Write Now: Writing Strategies that Instantly Elevate Your Writing

Mississippi College School of Law

Professor Vicki Lowery
Professor Mary Purvis

Good legal writing does not sound as though it was written by a lawyer.
Good legal writing, in general, is writing that
keeps the readers' interests foremost.[1]

Three Guiding Principles

- Speak Human
- Lead From the Top
- Guide Your Reader

Sharpening Our Knives

- Introduction
- Issue Statements
- Facts
- Argument

Tools Available

- Deep Issue Statements
- Show, Don't Tell
- Declutter
- Phrases-That-Pay
- Speed
- Spice

[1] William Eich, former Chief Judge, Wisconsin Court of Appeals

Introductions

Narrative Nonfiction

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the **only person brought to trial**. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney's office **has a long and disturbing history of failing to produce exculpatory evidence** to criminal defendants.

Simple Hook

Both the district court and the court of appeals held that the equal protection component of the Fifth Amendment's due process clause was violated when the federal government imposed $363,053 in estate taxes on the estate of Thea Spyer **simply because she was married to a woman** (respondent Edith S. Windsor), **instead of a man**.

Emotional Hook

After unceremoniously renouncing his parental rights to his unborn daughter—Baby Girl—**in a text message** and making no effort to see Baby Girl for months after she was born, Father stepped in **at the eleventh hour** to block an adoption that was lawful and in the "best interests" of Baby Girl.

Vivid Words and Images

Oklahoma intends to execute petitioners by injecting them with large amounts of a paralytic drug and potassium chloride. The paralytic drug produces a **chemical entombment, paralyzing and eventually suffocating the person**. Potassium chloride feels like **liquid fire as it courses through the veins;** it eventually stops the heart. Throughout this process, the paralytic drug ensures that **observers see no evidence of suffering, because the prisoner will be completely paralyzed**.

Deep Issue Statements

Consider framing your issue statement in **multiple sentences** (premise-premise-question) stated simply in **75 words or less.** Write **syllogistic** issues that read fairly but have only on answer. Make the minor premise as concrete as you can within your 75-word limit. The idea is to get your point across at the outset so that you meet the **90 second-second test**.

Consider these two examples:

I. Traditional "Whether" Statement:

Whether there was a violation of the OSHA requiring every incident-investigation report to contain a list of factors that contributed to the incident, when the investigation report on the June 2002 explosion at the Vespante plant listed the contributing factors in an attachment to the report entitled "Contributing Factors," as opposed to including them in the body of the report?

Revised into a Deep Issue Statement:

OSHA rules require every incident-investigation report to contain a list of factors that contributed to the incident. The report on the June 2002 explosion at the Vespante plant listed the contributing factors not in the body of the report but in an attachment entitled 'Contributing Factors.' Did the report thereby violate OSHA rules?

II. Traditional "Under-Does-When" Format

Under Louisiana paternity law, does a husband have to pay child support for his wife's child until he proves he is not the father when he did not deny paternity until five years after the child's birth?

Revised into a Deep Issue Statement:

Under Louisiana law, a husband is presumed to be the father of his wife's child and must support the child unless he denies paternity within one year of the child's birth. Rousseve did not deny paternity until five years after Aleigha's birth. Was he obligated to support Aleigha until he proved that he was not her father?

Consider These "Real World" Examples of Deep Issue Statements:

III. "Real World" Example

The Sixth Amendment to the United States Constitution guarantees a criminal defendant "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). To establish ineffective assistance of counsel, Adekeye must prove his counsel's representation was objectively unreasonable and materially prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Does Adekeye satisfy the *Strickland* standard where record evidence proves that his retained counsel altogether refused to investigate his criminal case before trial, including a deliberate failure to interview eyewitnesses and accomplices to the alleged crime?

IV. More "Real World" Examples

(2) Scope of a partner's statutory duty of loyalty

The jury found—in a finding not challenged by Enterprise—that Enterprise breached its duty of loyalty when it stole a partnership opportunity for itself. Section 152.002(b) of the TBOC says that partners may not "eliminate the duty of loyalty," but the court of appeals allowed an early-stage letter to relieve Enterprise of responsibility for its undisputed breach of that duty.

- Did the court of appeals erroneously permit a partner to prospectively eliminate the statutory duty of loyalty in violation of the TBOC?

Facts

Show Don't Tell

For generations, Inupiat Eskimos hunting and fishing in the Delong Mountains in Northwest Alaska had been aware of **orange- and red-stained creekbeds** in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Barker noticed **striking discolorations** in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the **discovery of a wealth of zinc and lead deposits**. Although Baker died before the significance of his observations became known, **his faithful traveling companion—an Irish Setter who often flew shotgun—**was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek.

[. . .]

Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. The vast majority of the area's residents are Inupiat Eskimos whose **ancestors have inhabited** the region for thousands of years. The region offers only **limited year-round employment opportunities**, particularly in the private sector; in the two years preceding Alaska's permit decision, the borough's unemployment rate was the highest in the State. . . . Prior to the mine's opening, the average wage in the borough was well below the state average; **a year after** its opening, **the borough's average exceeded** that of the State.

