Drafting Skills: Tips for More Effective & Efficient Writing

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Drafting Skills: Tips For More Efficient & Effective Writing

Or, in the words of Elmore Leonard, "My most important piece of advice to all you would-be writers: when you write, try to leave out all the parts readers skip."

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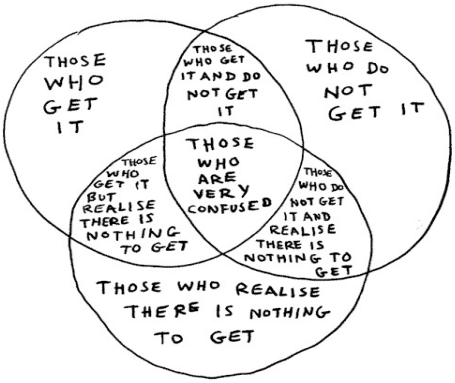
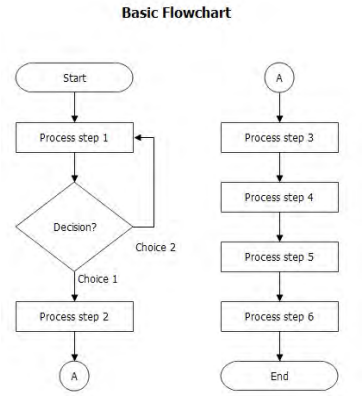
A Toolkit of Techniques: 20 Suggested Tips

"To the man who has only a hammer in the toolkit, every problem looks like a nail." *Abraham Maslow (1908-1970)*

Getting Started

1. **Try outlining in untraditional form**. Try a Venn diagram. Try a flow chart. Try a whirlybird or a pinwheel. Draw pictures. Scribble. Draw a circle, write down some concepts inside it and draw arrows from one to another. Then try a traditional outline.





2. **Match the structure and design to the substance**. Make sure both the structure and substance are analytically sound, and that the design of the work fits both. Break the material into issues or sections that are logically distinct. Use a pattern, reveal the pattern to the reader, and let the reader fit the content into the pattern.

Don't, for example, just write up your research the way you conducted it. You probably tried some dead ends and did some backtracking. Some of those arguments may have steered you in a new direction, but the court doesn't necessarily need to know that. For example, just because the historical background of one issue led you to take a new approach on a related issue, that background may or may not be relevant to your analysis and your argument. The court wants to read your final analysis, not how you got there.

Drafting

3. **Present the issue– and the requested action– at the outset.** Judges are busy– we're busy– and no rational reason exists to "hide" your requested action/relief sought inyour document's bowels. Instead, move the issue statement to the beginning of your document.

(Before)

DEFENDANT'S SUPPLEMENTAL MOTION TO SUPPRESS EVIDENCE AND MEMORANDUM, AND REQUEST FOR EVIDENTIARY HEARING

Pursuant to Rule 12b, Defendant...respectfully files this her Supplemental Motion to Suppress Evidence and Memorandum, and Request for Evidentiary Hearing, and would respectfully show that:

I. Late-Arriving "Discovery" has given rise to Additional Fourth Amendment Challenges

Defendant asks this Court to suppress the following evidence which was discovered by the Government as a result of and through the exploitation of an illegal search, seizure, and arrest:

(1) Any written or recorded statements made by the Defendant;

(2) The substance of any oral statements made by the Defendant before or after his arrest in response to interrogation by a person then known to be a Government agent which the Government intends to offer in evidence at trial; and,

(3) Any other evidence, tangible or testimonial, discovered as a result of and through the (exploitation of the illegal search and seizure, including any evidence derived indirectly through exploitation of the fruits of the primary illegality.

In addition to those grounds for suppression set out in her Initial Motion, this additional Motion presents three additional independent grounds for suppression: (1) the warrantless, and thus presumptively unlawful, search of her car was unreasonable as a matter of law; (2) the warrantless search did not fall within any of the recognized exceptions to the warrant requirement; and, (3) the third-party consent to search the rental car was legally ineffective inasmuch as, at the time of the search, the bailor (Enterprise Car Rental Corp) did not enjoy a greater access or control of the car than did (Defendant).

