you may think it better to lead your analysis of a complex issue with a conclusion rather than an issue statement and the legal principles. Or, you may discover the facts of your case need to be rearranged or told with more detail to harness their persuasive force. Revisiting your brief once it is written will ensure you are saying exactly what you mean to say. ■

HON. LIDIA S. STIGLICH is a district judge in the Second Judicial District Court, Department Eight, in Reno, Nevada. Before her appointment to the bench by Governor Brian Sandoval in November of 2012, she was the managing partner at Stiglich & Hinckley, LLP in Reno, and a trial attorney at the San Francisco Public Defender's Office.

ZELALEM BOGALE has been a law clerk since 2011, and currently serves as law clerk to Judge Stiglich. He has previously clerked in the Second Judicial District Court and the U.S. District Court for the District of Nevada, and has served as a judicial extern in the U.S. District Court for the Southern District of California. He will join the Washoe County District Attorney's Office as a Deputy District Attorney in the fall.