Decluttering the Facts

Before:

Plaintiff was injured when she slipped and fell on kiwifruit at the Shop Rite Supermarket on February 16, 2015. On July 25, 2015, her doctor diagnosed a herniated disk in her lower back. From July 5, 2015 until the present she has been receiving treatment for this condition. On January 5, 2016, Plaintiff sued Shop-Rite, alleging negligence and gross negligence in maintaining the premises. On September 14, 2016, a jury trial began. On September 15, 2016, the jury returned a verdict in favor of Shop-Rite. On September 16, 2016, the trial court entered a judgment on the verdict. On October 3, 2015, Plaintiff filed a motion for a new trial, which was denied on October 5, 2015. On October 26, 2015, Plaintiff filed a timely notice of appeal.

After:

On February 16, 2015, Harrison allegedly slipped and fell on kiwifruit at the Shop-Rite Supermarket. **More than five months later**, her doctor diagnosed a herniated disk in her lower back. Harrison sued Shop-Rite, alleging negligence and gross negligence in maintaining the premises. A jury returned a verdict in favor of Shop-Rite, and the trial court entered judgment on the verdict. **After** the court denied Harrison's motion for a new trial, she timely appealed.

Before:

On January 2, 2017, Alma Jones rented a car from XYZ Rentals, Inc. She kept the car from January 2, 2017, through January 4, 2017. On January 4, 2017, she drove the car into a retail store that she owned, causing extensive property damage. On January 5, 2017, Ms. Jones reported the accident to her property insurer. On January 6, 2017, she reported it to her no-fault insurer. On February 5, 2017, the property insurer paid the claim. On May 21, 2017, the property insurer sued the no-fault insurer to recover the amount it paid on the claim.

After:

Alma Jones rented a car from XYZ Rentals, Inc. **A few days later**, she drove the car into a retail store that she owned, causing extensive property damage. Ms. Jones reported the accident to her no-fault and property insurers. **After paying the claim**, the property insurer sued the no-fault insurer to recover the amount it had paid.

Statement of the Case

A prison guard accused 17-year-old George Alvarez of assault, and the State procured a guilty plea from him despite a video that proved he is actually innocent. *See Alvarez v. City of Brownsville*, 860 F.3d 799, 800-01 (5th Cir. 2017). A panel of this Court held that Alvarez had no constitutional right to the exculpatory video because he pleaded guilty. *Id.* at 801-03. As discussed below, however, the due process protections recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny compel the conclusion that the State may not withhold exculpatory information while a defendant pleads guilty to a crime he did not commit.

Test Your Skills!

Try your hand at revising the rough draft of a motion. Keep in mind ways to declutter your prose; include only legally relevant dates and details; use strong verbs; avoid legalese and wordy constructions; replace zombie nouns with verbs where appropriate; cut unnecessary prepositional phrases; fix non-parallel series; eliminate throat-clearing phrases; etc.

Before:

COMES NOW, Marcus Doyle and files this Motion to Extend Time for Filing of Pretrial Order, and in support thereof is respectfully showing the Court the following: On August 4th, 2014, this Court ordered Doyle, pursuant to Rule 16(b), to submit a pretrial order prior to January 30, 2015. The defendant has been diligent with his preparation for trial. However, more time is required to assemble exhibits, examine the plaintiffs exhibits, and for preparation of properly-supported objections. It should be noted that the case is set for trial on March 30, 2015; the granting of the extension of the pretrial filing deadline at this point in time would not cause the trial to be delayed. Doyle requests that this Court grant the Motion, extending the time for filing the Pretrial Order until March 2, 2015. A proposed order is attached for the convenience of the Court. [146 words]

After:

Marcus Doyle moves to extend the pretrial-filing deadline and respectfully states:

On August 4, 2014, this Court ordered Doyle, under Rule 16(b), to submit a pretrial order before January 30, 2015. Although Doyle has diligently prepared for trial, he needs more time to assemble exhibits, examine the plaintiff's exhibits, and prepare properly supported objections. Because the case is not set for trial until March 30, 2015, extending the pretrial-filing deadline would not delay the trial.

Doyle asks the Court to extend the deadline to March 2, 2015. A proposed order is attached for the Court's convenience. [96 words]

Here are some edits that we wanted to highlight:

- Removed legalese (COMES NOW; in support thereof).
- Cut wordy phrases (pursuant to; prior to; at this point in time).
- Replaced zombie nouns (preparation [two places]; extension).
- Hyphenated phrasal adjectives correctly (properly supported objections [no hyphen with *–ly*]; pretrial-filing deadline).
- Replaced sentence-starting *However* with *Although* clause.
- Removed flabby *be*-verbs and passive voice where appropriate (is required; to be delayed; but kept *is attached* because focus is on the proposed order).
- Removed unnecessary prepositional phrases (with his preparation; for preparation of; granting of the extension of; convenience of the Court).
- Cut throat-clearing phrase (It should be noted that).
- Made series elements parallel (assemble, examine, prepare).
- Fixed typos and other errors (August 4, 2014; plaintiff's exhibits; convenience).

Structure

Structuring Each Argument

For appellate brief writing, writers tend to use more sophisticated and persuasive structures or organizational paradigms that provide an **explanation** of the reasons for the result you seek on behalf of your client. After explaining a reason, you can set forth legal recognition of the reason (e.g., "The Fifth Circuit Court of Appeals adopted this rationale. . . ."). You can then explain the facts of the case (or cases) and show how they are similar to the situation on appeal. You can choose from several structures.