(After)

DEFENDANT'S SUPPLEMENTAL MOTION TO SUPPRESS EVIDENCE AND MEMORANDUM, AND REQUEST FOR EVIDENTIARY HEARING

Late-Arriving "Discovery" has given rise to Additional Fourth Amendment Challenges

Because the Government has just now provided additional discovery, (Defendant) wishes to supplement her initial suppression motion on three additional grounds: (1) the warrantless search of her car was unreasonable; (2) the warrantless search did not fall within any of the recognized exceptions to the warrant requirement; and, (3) the third-party consent to search the rental car was legally ineffective inasmuch as, at the time of the search, the bailor (Enterprise Car Rental Corp) did not enjoy a greater access or control of the car than did (Defendant).

4. **Avoid lengthy sentences– aim for about a 20-word sentence length.** "Twenty" is not a magic number but it serves as a handy rule of thumb. As you increase sentence length, you also increase the odds of losing your reader. If you can't convey your thought within 20-or-so words, you probably require a second sentence in which to do so. (21 words.) Also try to avoid repetitive sentences with the same structure; in particular with two clauses separated by a comma.

5. **End your sentence with your strongest point.** In other words, end your sentences with your main idea.

Example No. 1:

> Carter's objections do not correspond to the equivocal statements at issue in *Sutton*.
>
> or…
>
> Unlike the statements at issue in *Sutton*, Carter's objections were unequivocal.

Example No. 2: From a 2007 petition for certiorari:

> "This case presents an issue of urgent practical importance– whether Rule 32(h)'s notice requirement survives *Booker*."
>
> or…
>
> "Whether Rule 32(h)'s notice requirement survives *Booker* is an issue of urgent practical importance well presented by this case."

(Because the main idea was that *this case* was a good vehicle by which to undertake review, the latter example better expressed that point.)

6. **Chose nouns and verbs over adjectives and adverbs.** "*Most adjectives are … unnecessary. Like adverbs, they are sprinkled into sentences by writers who don't stop to think that the concept is already in the noun.*"[12] Strong nouns require no adjectives; strong verbs require no adverbs. When editing, try to strengthen your choice of nouns and verbs.

Examples

Adjective and Noun	**Better Noun**
famous people	celebrities
famous places	landmarks
rude person	boor
Adverb and Verb	**Better Verb**
cried loudly	bawled, wailed
quickly went	rushed, ran
said loudly	yelled, screamed

(*See* Bryan Garner, *The Winning Brief* 194 (1999)).

7. **Minimize the use of "to be" as a verb**. Just because the *be*-verb is English's most-commonly used verb doesn't mean it needs be *your* most-commonly written verb. *Be*-verbs are "weak"– they connote no action. Choose "action" verbs, instead. These verbs suggest "motion" and "activity" and better engage the reader.

8. **Use the active voice, and put statements in positive form**. Minimize the use of not."

Example: The issue argued by defendant in his motion about his arrest was not addressed by the government.

or…

The government failed to respond to defendant's argument that the court should exclude from the trial any evidence of his recent arrest.

9. **Minimize capitalization, quotation marks, italics, underlines, parentheses, hyphens, and even footnotes**. The text is more readable without unnecessary emphasis, and without the interruption of reading the footnote. Check the Bluebook for rules. Other

[12]Ben Yagoda, *The Adjective -- So Ludic, So Minatory, So Twee*, The Chronicle Review, Feb. 20, 2004, found at http://chronicle.com/free/v50/i24/24b01301.htm.

than the court you are in, the Supreme Court, and the formal, full name of a court, you don't need to capitalize "court," nor do you need to capitalize the government. On the other hand, hyphenate compound adjectives, such as a "thirty-month sentence."

10. **Use parallel construction for parallel ideas**. Parallelism helps satisfy the reader's innate craving for order and rhythm and helps relate ideas to each other.

Example:

The government's arguments fail to demonstrate a reasonable basis for distinguishing between the nature of evidence necessary to prove the nature of a conviction and the type of evidence required to demonstrate the fact of the conviction.

or…

The government fails to demonstrate a reasonable basis for distinguishing between the *type of evidence* required to prove the nature of a conviction and the *type of evidence* required to prove the fact of the conviction.

