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Advice about written advocacy from the Washington Court of Appeals

Douglas E. Abrams

In 1940, veteran U.S. Supreme Court advocate John W. Davis delivered his essay, “The Argument of an Appeal.”¹

The essay primarily explored oral argument, but also weighed in on the art of brief writing.² Davis knew his subject well. The U.S. solicitor general during Woodrow Wilson’s presidency, he briefed and argued more appeals before the Supreme Court than any other lawyer in the 20th century (141 in total).³

The esteemed Davis opened his essay with a light touch and a creative analogy. The most constructive advice about effective appellate advocacy, he wrote, would come not from an advocate, but from a judge, who is “the target and the trier of the argument.”⁴

[S]upposing fishes had the gift of speech,” Davis reasoned, “who would listen to a fisherman’s weary discourse on fly casting . . . and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach?”⁵ An appellate advocate, Davis analogized, “is angling . . . for the judicial mind.”⁶

Advocacy’s “targets” and “triers”

Davis stated a truism: In opinions, law journal commentary, continuing legal education lectures, and similar venues, judges – the “targets” and “triers” who read and hear advocacy – contribute valuable perspectives about what persuades and what does not.

This article concerns “*Briefly Speaking: Brief Writing—Best Practices*,” a collection of sound advice that appears on the website of the Washington Court of Appeals, the state’s intermediate appellate court.⁷ The court’s judges explore strategies of appellate practice, but that is not all. In this article, I select five of the court’s insights about effective written expression, insights that can enhance the quality not only of brief writing, but also of much other legal writing. The five entries below are quotes by the court of appeals, and I add supportive commentary.

1. “*BE BRIEF. There is no correlation between length and likelihood of success. Typically, the shorter briefs that get right to the point are better organized and more likely to inspire careful reading.*”⁸

“...strive to finish writing before the audience finishes reading.”

At the core of effective brief writing is the advocate’s judgment call about the virtues of brevity and the potentially harmful effects of overwriting.

On the one hand, consider the wisdom that opera singer Dorothy Sarnoff prescribed years ago for success on stage: “Make sure you have finished speaking before your audience has finished listening.”⁹ An advocate should similarly strive to finish writing before the audience finishes reading.

Brevity, the core of Sarnoff’s wisdom, remains a prudent advocate’s lodestar because undue length risks camouflaging the brief’s central points amid verbal underbrush. This underbrush may impose factual or legal haze that would enable opponents to distinguish or deflect central points made in the brief.

Not only that, but as judicial dockets have swelled in recent decades, judges managing heavy caseloads have reportedly grown increasingly impatient with overwritten briefs. “I have yet to put down a brief,” reports U.S. Supreme Court Chief Justice John G. Roberts Jr., “and say, ‘I wish that had been longer.’ . . . Almost every brief I’ve read could be shorter.”¹⁰

The Washington Court of Appeals quotes these cautionary words to advocates from federal D.C. Circuit Judge Patricia M. Wald: “Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case.”¹¹

On the other hand, brevity’s virtues mark only half of the advocate’s expressive calculus because unwarranted brevity may disserve the client’s interests. In the exercise of professional judgment, the advocate may conclude that a case’s factual or legal complexity requires a longer rather than a shorter writing. Each case has its own distinctive character, and impulses that warrant brevity must co-exist with the ultimate goal of effective presentation.

In the final analysis, the advocate’s soundest goal is a healthy balance – a writing (a) that is as brief as possible, consistent the court’s maximum-page rule but (b) that also fulfills the professional obligation to the client and the court to effectively recite the facts, law, and argument.¹²

2. “*EDIT. Feel free to throw away your first drafts. . .*”¹³

Editing begins with the writer. “There is no such thing as good writing. There is only good rewriting,” said U.S. Supreme Court Justice Louis D. Brandeis, who reportedly sometimes rewrote his draft opinions for substance or style a dozen or more times before the final product satisfied him.¹⁴ Self-editing works for judges, and it also works for the lawyers who argue before them.

Self-editing is ideally only the beginning of brief writing’s editorial process. Pride of authorship energizes serious writers, but prudent brief writers also remain receptive to careful editing of early drafts, when time permits, by a colleague or other third person who can offer fresh, candid review and critique. Brief writing can be a team effort, with third-person editors as the writer’s valued teammates.

For the client’s sake, the advocate’s true pride of authorship should reside in the final submission to the court, and not in preliminary drafts that are destined for revision or discard.

3. “*PROOFREAD.*”¹⁵

Lawyers prevail on the merits in some cases but not in others. Win or lose, however, a track record of competent brief writing encourages respect among bench and bar for the lawyer’s work product. A solid professional reputation is difficult to earn and difficult to maintain, but easy to lose.