One such structure is TREAT where:

(1) **T=Thesis**;
(2) **R=Rule**;
(3) **E=Explanation**;
(4) **A=Application**; and
(5) **T=Thesis**, restated as a conclusion.

Another variant is CREXAC where:

(1) **C=Conclusion**;
(2) **R=Rule**;
(3) **EX=Explanation**;
(4) **A=Application**; and
(5) **C=Connection/Conclusion.**

The **CREXAC** formula uses the same basic approach as **TREAT**, but it emphasizes ending with a **"Connection/Conclusion"** that makes clear the conclusion and signals to the reader that this part of the argument is complete. Here's an example of a "Connection/Conclusion":

> Therefore, because Mr. Burglar was committing a burglary when he was bitten, Mr. Angell cannot be held liable for Burglar's injuries under Ohio Revised Code Section 111.11.

More importantly, **CREXAC** can be used to demonstrate to the reader exactly how this part of the analysis fits into the argument as a whole. At a minimum you should connect the **phrase-that-pays** [i.e., the key term(s)] . . . to the point that was at issue in that section of the argument. Here's an example of how that could be done, where "plain view" is the phrase-that-pays:

> Activities that Respondents exposed to the plain view of outsiders were not protected by the Fourth Amendment. Because Respondents' activities within the apartment were in plain view from Thielen's lawful vantage point, Thielen's observation did not violate a reasonable expectation of privacy.

When applied in full, the formula looks something like this:

Conclusion: This Court should find Result.
[or, This Court should find not-Result.]

Rule: If phrase-that-pays (PTP) exists, then result occurs.

Explanation: In Authority case.1, court held that phrase-that-pays existed because facts + reasoning. [more authorities about the phrase-that-pays existing, if needed]

In Authority case.2, court held that phrase that pays did not exist because facts + reasoning. [more authorities about the phrase-that-pays not existing, if needed]

Application: Phrase-that-pays = my case facts

[or, phrase-that-pays ≠ my case facts.]

[details about facts as needed]

If needed:

Unlike [party or thing] in Authority case.1, [party or thing] in my case did not . . . .

Like [party or thing] in Authority case.2, [party or thing] in my case did . . . .

Connection-Conclusion:

Therefore, because phrase-that-pays exists, result should occur.

[or, Therefore, because phrase-that-pays does not exist, result should not occur.]

If appropriate:

Because result should occur, case should be resolved in X's favor.

Another acronym that deserves highlighting is **CRuPAC**. It is especially useful because it emphasizes proof of the rule where:

C = Conclusion (provide the reader with the conclusion on the issue in the headings and possibly introductory materials, in other words, it puts your thesis up front for the reader);

Ru = Rule (containing a synthesized exposition of the law that is applicable to the issue);

P = Proof of the Rule (presenting "proof" of the rule in support of the rule to convince the reader of the validity of the rule through statutory provisions, judicial decisions, secondary sources, policy arguments, etc.);

A = **Application** (showing how the facts of the present case fits into the applicable legal rule as well as comparing and contrasting to the facts of supporting case law); and

C = **Conclusion** (restating the conclusion).

Incorporating Each Argument Into a Broader Overall Structure

Whichever argument structure you adopt, it will be necessary to incorporate it into a broader overall structure. The following template is useful if your argument involves a multi-part test or elements analysis:

A. Argumentative Heading

Paragraph setting out a favorable statement of the standard of review and the applicable statutory language, regulation, court rule, or common-law rule and listing or identifying the elements.

1. Argumentative heading for the first element
- Assertion
- Statement of the Rule
- Decryptions of analogous cases
- Your argument, including your response to your opponent's arguments
- Conclusion

2. Argumentative heading for the second element
- Assertion
- Statement of the Rule
- Decryptions of analogous cases
- Your argument, including your response to your opponent's arguments
- Conclusion

[and so on for each element.]

The above structure should be appropriately varied according to the circumstances. For example, it may sometimes be more persuasive to start with a favorable statement of the rule instead of an assertion; in other situations, a favorable statement of key facts might precede the

statement of the rule; or you may start with the analogous cases before stating the rule.

The organizational scheme can be shifted for each element, depending on what works best in terms of highlighting the strengths of the case and your case theory. For example, if the rule strongly favors your client, you will usually want to use an organization scheme that allows you to put the rule at the beginning. On the other hand, if the facts are very favorable, you will usually want to use an organizational scheme that allows you to put them at the beginning. When the analysis involves several steps, starting with your assertions can provide a useful roadmap.

Dealing with Adverse Cases

During the course of your argument, you will likely need to address adverse cases. In doing so, look to see if any of the following seven ways of doing so would be helpful:

- the procedural posture of the adverse case differs significantly;
- the material facts of the adverse case differ significantly;
- the adverse case is not controlling because it is from a different jurisdiction, the statements are merely dicta, or the adverse case is otherwise not binding under applicable rules of stare decisis;
- the adverse case is against the weight of authority or it is against the modern trend of authority;
- the adverse case is old and thus outdated;
- the adverse case involved a split decision and the dissent is more persuasive; and
- the adverse case was wrongly decided and thus created bad law.

