

## Litigation

# Once More Into The Brief

By Robert D. "Bo" Links

**W**hat is part science, part art, and part sorcery? You've got it. Writing an effective brief that can win a case.

The practice of good brief writing need not be painful or difficult. The greats draw inspiration from the world around them, but you don't have to be great to be effective. All you have to do is follow a few rules I learned as an advocate and, more recently, as an arbitrator. This advice may not solve every problem, but it will help you become more effective when the time comes to brief your client's cause.

The foremost principle of writing briefs is right in front of you: be brief. If the powers that be wanted a legal encyclopedia or a James Michener novel, they would have asked for it.

To be sure, a significant case will probably require a significant effort. But to be effective, every advocate should follow the command that applies to every speaker: be brilliant, be brief, and be seated.

During my time as an advocate and as an arbitrator, I have seen a lot of different styles. I have, to be sure, seen the "novel" style — long, mysterious, guarding the punch line until the last chapter. Not effective. I have also seen the "passion play" — emotional, but not with much substance. Also not effective. And I have also seen the "instruction manual" — the nuts and bolts. It may be boring, but it can be effective with just a few touches.

I would suggest that lawyers forget about creating a particular style and work on fundamentals. Here are a few basics that always come into play.

- Present a Theme, Be Direct and Be Consistent.

Always remember that you must have a theme. It could be as simple as saying "this case is a piece of junk." Of course, if that is your theme, you would express it more eloquently. You might say: "The case at bar does not merit the court's attention. It should be dismissed with prejudice." The point is have a theme and pitch your case around it. And make sure you state your theme up front, so it hits the reader as soon as possible.

- State the Issue — And Do It Your Way.

Every case presents an issue that must be decided. The best starting point for a writer is to state the issue your way. If you think of the issue as a question, an old saw will ring in your ears: The answer you get depends on the question you ask. Applying this bit of homespun wisdom to writing briefs, we distill a cardinal principle: always state the question your way. If you do so, you will maximize your chances the judge or arbitrator will give you the answer you want.

- Short Words, Short Sentences.

Use simple declarative sentences. The fact is, they work the best. They are easily understood and are usually the most powerful way to make a point. Long sentences with subordinate clauses and ten-dollar words may impress a high school English teacher, but not judges or arbitrators.

Think Hemingway. He won the Nobel Prize for Literature and his writing was straightforward and direct. Yours should be too. You do not need to be a Nobel laureate to tell the court what you want and why you want it. "Plaintiff and defendant had a contract for strawberries. Defendant did not deliver as promised. As a result, plaintiff incurred \$350,000 of expenses to cover and seeks reimbursement." With apologies to Emeril Lagasse, "Bam!" We know in a heartbeat what the case is about. We know what happened and we know what you want. Details to follow.

- Citation Format by the Book.

You will inevitably be citing cases and other legal authorities. Make sure you follow either the California Style Manual or the Bluebook, as required by Rule 3.1113(g) of the California Rules of Court. By adhering to the proper format, your brief will



look right and convey to the decision maker that you are a serious lawyer who knows the craft of legal writing.

- Quotations: Use 'em if You've Got 'em.

We all have biases, and one of mine favors quotations from cases. If you have a succinct passage from a governing case, don't just cite to it. Quote from it. Let the court's words — not yours — guide the legal analysis. Bear in mind that the key here is the word "succinct." Long quotations tend to lose the reader, while short ones, especially if they are to the point you are making, can be extremely effective.

- Brush Strokes by the Artist.

Now that we've identified several fundamentals, let's (with another reference to Lagasse) "kick it up a notch." What can you do to lift your brief from the ordinary to the great? One technique I use is to draw my theme from a memorable quotation or legal reference. It's one thing to quote a case,

but it is quite another to include in your brief — especially up front and at the conclusion — a timeless quote from a respected jurist.

For example, a few years ago in a case involving a governmental entity that had shortchanged my client, I opened my argument with a reference to Justice Oliver Wendell Holmes. My brief began, "Eighty-three years ago, Justice Holmes wrote that 'men must turn square corners when they deal with the Government.'" *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141 (1920).

I did not stop there, for down through the years, the courts have added an important gloss to what Holmes said in the *Rock Island* case. My opening paragraph continued: "To that principle, there has been appended an appropriate corollary, for '[it] is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.'" *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (Jackson, J., dissenting). Thus, the United States Supreme Court has correctly observed that "[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people ...'" *Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51 (1984).

**M**y next paragraph consisted of one simple, powerful sentence. It rang loud and clear: "This case tests the power of those words."

With this opening, I was off and running and the result was successful (in arbitration, in the law & motion department, and eventually in the Court of Appeal when I had to respond to a constitutional challenge; see *Lapidus v. City of Wasco*, 114 Cal.App.4th 1361 (2004) if you want to know how the case turned out).

At oral argument in the Court of Appeal, I did not have to say much. I had the luxury of watching the justices pepper my opponent with difficult questions. Clearly, the court understood and agreed with my theme.

Where do you get material like this? I recalled the Holmes quotation from law school, more than 30 years ago. But I am not always so lucky. When my memory needs a little help, I turn to a trusted source book. One of my personal favorites is a dictionary of legal quotations (see, e.g.,

Shapiro, *The Oxford Dictionary of American Legal Quotations* (Oxford University Press (1993)).

If you want to make your legal writing more interesting, you should locate one of these compendiums and keep it on your bookshelf within easy reach. It will provide a wonderful gateway for legal argument. Sometimes, just by scanning notable quotations, I get a new slant on an old issue. Even if I don't use the quote, I often find myself headed in the right direction.

Here are but a few examples that I pulled out of my quotation dictionary in the space of 30 minutes.

For a case involving procedural issues, how about using something like these gems:

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 US 332 (1943) (Frankfurter, J.).

"Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123 (1951) (Douglas, J.).

For a case where you must argue for a new rule of constitutional law:

"[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers v. United States*, 233 US 604 (Holmes, J.).

**H**ow about the opposite case, where you must argue against an expansive interpretation of Constitutional law and in favor of a more literal approach:

"The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. New York ex rel O'Keefe*, 306 US 466 (Frankfurter, J., concurring).

On holding government accountable:

"Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 US 99 (Black, J., dissenting).

Here is another one of my favorites, which comes in handy in statutory interpretation cases:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 US 418 (1918) (Holmes, J.).

Although I do not practice criminal law, I think the following quotation would be an excellent opening to a brief dealing with prosecutorial misconduct:

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." *Canons of Professional Ethics*, Canon 5 (1908).

Imagine yourself opening or closing a brief with words like these! Not only do these quotations make brief-writing fun, but they also make for gripping, successful argument. With nuggets such as these, you have the tools to capture your audience, hold their attention, and if you've got a case that fits the quote, you will be a good piece of the way toward victory.

For an advocate in the arena of combat, it doesn't get any better than that.

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