Judges may remain tolerant of a brief’s occasional typo or similar failing,¹⁶ perhaps because perfection is elusive and judges are typically former practitioners who recall that time pressures, tight deadlines, and financial constraints can define a lawyer’s practice. As lawyers strive to get everything right, an occasional miscue may evade attention and remedy.

At some point, however, a brief riddled with misspellings, grammatical errors, or similar shortcomings may lead judicial readers to suspect that the writer might also be less than careful about substantive or procedural recitation and argument.¹⁷

4. “*STAY WELL UNDER THE PAGE LIMIT. Do not use footnotes and other devices to squeeze more words onto each page.*”¹⁸

This entry is related to entry one above. Facing swelling dockets and increasingly complex litigation in recent years, courts have mandated page limits for briefs and other written submissions. Page limits are maximums that an advocate must heed (unless, in the unusual case, the court grants leave to submit a filing that exceeds the limit). The advocate is under no compulsion to approach or meet the maximum, however, and may “finish early.” Balanced brevity, grounded in an economy of words, remains the advocate’s ambition.

Judges spend their judicial careers reading briefs and other filings, and they are unlikely to be fooled by an advocate’s effort to evade maximum-page limits by larding the submission with excessive footnotes in a smaller font. Rules prescribing generally applicable maximum-page limits reflect the court’s good faith effort, in the interests of justice, to enable advocates to fully present the facts, law, and argument. Like other generally applicable court rules, page limits drawn from experience work more often than they do not.

Self-discipline remains a legal writer’s ally. If an advocate feels especially constrained by the maximum-page limit in an exceptional case, the most ethical approach is not footnote abuse, but instead disciplined editing until the submission remains within bounds. If an advocate forecasts that disciplined editing will not bring the brief within the limit, the advocate may consider moving for leave to file a brief whose length exceeds the rules’ maximum.

5. “*Include some type of short summary or introduction.*”¹⁹

Judges are generalists and not specialists.²⁰ They acknowledge that the dueling advocates may initially be more familiar with the case’s facts and law than the court is.²¹ The advocates may have lived with the case or their clients’ circumstances before the court receives the papers, and the issues may be within the advocates’ specialty and experience.

“Frontloading” – opening a brief, section, or other lengthy presentation with a short summary and overview of what follows – helps remedy any initial imbalance between advocates and the court. Space devoted to frontloading counts in calculating compliance with maximum-page limits; however, efficient frontloading is space well spent because the resulting roadmap orients the court and enables it to focus more fruitfully on the dispositive procedural and substantive issues.²²

After all these years, this is my final “Writing It Right” article. I remain grateful for the encouragement and support I have received from The Missouri Bar and from individual members. Thank you very much. -D.E.A.



Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 50,000 times worldwide (in 153 countries). His latest book is Effective Legal Writing: A Guide for Students and Practitioners (West Academic 2d ed. 2021).

Endnotes

- 1 96 A.B.A.J. 895 (1940), reprinted in John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRACTICE & PROCESS 745 (2001).
- 2 3 J. APP. PRACTICE & PROCESS, *supra* note 2 at 746-47.
- 3 *Listening to John W. Davis*, 3 J. APP. PRACTICE & PROCESS 743, 744 (2001).
- 4 3 J. APP. PRACTICE & PROCESS, *supra* note 2 at 745.
- 5 *Id.* at 746-47.
- 6 *Id.* at 745.
- 7 Washington Court of Appeals, Div. 1, CLE, “*Briefly Speaking*”: *Brief Writing – Best Practices*, https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=briefWriting; https://www.courts.wa.gov/appellate_trial_courts/ (Click on link in right-hand column).
- 8 *Id.*
- 9 Western Mail (Cardiff, Wales), May 20, 2008, at 17 (quoting Sarnoff). See also Douglas E. Abrams, *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND*

PRACTITIONERS 46 (2d ed. 2021) (same).

10 Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 *Scribes J. Legal Writing* 35 (2010); see also, e.g., Bryan A. Garner, *Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer, id.* at 167 (2010) (most briefs are “[t]oo long. Don’t try to put in everything”).

11 Patricia M. Wald, *19 Tips From 19 Years on the Appellate Bench*, 1 *J. App. PRACTICE & PROCESS* 10 (1999).

12 Douglas E. Abrams, *supra* note 10 at 50.

13 Washington Court of Appeals, *supra* note 8.

14 Eugene C. Gerhart, *Quote It II: A Dictionary of Memorable Legal Quotations* 462 (1988) (quoting Justice Brandeis); *Pride of Authorship*, 37 *A.B.A. J.* 209 (1951) (editorial).

15 Washington State Court of Appeals, *supra* note 8.

16 See, e.g., *Gaskins v. Baltimore City Public Schools*, 2016 WL 192535 at * 3 (D. Md. Jan. 15, 2016), *aff’d sub nom. Gaskins v. Abiodun*, 649 F. App’x 307 (4th Cir. 2016) (“While an occasional typo is perhaps inevitable and certainly forgivable, an abundance of errors tends to discredit the substance of a brief.”).