Cases of First Impression

What should you do if the issue is one of first impression (no controlling authority)? In that context, your brief will typically:

(1) establish that no controlling rule or test exists;
(2) assert the rule or test that should be adopted;
(3) attempt to persuade that your proposed rule or test is more appropriate than others; and then
(4) apply that rule to the facts of the case.

In addition, you may want to argue that even if the court adopts a less favorable rule or test (usually the one advocated by the other side), your client still should win under that rule or test. Here is a recommended template for this purpose:

A. Main Heading
Introduction establishing that the issue is one of first impression

1. <u>Subheading setting out the first assertion</u>
   - Paragraph setting out the rule that you want the court to adopt
   - Arguments relating to why the court should adopt your proposed rule rather than the rule being proposed by your opponent
   - Application of your proposed rule to the facts of your case.

2. <u>Subheading setting out additional or alternative arguments</u>
   - If appropriate, argue that even under the rule being proposed by your opponent your client wins.

Umbrella Paragraphs

The above structure included an introduction before the first subheading, which is often referred to as the umbrella section. It typically provides context for the argument that follows. It can also introduce the organizational structure of the brief. It is usually limited to one or two paragraphs. When it is used to introduce the component of the argument to follow and educate the reader, the umbrella paragraph(s) customarily include:

1. a summary of the rule explaining its relevant parts along with any evidentiary or procedural principles favorable affecting its function, such as burden of proof or presumptions;

2. an explanation of the status of any elements that will not be discussed because it is undisputed or not at issue at this stage of the litigation;

3. a persuasive summary of your argument on each element in dispute (limited to one or two sentences covering each element);

4. a notation of the standard of review if it is not in dispute or a more extended discussion if it is; and

5. a structural guide if it would be useful to the reader.

Drafting the Argument Headings

In drafting the argument headings (usually representing your conclusion or a dispositive argument), follow the widely accepted guidelines for preparing such headings.

- Use full sentences, not topical phrases.

- Make statements about your case, not about abstract legal principles.

- Make statements that demonstrate legal relevance.

- Try to incorporate reasons into the point headings. A good way to do so is to use the word "because." If there are several reasons, consider using subpoint headings to support the principal heading.

- Write the headings as positive statements rather than negative ones.

- State the actual legal rule rather than merely referring to or citing to a case or statute on the assumption that the reader already knows it.

Compare the following two headings;

[Uninformative]
Under the ruling of *Ross v. Berhard*, 396 U.S. 531 (1970), the federal district court properly struck a demand for a jury trial in an action for damages and injunctive relief stemming from a nuclear power plant accident.

[Rewritten to make clear the legal principle the *Ross* case established:]

Because a jury does not provide an adequate remedy for complex cases that are beyond its practical abilities and limitations, the district court properly struck a demand for a jury trial in an action for damages and injunction relief stemming from a nuclear power plant accident.

- Be sure to eliminate vague words that creep into the point headings, such as "this matter," "it involves," "it pertains to," "with regard to," "it deal with," "it concerns," etc.

- Discuss the strongest point first. First impressions tend to be lasting ones.

- Place refuting arguments in the middle rather than the beginning or end of a section. State those arguments on your own terms and then attack them with counterarguments.

- Remember to use subheadings to set out the logical steps or conclusions that collectively will support or prove your point heading.

- Be sure that the discussion under a heading or subheadings reflects its content.

In other words, if the headings or subheading is a statement of law, then the discussion under it should have no application of the law to the facts of your case.

For example, assume that your subheading is "An Arrest Without Probable Cause Is Invalid." Because this subheading is a pure statement of law, then the text that follows should not discuss the facts of your case. If you want to do so, the subheading could be changed to "The Arrest of Smith Was Invalid Because There Was No Probable Cause to Believe a Crime Was Committed."

Outlining

1. The bankruptcy court correctly denied the motion to dismiss filed by creditors Macquarie, Boland and Silverton.

2. The bankruptcy court erred as a matter of federal law in holding that Macquarie could exercise a blocking right through Boketo because Boketo is a shareholder.

    2.1. Macquarie should not be allowed to do indirectly through Boketo what it cannot do directly.

    2.2. In addition, it is Boketo's denial of fiduciary duty that should count, not Boketo's shareholder status.

        2.2.1 Boketo disclaims any fiduciary duty to Franchise Services.

        2.2.2 The case law makes fiduciary duty an essential element of the blocking provision "playbook."

        2.2.3 Without fiduciary duty, a blocking provision based on equity ownership is illogical and gives a creditor the same power it would have if a loan document prohibited bankruptcy.

3. **If reached**, Delaware corporate law would not allow Boketo to exercise the blocking right because Delaware imposes a fiduciary duty on a minority shareholder who has the power to control the corporation

    3.1. Minority shareholders who possess blocking rights generally owe fiduciary duties to the corporation in the exercise of those rights

    3.2. [. . .]

Designing Text: Formatting Headings and Subheadings

Now, with the use of word processors, brief writers have more tools available to help brief-readers and brief-users actually *see* the brief's organization: chief among them being boldface type, larger type sizes, and italics.

Although it's possible to still use progressive indents, the better technique is to use a combination of size, character weight, and roman-vs.-italic to signal gradations in headings.

According to Bryan Garner, author of *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts*, the problem with progressive indenting is that it doesn't mix well with double-spacing. It's good for the Table of Contents—use progressive indents there—but not in text.