11. **Omit needless language.** "There's no sentence that's too short in the eyes of God."[13] If a word doesn't add anything, delete it.

Example: There are many examples of evidence relevant to the sentence that a probation officer might consider, but of which the defendant would not necessarily have personal knowledge.

or…

A probation officer will often rely on evidence of which the defendant has no personal knowledge.

[13]Attributed to noted writer and editor William Zinsser.

12. **Employ definite, concrete language.** Use specific terms where they improve the idea you are trying to convey. Vague terms have much less impact than specific ones.

Example:

> Mr. Ford will not be able to avoid places where children are located without staying at home and avoiding public places. Restricting his movement this way would make it difficult for him to lead a normal life.

or...

> Mr. Ford will not be able to avoid places where children are located without avoiding locations such as churches, parties, family reunions, national parks, stores, and the beach. This broad restriction would prevent him from social activities such as volunteering, joining neighborhood groups, visiting friends or extended family, or taking a vacation.

Example:

> Many courts have addressed occasional challenges to the statute's constitutionality.

or...

> The Third and Fourth Circuits have addressed three challenges to the statute's constitutionality.

13. **Save syllables.** Try for one-syllable words. If they're unavailable, aim for two-syllable words. The point here is simple: strive for clarity *and brevity*.

14. **Bridging: paragraph-to-paragraph**. Paragraphs flow best when they connect or transition to one another. To create a bridge between paragraphs, using the following devices:

- Pronouns (*he, she, it*), because they point to something just above.
- Pointing words (*this, that, these, those*) because they likewise point to something immediately preceding.
- Echo links, which are words that repeat an idea in summary language.
- Explicit connectives (*further, moreover, in addition to, likewise, in sum,* etc.), which are obvious transitional words.[14]

Example: (an "Echo Link")

"Judicial Estoppel prevents parties from assuming inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits."...The central purpose of **judicial estoppel** is to preserve the integrity of the judicial system by preventing the parties from playing fast and loose with the courts."

At least one important boundary limits **this doctrine** in a way that is dispositive here. Simply put, a party may not assert judicial estoppel if he had no involvement in the earlier matter....

(Here, the phrase "this doctrine" echoes the phrase "judicial estoppel.")

[14]Bryan A. Garner, *The Winning Brief* 98 (1999).

15. **Use sign posts (Or "headers") to keep the reader focused.** You know what happened below but the reader (usually) doesn't. Use sign posts to break up your factual narrative and your various legal arguments.

Examples:

C. <u>Statement of Facts</u>

Genesis: An Online Chat Between an Undercover Officer and (defendant).

On July 3, 2007, Detective McLaughlin of the Keene Police Department in Keene, New Hampshire, was working undercover on the Internet posing as a 14-year-old boy named Brad Dean. (PSR ¶13.) While working in this undercover capacity, McLaughlin entered a website called "Triggers Dreamworld" and was contacted by ….. using the Yahoo profile… .

… *(As the Next Sign Post Implies, Things Went Poorly for the Defendant.)*

A Request for Downward Variance & Legal Challenge to U.S.S.G. § 2G2.2

Before sentencing, *(defendant)* submitted a comprehensive Request for Downward Variance, in which he challenged § 2G2.2's conformity with the Section 3553(a) sentencing factors. (*See* Defendant's Sentencing Memorandum) His memorandum traced the tortured history of this guideline and relied upon case law and detailed law commentaries to explain the flaw with USSG § 2G2.2; namely, that almost all defendants receive an advisory sentence which reaches or exceeds the statutory maximum sentence, regardless of the individual's acceptance of responsibility, lack of criminal history points, and mitigating personal history and characteristics.

16. **Ditch legalese (the Latin stuff and the English "therein, "heretofore," etc.)** There are so many reasons why it's counter-productive to use Latin and English "legalisms." For one thing, jurists don't speak Latin. For another, neither do lawyers (or anyone else). Pilfering a "dead language" is a practice more appropriate for The History Channel. In short, using these dead terms tends to work against your efforts elsewhere to bring your writing alive.

Ditto for the use of English "legal jargon." We don't use those terms in our spoken language so why use them in your written language? Leave the "Wherefore's" to Shakespeare.

