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9 Writing Tips From The Justices' Opinions Last Term

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The U.S. Supreme Court's current ideological divide may be the sharpest we've seen in a long time. Yet the justices do unite in one key respect: The current court boasts some of the best opinion writers in American legal history.

Take the opinions from the tumultuous last term. From those ashes, I extract nine tips and nine examples that can jump-start your own writing

1. Follow complex analysis with a pithy summary paragraph aimed directly at the reader.

Most attorneys include a conclusion at the end of an entire document or long section. But readers also appreciate wrap-ups along the way.

In Vega v. Tekoh, for instance, Justice Samuel Alito "boils down" his own points about why Miranda rules are merely prophylactic:

> What all this boils down to is basically as follows. The Miranda rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, Miranda was a "constitutional decision," and it adopted a "constitutional rule" because the decision was based on the Court's judgment about what is required to safeguard that constitutional right.[1]

2. Explain why the result you seek makes sense.

Especially when your client seeks a result that isn't intuitive or appealing, share a less-than-obvious benefit. You can avoid pure policy rationales or squishy interpretations while allowing the court to feel good doing what you're asking for.

As then-U.S. Circuit Judge Richard Posner put it in a 1999 article titled "Convincing a Federal Court of Appeals From the Bench," explain "what, if anything, turns on the outcome, either for the parties or for some larger community."

Take your cues from George v. McDonough, in which Justice Amy Coney Barrett stresses the need for finality, even if it means refusing to revisit a denial of disability benefits to a Vietnam vet:

> And while George suggests otherwise, there is nothing incongruous about a system in which this kind of error — the application of a since-rejected statutory interpretation — cannot be remedied after final judgment. On the contrary, and as the lower courts have explained, the VA's longstanding approach is consistent with the general rule .... That limitation serves important interests in finality, preventing narrow avenues for collateral review from ballooning into "substitute[s] for ordinary error correction through appeal."[2]

3. Emphasize what a line you've drawn in the law still allows.

Slippery-slope arguments often invite guffaws, but they can still pack a punch. Conceding that your points have limits can stymie your opponent's plans to alarm the court with a parade of horribles.

A plaintiff asking for big damages can explain why they're not infinite. And a defendant asserting that there's no breach of contract can conjure up a set of facts that would suggest otherwise.

Take now-retired Justice Stephen Breyer's opinion in Torres v. Texas Department of Public Safety. Sure, he could have stopped at "you can't sue a nonconsenting state." But by revealing three other ways to sue a state, he makes the restriction on citizens seem more reasonable:

> Basic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State. ... States still remain subject to suit in certain circumstances. States may, of course, consent to suit. ... Congress may also enact laws abrogating their immunity under the Fourteenth Amendment.... [and] States may be sued if they agreed their sovereignty would yield as part of the "plan of the Convention."[3]

4. Improve flow by starting a new paragraph with a nod to the end of the one before.

With so much legal writing copied and pasted and reordered these days, getting long passages to flow cohesively is tough. Sprinkling in logical signposts like "even so" or "in any event" can help. So can numbering and bullet points.

But one of the best ways to improve flow is to begin a paragraph not with a brand-new point but with something the reader will recall from the paragraph before. Justice Neil Gorsuch is especially good at this technique. In Kennedy v. Bremerton School District, for example, he begins the second paragraph below with a question he imagines the reader might have had at

the end of the first. And then in the third paragraph he uses the phrase "a different understanding" to sharpen the contrast he is about to draw:

> [T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. ... The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "'trump[ed]'" Mr. Kennedy's rights to religious exercise and free speech. …
>
> But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. ... A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail....
>
> The District arrived at a different understanding this way. It began with the premise.... [4]

5. Imagine speaking to your reader, adding logical cues, and even using second-person direct reference.

In an interview at Harvard Law School a few years ago, Justice Elena Kagan distinguished between conversational writing, which she strives for, and informal writing, which she says goes too far.[5]

If conversational writing is our beacon, it means more than just relaxing word choice. It also means simulating a dialogue with a reader that you must conjure up. It should remind your readers of a professor who keeps even restless students engaged and enthusiastic.

Unlike many who wax poetic about writing, Justice Kagan follows her advice. Here, in Becerra v. Empire Health Foundation, For Valley Hospital Medical Center, her style is so conversational that she even speaks to us directly:

> In any event, Empire is too quick to claim that those who (on its view) are tossed from the Medicare fraction for non-income-based reasons would still wind up in the Medicaid fraction. Recall here the role Empire says the phrase "(for such days)" plays. ... According to Empire's ultimate argument, that phrase is what converts the ordinary statutory meaning of "entitled to benefits" (i.e., qualifying for Medicare) to a special meaning (i.e., actually receiving payments). So where the phrase "(for such days)" does not appear, the usual meaning of "entitled" should govern. Now look again at the description of the Medicaid fraction. ... In that description, "for such days"....[6]

6. Use numbering to organize, explain, and deflate your opponent's arguments.

Many trial lawyers and appellate advocates try to make advocacy less a tennis match than an individual sport. Some believe that if you simply ignore your opponents, call them names, or refer to their points as a hot mess, you'll prevail by default.
That might work if you're lucky enough to have a slam dunk. The rest of the time, gain credibility and reinforce your message by helping the court understand your opponent's counterarguments and then shooting them down one by one.