The sequence in text, then, should be as follows: **boldface large**; **boldface**; ***boldface italic***; *italic*. Position all headings flush left.

1. Main heading in large boldface.

A. Subhead in regular boldface. Notice that in this heading, as in the ones below, the indent is "hanging"—the second line of text doesn't begin at the left margin. This enhances clarity.

(1) ***Second-level subhead in boldface italic. Notice that the italicizing makes the heading a tad smaller even though the typeface specifications are otherwise the same.***

(a) *Third-level subhead in italic. Rarely will you need this level, but it's good to have it available.*

Avoid all capitals (all-caps) and initial-caps text. Words written entirely in capital letters are more difficult to read. Of course, many writers use all capital letters to designate element headings such as "SUMMARY OF THE ARGUMENT" or "QUESTIONS PRESENTED." Most readers can tolerate this limited use of all capital letters reasonably well, but writing more than a few words in all capital letters will usually drive the reader to another paragraph. Placing two-to three-line point headings in all caps almost guarantees that the reader will skip the headings. Initial-caps are likewise discouraged because words written in initial-caps are likewise difficult to read.

Citations and Emphatic Text: Underlining, *Italics*, Boldfaced Type, and CAPITALIZATION

Both the *ALWD Citation Manual* and the *Bluebook* allow the writer to choose between underlining and italics when citing cases and other titles. Although both underlining and italics have the same meaning vis-a'-vis citation form, they are not equal.

For Quick Reference

Use Boldface	Avoid All Caps and Initial Caps
Use Italics (including case names)	Avoid Underlining
	Avoid Progressive Indents (in text but use only in the Table of Contents)

Use Umbrella Paragraphs

ARGUMENT

The Court should hold that a defendant's due-process rights are violated if the government withholds exculpatory information before the defendant pleads guilty and is sentenced. This rule necessarily follows from the Supreme Court's *Brady* precedent, and it represents the prevailing view among lower courts and leading commentators. Enforcing this right is also crucial for defendants given the realities of today's criminal justice system. The pervasive use of plea bargaining and the dynamics of those negotiations underscore the important role that the disclosure of exculpatory information has in the search for truth and justice.

I. Today's justice system is a system of pleas, so disclosure of exculpatory information in plea bargaining is imperative.

Use of Lists and Bullet Points

At the hearing on the Motion, Lawal admitted by live testimony a litany of professional failures that combine to prove the paucity of his pretrial investigation.

- Despite hiring a private investigator, Lawal never received the investigator's report "because the family refused to pay a single penny for [his] service." (ROA.360).

- Lawal never requested a copy of the offense report from the State, (ROA.342),so he failed to identify and interview material witnesses, (ROA.360–66). In fact, Lawal had no idea prior to trial which witnesses the State would call. (ROA.363).

- Despite testimony about the salon's "tinted windows," (ROA.673), Lawal never photographed the salon or moved to exclude Mendez's identification,(ROA.365–66). Nor did he hire an expert specializing in eyewitness identification. (ROA.368).

- Lawal never went to the police property room to inspect what Mendez believed to be a gun. (ROA.368). In fact, he never inspected any physical evidence at all. (ROA.368).

- Lawal never asked to review the statements made by Adekeye or his co-defendant at the police department after their arrests. (ROA.373). Nor did he request a copy of the 911 tape or the police dispatcher's recording made the day of the alleged crime. (ROA.373–75).

- During discovery, Lawal failed to collect the State's Brady material and indeed made no serious attempt to do so. (ROA.360–363). He filed a Motion for Discovery and Inspection of Evidence, (ROA.230), but never presented his request to the trial court or secured a ruling on the Motion, (ROA.360–63).

Use Kicker Sentences

The failings of Rex's claim for tortious interference are **threefold**. **First**, a claim for tortious interference with contract requires an enforceable contractual obligation with which the defendant interfered. To state a claim, therefore, Rex must allege an enforceable obligation with which Mitchell interfered. Rex does not. There is no allegation that the APA required Adams to pay Rex for the Yuengling distributorship rights because no such obligation existed. Nor did Rex allege—because it cannot—that Yuengling consented to the transfer of Rex's Yuengling distribution rights to Adams. Because the APA contained an unfulfilled condition precedent (Yuengling's consent to the transfer of its distribution rights) that must have been fulfilled before any purchaser was obliged to pay for those rights, Rex has no claim for tortious interference.

Second, Rex's complaint fails to allege that Mitchell acted unlawfully in accepting Anheuser-Busch's assignment of the right to purchase Rex's interest. To be sure, Mitchell intentionally accepted the assignment. But as the circuit court noted, acting intentionally is not synonymous with acting unlawfully, which is required for a tortious interference with contract claim.

Third, Rex failed to plead that Mitchell acted with malice and an intent to harm Rex in accepting the assignment of the APA. While Rex alleges (wrongfully) that Mitchell knew its alleged actions would harm Rex, knowledge is insufficient to support a claim for tortious interference with contract.

Bottom Line

- Grab the reader from the get-go.
- Convey your theme—in one or two sentences—at the outset.
- Weave that theme throughout your brief.
- Once you grab the reader, do not let go.