17. **Drop footnotes to citations.** The authors disagree on this one. As a proponent, I (Jerry) argue that in-text citations can– and usually do– interrupt the reader's progression. (In fact, I'd bet that, if pressed on the subject, most readers would admit to "blowing off" or "skipping over" the citations.) So I suggest that if you want to mention a specific case, refer to the style and, perhaps, the issuing court. But consider placing the citation itself in a footnote. And whatever you do, purge the text of string-cites.

I realize that some people may be uncomfortable following this suggestion. Why not try it out for a few weeks or months and see if it grows on you? I am quietly confident the technique will grow on your readers.

Example:

> In *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d. 203 (2007), *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d. 445 (2007), and *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558, 169 L.Ed.2d. 481 (2007), the Supreme Court fleshed out the contours of sentencing following its decision in *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621 (2005). In *United States v. Jones*, 999 F.3d 555 (14th Cir. 2009), the circuit court noted this fact.
>
> or…
>
> In its *Rita*,[1] *Gall*,[2] and *Kimbrough*[3] decisions, the Supreme Court fleshed out the contours of post-*Booker*[4] sentencing. In *United States v. Jones*,[5] the Fourteenth Circuit noted his fact.

Beverly, on the other hand, strongly opposes putting citations in footnotes as a routine practice (in court documents, as opposed to articles). She thinks judges and lawyers who litigate are used to reading citations in the text, including long string cites. Dropping citations into footnotes makes the reader look down to find the court and year, which breaks up the flow of reading the brief. Having to do so multiple times, particularly while writing a response to a brief or motion, is frustrating. Beverly advocates following the Bluebook convention on briefs, which is to keep citations in the text.

18. **When using a lengthy quotation, provide an informative lead-in.** If you use a lengthy quotation, make an assertion first and then the quotation becomes the support.[15] The reader will use the quotation to verify your assertion:

Example:

(Before)

The sentence should not be affirmed because a reasonable district court *could have* reasonably imposed the same sentence on a different rationale. As the Third Circuit explained:

> It will be a rare case when it is clear that no acceptable reasoning can justify a given sentence. Yet even rightly admired judges may make a decision which we believe is unsupportable, and we are obligated to point that out when it occurs. In general, however, when we are reviewing a sentence and find ourselves unable to see how the reasons articulated lead to the punishment imposed, we will be focused on trying to obtain a better understanding of the district court's reasoning.

(After)

The sentence should not be affirmed because a reasonable district court *could have* reasonably imposed the same sentence on a different rationale – As the Third Circuit explained, the rationale ***actually provided by the district court*** must be sufficient to explain the sentence:

> It will be a rare case when it is clear that no acceptable reasoning can justify a given sentence. Yet even rightly admired judges may make a decision which we believe is unsupportable, and we are obligated to point that out when it occurs. In general, however, when we are reviewing a sentence and find ourselves unable to see how the reasons articulated lead to the punishment imposed, we will be focused on trying to obtain a better understanding of the district court's reasoning.

[15]Bryan A. Garner, *The Winning Brief* 299 (1999).

Editing

19. **If in doubt, throw it out**. If you write early, and write to help you think, you must be willing to jettison large chunks of your work as you proceed to think it through. Just because you wrote it down, doesn't mean its golden.

20. **Never write a sentence you can't speak aloud. So read aloud. (To other people).** Write how you would speak. And prove that you're doing just that by reading your drafts out loud to other people. Their immediate reaction(s) will identify the awkward (or the incomprehensible). In other words, strive for a conversational tone. This may seem like common sense but we all write sentences which, if read aloud, sound preposterous (or worse).

SUMMARY

Not only do we have different backgrounds and writing experiences, we think and work differently. Some people procrastinate, and function better with a looming deadline; others start right away, and prefer not to risk panicking at the end. Some write to think, some think before writing. Even if you don't find these ideas useful, its worth it to try different techniques because the process of deciding what you don't want to do often improves your writing.

In closing, some general reminders:

- Thinking takes time, and writing well takes even more time.
- Weak arguments drag you down.
- Be persuasive, not argumentative
- Provide a compelling train of thought.
- Remember the tone, the rhythm, the flow.
- Respect.
- And try to imagine yourself as the reader.