Justice Brett Kavanaugh offers an excellent model in Oklahoma v. Castro-Huerta. See how he enumerates counterarguments, distills them, and then explains why they shouldn't carry the day:

> To overcome the text, Castro-Huerta offers several counterarguments. None is persuasive.
>
> First, Castro-Huerta advances what he describes as a textual argument. He contends that the text of the General Crimes Act makes Indian country the jurisdictional equivalent of a federal enclave. To begin, he points out that the Federal Government has exclusive jurisdiction to prosecute crimes committed in federal enclaves such as military bases and national parks. …
>
> Castro-Huerta's syllogism is wrong as a textual matter.[7]

7. Favor short, concise, direct, modern words.

On the pure wording front, people sometimes overhype three problems: legalese, passive voice, and long sentences. Sure, avoiding these matters. But superb style means more than just staying away from "hereto," rewriting "the lie was told by the plaintiff," and shunning 300-word sentences.

Take the passage below from Chief Justice John Roberts' opinion in Biden v. Texas. It has no legalese, passive voice, or long sentences.

Yet imagine if instead of beginning with "in short," he used "by way of summary."

> In short, we see no basis for the conclusion that section 1252(f)(1) concerns subject matter jurisdiction. It is true that section 1252(f)(1) uses the phrase "jurisdiction or authority" rather than simply the word "authority." But "[j]urisdiction ... is a word of many, too many meanings." ... And the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims. ... Section 1252(f)(1) no doubt deprives the lower

> courts of "jurisdiction" to grant classwide injunctive relief. ... But that limitation poses no obstacle to jurisdiction in this Court.[8]

Also, consider the effects of the following substitutions:

- "Utilizes" instead of "uses";
- "In lieu of" instead of "rather than";
- "Nevertheless" instead of "but" at the start of the third sentence;
- "Furthermore" instead of "and" at the start of the fourth sentence;
- "Whether or not" instead of "whether";
- "Regarding a particular class of claims" instead of "over a particular class of claims";
- "Doubtlessly" instead of "no doubt";
- "But such limitation" instead of "but that limitation."

Point made?

8. Deepen your advocacy by contextualizing public law, the common law, or both.

The example above from Justice Barrett shows the value of explaining why and how a result makes sense. But it can be just as effective to explain the basis for the governing law itself.

In Concepcion v. United States, for example, Justice Sonia Sotomayor highlights the links between a particular statute — the First Step Act — and a particular approach to sentencing that she seeks to invoke. With that context in mind, she's able to frame the act in a way that bolsters the broader arguments she's about to make:

> There is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her "as an individual." ... In line with this history, federal courts today generally "exercise a wide discretion in the sources and types of evidence used" to craft appropriate sentences. ... [W]hen a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing. … Congress enacted the First Step Act of 2018 against that backdrop.[9]

9. Highlight a concession and then explain confidently why it doesn't hurt your cause.

As the examples from Justice Breyer and Justice Kavanaugh suggest, strong advocates — and yes, judges are advocates — embrace concessions and counterarguments with aplomb. From that perspective, your arguments will emerge stronger if you concede a potential weakness in your analysis and then explain why it just doesn't matter.

In our final example, from New York State Rifle & Pistol Association Inc. v. Bruen, Justice Clarence Thomas offers a model of how to do so. He uses a two-step pattern I've seen from many top brief writers as well.

First, write a "to be sure" concession. Or if you can't stand that phrase, try "of course" or "it is true that."

Then add a "but" or "yet" sentence that pours water on the fire you just lit:

> To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." ... But reliance on history to inform the meaning of the constitutional text — especially text meant to codify a pre-existing right — is, in our view, more legitimate and more administrable than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[10]

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[1] https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf.

[2] https://www.supremecourt.gov/opinions/21pdf/21-234_2b8e.pdf.

[3] https://www.supremecourt.gov/opinions/21pdf/20-603_o758.pdf.

[4] https://www.supremecourt.gov/opinions/21pdf/21-418_i425.pdf.

[5] https://www.youtube.com/watch?v=uykBVlnWd9Q.

[6] https://www.supremecourt.gov/opinions/21pdf/20-1312_j42l.pdf.

[7] https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf.

[8] https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf.

[9] https://www.supremecourt.gov/opinions/21pdf/20-1650_3dq3.pdf.

[10] https://www.supremecourt.gov/opinions/21pdf/20-1650_3dq3.pdf.