17 *Gaskins v. Baltimore City Public Schools*, *supra* note 17 at * 3.

18 Washington Court of Appeals, *supra* note 8.

19 *Id.*

20 *Indiana Lumbermens Mut. Ins. Co v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008).

21 Douglas E. Abrams, *supra* note 10 at 17.

22 *Id.* at 16-17.

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he award of damages to any aggrieved party.”).

54 See, e.g., MO. REV. STAT. §351.855(3)-(4) (“[T]he court ... may order ... (3) [t]he removal from office of any officer or director; [or] (4) [t]he appointment of any individual as a director or officer.”).

55 See, e.g., MO. REV. STAT. §351.855(1) (“[T]he court ... may order ... (1) [t]he performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers or of any other party to the proceeding.”).

56 See, e.g., *Robinson*, 538 S.W.2d at 182 (holding that a buyout is a proper remedy for oppression).

57 See, e.g., *Fix*, 538 S.W.2d at 357 n.3(b).

58 See, e.g., *id.* at 357 n.3(c).

59 See, e.g., *id.* at 357 n.3(e).

60 See, e.g., *id.* at 357 n.3(g); see also *Kirtz*, 463 S.W.2d at 548.

61 See, e.g., *id.* at 357 n.3(i).

62 See, e.g., MO. REV. STAT. § 351.855(2) (“[T]he court ... may order ... (2) [t]he cancellation or alteration of any provision in the corporation’s articles of incorporation or bylaws.”).

63 *Robinson*, 538 S.W.2d at 182, 183–84.

64 *Id.* at 184.

65 306 S.W.3d 138 (Mo. App. S.D. 2010).

66 *Waters*, 306 S.W.3d at 147 (citation omitted).

67 *Id.* at 147 (citation omitted).

68 *Kirtz*, 463 S.W.2d at 545.

69 *Id.* at 545–46.

70 *Id.* at 545.

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3 *Babb v. Bartlett*, 638 S.W.3d 97, 104 (Mo. App. E.D. 2021) (quoting *Consol. Elec. & Mechs., Inc. v. Schuerman*, 185 S.W.3d 773, 775 (Mo. App. E.D. 2006)).

4 *State ex. Rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 493 (Mo. banc 2019) (quoting *State ex. rel. Boyer Corp. v. Moriarty*, 536 S.W.3d 227, 230–31 (Mo. banc 2017)).

5 *State ex. rel. Key Ins. Co. v. Roldan*, 587 S.W.3d 638, 641 (Mo. banc 2019) (quoting *Cedar Crest Apartments, LLC*, 577 S.W.3d at 496 n.5).

6 *State ex. rel. William Rammi Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 139 (Mo. banc 1987) (citing *State ex. rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo. banc 1970)).

7 *Roldan*, 587 S.W.3d at 643; *Hartenbach*, 742 S.W.2d at 139.

8 *Roldan*, 587 S.W.3d at 643; *Babb*, 638 S.W.3d at 104.

9 *Cook v. Parkland Health Center*, No ED 111044 (Mo. App. E.D. 2023).

10 *Devitre v. Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 331–32 (Mo. banc 2011).

11 *Id.*

12 *Id.*

13 See *Land Clearance for Redevelopment Auth. Of City of St. Louis v. Zitzko*, 386 S.W.2d 69, 78 (Mo. banc 1964).

14 *Id.*

15 See *Zitzko*, 386 S.W.2d at 69.

16 *Id.*

17 *Mayes v. St. Luke’s Hosp. of Kansas City*, 430 S.W.3d at 260, 271–72 (Mo. banc 2014).

18 *Collier v. Steinbach*, No ED 110937 (Mo. App. E.D. 2023).

19 *Henderson v. Fields*, 68 S.W.3d 455, 473 (Mo. App. W.D. 2001).

20 *Maloney v. Benchmark Ins. Co.*, 628 S.W.3d 667, 680 (Mo. App. W.D. 2021).

21 See *Maloney*, 628 S.W.3d at 681.

22 *Glasgow v. Cole*, 168 S.W.3d 511, 515 (Mo. App. E.D. 2005).

23 *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 191 (Mo. banc 2014).

24 *Ferbet v. Hidden Valley Golf and Ski, Inc.*, 618 S.W.3d 596, 606 (Mo. App. E.D. 2020).

25 *Ferbet*, 618 S.W.3d at 606 (quoting *Coomer*, 437 S.W.3d at 197).

26 *Griffin v. The Haunted Hotel, Inc.*, 242 Cal App. 4th 490 (2015).

27 *Id.* at 501.