THE ART OF LEGAL WRITING: MEN WALK ON MOON

Strong Written Advocacy for the Busy Professional

David Neil
McCarty[2]

In today's complex world of pretrial and appellate litigation, great trial advocacy is no longer enough to achieve a victory for your client—let alone safeguard one. Decisions from the Supreme Court have reshaped the Rules of Civil Procedure, choice of venue, and the admissibility of experts—among dozens of other subjects both civil and criminal. More than ever, simple and persuasive writing is a key to strong legal advocacy.

In today's world, even the most routine negligence case can be hard fought at trial and on appeal. Knowing key basics of writing will enhance your professional work in multiple ways. First, it will take away that weird gnawing at the back of your neck when you see a Petition for Interlocutory Review or Motion for Summary Judgment. Second, it will help guide you throughout pretrial and perhaps keep you from making mistakes that can haunt you on High Street or Lafayette Street. Last, focusing on essentials may help you protect the interests of your client and your office's work flow.

All professionals should master 3 core concepts for effective legal writing.

1. Know your audience
2. Simplicity
3. Organization

[2] Mr. McCarty is a solo practitioner focusing his practice on civil and criminal appeals before the Mississippi Supreme Court, the Fifth Circuit Court of Appeals, and the Mississippi Court of Appeals. *See* www.McCartyAppeals.com for more. A version of this article appeared in a 2012 issue of the Mississippi Association for Justice's *Voir Dire* magazine.

4.

1. ***Know your audience*** is a key component of legal writing.

Before you put ink to paper or electron to screen, you need to have determined one critical point: Who is your audience? Many practitioners are not reflective in how they present their briefs, and assume a huge level of technical expertise on behalf of the Reader. Understand that the Reader may not always be a justice or judge, and in many cases will be a young and inexperienced law clerk, or even an overwhelmed student externing for the judge. The only way you can communicate to the Reader is through your writing. If your writing is weak or overly complex, then you will never get your point across to your Reader.

Further, working to know your audience can help you craft a strong narrative that best suits the needs of your client. There is a reason many Rules of Appellate Procedure discourage the use of bland terms like "appellant" or "respondent"—they fail to usefully describe the parties to a busy Reader.

2. ***Simplicity*** is far too overlooked in what we think of as a complex world. We must simplify our arguments in order for the Reader to understand them. We must also simplify them so that we can make a strong and cohesive argument.

I often try to wrangle my students into clarifying and simplifying their legal writing. *Think First Grade! Subject, then verb, then preposition, then direct object*—"Jane ran up the hill."

I inevitably get the same response: "this material is just too complex to dumb down!" Or: "how can I explain a Rule of Civil Procedure in a simple way?"

First off, writing cleanly and simply isn't "dumbing down." Second of all, no matter how nuanced or sophisticated your MTCA claim or ERISA cause of action or Section 1983 pitch is, it's not more complex than the pinnacle of human achievement—getting humans off the face of the planet and to the moon.

In 1969 the *New York Times* wrote about the Apollo 11 moon landing. The headline was tremendous: **MEN WALK ON MOON**.[3] In just four words—none of them longer than four letters—the Grey Lady summed up the greatest technological triumph of recorded history.

Despite the attention grabbing headline (which most kindergartners could parse), the article really eases into the details. While civilian Commander Neil Armstrong isn't named until the third paragraph, but the details are well established: the Americans of Apollo 11 landed at 4:17 on July 20. While Colonel Aldrin makes the cut, Lt. Col. Michael Collins doesn't even make it above the fold—in fact, President Nixon makes an appearance before he does.

The information at the beginning is brief, compelling, and helps to orient the Reader: only the essentials. Yet by the end of the 3,000+ word article, even Mr. Armstrong's excited heart rate is discussed, as well as the intricate details of the landing ("about 120 miles southwest of the crater Maskelyne . . . on the right side of the moon as seen from earth"). The heavy technical details are present, but the Reader is eased into the complexity of the myth-dwarfing feat.

You will never write about something as complex, nor something as important. While the headline is simple, it is utterly memorable. My students have started to roll their eyes when I bring up "MWOM," but the ease by which the newspaper explained this feat can inform any type of law practice and your legal writing.

I also recall something I learned from former Presiding Justice Dickinson of the Mississippi Supreme Court, who brought me in with him to teach two semesters at Mississippi College School of Law. The first semester was in Evidence, and the second was Trial Practice. I took as many notes as some of the students (maybe more). One of the things I'll never forget was his discussion of vocabulary.

---

[3] John Noble Wilford, Men Walk on Moon, 118 N.Y. Times A1 (July 21, 1969). To read the wonderful article, visit http://www.nytimes.com/learning/general/onthisday/big/0720.html?scp=1&sq=men%20walk%20on%20moon&st=se#article.

We all have three vocabularies: the broadest is our *reading* vocabulary. We read cases from the1800's, the Bible, the Constitution, novels—many of which are constructed in archaic and complex language.

The second vocabulary is our written one. As lawyers, we're all skillful and mostly fluent in our special languages. But what we write is more complex than what we would say out loud—as any of you who have written out an opening or closing have realized.

Our narrowest vocabulary is the spoken one. I can read *heretofore*, or *forthwith*, but I wouldn't write them, and to say them out loud would be really weird.

Justice Dickinson was always pressing the students to talk to the jury how we would talk to our family. Don't say *vehicle* if you can say *car*, and don't write "the appellant brings forth this claim of error predicated on the denial of constitutionally-afforded rights" if you can write "the trial verdict should be reversed because the jury instructions didn't follow the law."

Simplifying our vocabulary can be a powerful way to advocate for our clients. In fact, the dynamic powers of simplicity have defined some of the greatest appellate lawyers of the past century. In 2000 there was a dispute between two elected officials; you might have heard of it.[4]

While the case presented Constitution-straining issues that arguably imperiled the Republic, the issue was actually simple: should the state of Florida continue a recount of votes cast in an election? One side thought Florida should proceed, the other thought Florida should stop.[5]

Here's the first headline, or header, of then-Governor Bush's brief to the Supreme Court, by former Solicitor General Ted Olson:

[4] *Bush v. Gore*, 531 U.S. 98 (2000)

[5] Sometimes it is a useful exercise to explain a complex scenario with simple terms.

I. The Decision Of The Florida Supreme Court Violates Article II Of The Constitution

Laurence Tribe and David Boies, on behalf of Vice-President Gore, responded with a section entitled:

I . Article II Provides No Basis to Override the Florida Supreme Court's Decision

That's it. No fireworks, no drama—pure simplicity that spans only one line, roughly a dozen words a piece. Yet in those relatively simple sentences contain both radically different policy perspectives and dynamic language. While the headlines are not quite at "MWOM" level, they're extremely tight.

After indoctrinating students with "MWOM," I challenge them to crack open a headline and peer inside it to determine the true focus of the writer. With grand advocates like General Olson and Mr. Boies (and their respective teams), every word is wielded like a scalpel. A close examination can reveal the larger focus of each person's argument.

The subject of Governor Bush's argument focuses on the *decision* of the Florida court—and that its decision was violating the Constitution. Without even the limited descriptors in the headline, the basic meaning is *Decision Violates Constitution*. The concept is immediately understood and brutally clear. The focus of the brief is then on the failures of that decision. Note that the Governor did not take a more blunt approach and shift his subject (and ire) to the Florida Supreme Court. The headline could have easily been *The Florida Supreme Court Is Violating the Constitution*.

In contrast, the Vice-President focuses on the Constitution; the subject of his headline is Article II, not the decision of the Court. Indeed, he pushes the Florida appeals court to the end of his headline in an attempt to defuse the indirect attack of Governor Bush. At its core, the headline is *Constitution Doesn't Affect Decision*. The focus is then on how the Constitution should be interpreted in a more limited fashion as to allow the State to function.

The Vice-President's argument is inherently weaker than the his opponent's rhetoric. Regardless of the legal substance of the brief, it is softer because it asks for restraint in the face of the outcry over a "violation." I suspect a mirrored argument was considered and abandoned as too simplistic and even weaker. *The Decision Does Not*

Violate Article II does not change the focus enough from the Florida decision to the Constitution.

Dynamic yet simple writing is nothing new. There is a case from 1955 where the first headline in the Appellants' brief is this:

> I. **The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions.**

While not as tight as the prose of Olson and Boies, this is still a very powerful sentence. Contrast it to prose of a companion brief, where another group of Petitioners in a similar situation argued the following:

> I. **The action of respondents in excluding minor petitioners from admission to Sousa Junior High School solely because of race or color and in refusing to permit adult petitioners to enroll their children in Sousa Junior High School solely because of race or color deprives petitioners of their liberty and property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States.**

While both headers contain the same general legal argument, which is stronger to you? Why? With all due respect to the advocates for the latter, I believe the former is much stronger because it is inherently clearer. The simplicity of the writing confers a greater authority.[6]

[6] For the result of this great advocacy, see *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954). One of the attorneys for the plaintiffs with the stronger, more concise statement was Thurgood Marshall, later a Justice of the Supreme Court.

Using the modern brevity of the *Bush v. Gore* lawyers, can we improve these statements? Take a shot at improving the former headline. Keep it MWOM simple—aim for a dozen or less words. Trim away the fat of unnecessary words. Think about where the focus should be.

I. _____

_____

Now, try the second one about Sousa Junior High:

I. _____

_____

3. ***Organization*** will strengthen your arguments, lessen the problem of writer's block, highlight your dynamic and simple writing to its greatest effect, and focus your argument for maximum impact. It can also save you buckets of time. In law school, we use the CREAC model. This stands for:

   Conclusion

   Rule

   Explanation of the rule

   Application of the rule

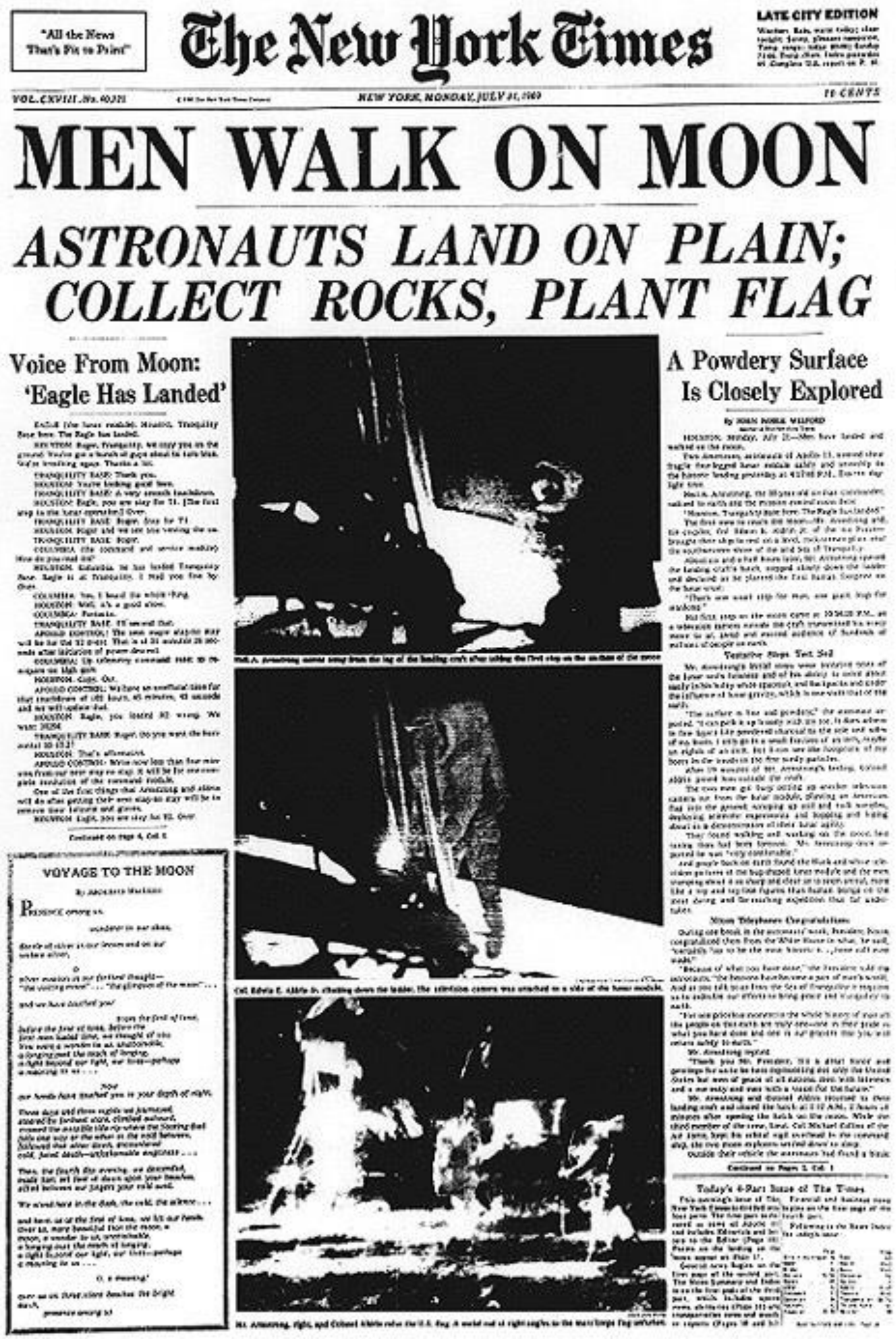
   Connection-**C**onclusion

Use CREAC to shape your arguments and hammer home key issues and theories. A simple application of CREAC is the following argument. Note the content fits tightly within its section:

> [C] Because the trial court ignored the split in testimony, summary judgment should not have been granted.
>
> [R] It is bedrock law that the testimony of a witness is for a jury to weigh. *See McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) ("Matters regarding the weight and credibility of the evidence are to be resolved by the jury"). [E] If there is a conflict or inconsistency in testimony, the Court has made clear that the jury is who determines the facts, since "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781.
>
> [A] In this case, Mr. Thomas has stated that he was not at the grocery store, while Mr. Smith says that he was. This key inconsistency in testimony should be weighed by the jury, and not a trial court. Further, this split in testimony mandates against granting summary judgment.
>
> [C-C] Because the trial court should have allowed a jury to weigh the credibility of the witnesses, summary judgment must be reversed.

Note that the Conclusion actually goes *first*. This is because we want to focus our Reader on the most important point of our argument, and to immediately focus on the relief we seek. We then detail the applicable Rule (and Explain it if needed), then Apply it to our facts. We close by again repeating the relief we seek.

I BEGAN TO WRITE the components of "MWOM" down a few years ago when I realized the same issues kept coming up in discussions with co-counsel, other legal professionals, or in my classes. If you master these core concepts, you will strengthen your legal writing skills.



"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

NEW YORK, MONDAY, JULY 21, 1969

10 CENTS

MEN WALK ON MOON

ASTRONAUTS LAND ON PLAIN; COLLECT ROCKS, PLANT FLAG

Voice From Moon: 'Eagle Has Landed'

A Powdery Surface Is Closely Explored

VOYAGE TO THE MOON

Recommended Materials

Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (4th ed., Aspen Publishers 2014).

Matthew Butterick, *Typography for Lawyers: Essential Tools for Polished & Persuasive Documents 110* (Jones McClure Publishing 2010).

Robert Dubose, *Legal Writing for the Rewired Brain: Persuasing Readers in a Paperless World* (Texas Lawyer: An ALM Publication 2010).

Ross Guberman, *Point Made. How to Write Like the Nation's Top Advocates* (2d ed., Oxford University Press 2014).

Bryan Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3d ed., Oxford University Press 2014).

Wilson Huhn, *The Five Types of Legal Argument* (3d ed., Carolina Academic Press 2014).

Noah A. Messing, *The Art of Advocacy* (Wolters Kluwer L. & Bus. 2013).