

——May 1999

Some Notes on Legal Writing, Brief Writing and Document Drafting

© 1999 Marc S. Mayerson

*Of all those arts in which the wise excel,
Nature's chief masterpiece is writing well.*

— Sheffield, Duke of Buckinghamshire
Essay on Poetry

I can't teach you how to write, only how to write better. Writing is hard work, and you are the person that must do that work. But I can show you concrete steps and specific moves that you can and most definitely should apply in all your legal writing. If you review and edit your written work by applying the points that I outline here, the quality and persuasiveness of your written product will improve.

Part 1: Writing and Brief Writing in Particular

1. Boil down and tighten your prose.

- Edit and tighten each sentence —
 - make sure parallels are parallel
 - look for prepositional phrases: change “one of the reasons” to “one reason”
 - think about every word: should this word be included? moved? Can this word and two others be combined by using a different word? You want to crunch your stuff down.
 - Put verbs and their objects in proximity; put modifiers adjacent to what they modify.

- This is very important and takes patience and thoroughness. Every sentence should be examined this way.

2. Put the stress at the end of the sentence.

- Reorder your sentence so that the “point” is at the end of the sentence – not in the middle and preferably the words just before the period.
- Move modifiers and qualifiers from the end of the sentence
 - change “the sentence is death in these circumstances” to “in these circumstances the sentence is death”

3. Strengthen and vivify your prose

- Look for “is” constructions to see whether the subject and object of the sentence can be connected with a better, more active, usually more descriptive verb. Two long phrases held together in the middle by an “is” is an unwieldy and weak sentence structure. Look for the intro “There is” too.
- This has an amazing effect on the quality of your writing.
- You have a vocabulary, use it.
- This does not mean using your sesquipedalians (necessarily).
- Spending time thinking about the creative use of language and searching for the right words is very important.
- One of my favorite examples from a brief I did was in the Delaware Supreme Court where we said “the carriers lard their brief with strong rhetoric.”

- Depending on your audience, I think you can use fancy words – if you're not doing it to fancy up your language. Sometimes English may have already provided a ready-made word that expresses precisely your intended meaning, in which case it may be ok to use it. I think there is little doubt that you should err on the side of not using “big words.”
 - But well-chosen words are always desired.
- Put actors, people, legal-operands in your sentences.
 - Use names, not plaintiff, defendant
 - Cast legal rules in terms of how legal actors act
 - This is very difficult, and it is not usually a “correction” to a sentence but results in the original sentence being entirely rewritten.
 - Instead of “murder is the unlawful taking of a human life” try “murder occurs when a person unlawfully takes another's life”
 - This is another way of saying to use verbs, not nouns.

4. Pacing is important.

- Think about the length of your sentences.
 - Generally, short is better. But “choppy” is to be dreaded.
 - Sentences (and Paragraphs) should be only of reasonable length.
 - You can achieve an effect by creating a certain rhythm in a paragraph and then stopping it with an abrupt short declarative sentence.

- Think about using short paragraphs (one or two sentences) in this same manner.

5. Put old information before new information

- Look at how your sentence is ordered. If you are explaining something to the reader, use information that is already familiar to the reader before introducing new information.

- If you've been telling your reader about events at a hotel,

Change “the issue is one of corruption, given that payment took place at the hotel”

to “Because payment took place at the hotel, the issue is one of corruption.”

- This also works better because it puts the stress at the end of the sentence before the period.

- Of course, you've got to change “the issue is one of corruption” to “the issue is corruption.”

6. Please learn grammar and punctuation.

- **Do Not** “comma by instinct.” Your instinct is wrong. You don't know the rules, and therefore you do not use commas correctly. It is not hard. But there are rules. More than that, with some readers the misuse of punctuation, grammar and the like cast doubt on the quality of the lawyer and the care that went into preparing the brief.
- I am a fan of the hyphen. I believe that any lawyer whose goal is precision and who desires to preclude misreadings should use hyphens in phrasal adjectives.

7. Know what words actually mean.

- My Judge tells the story that when he had his first oral argument before the California Supreme Court as a relatively young lawyer, he shortly thereafter received a letter from the Court. It was a note from Justice Stanley Mosk expressing appreciation for his being one of the few lawyers that had appeared before the court that knew the difference between “criteria” and “criterion” and used them correctly.
- A client told me that “fulsome” does not mean “fully” – it means abundant to excess or vulgar. Not good.
- Particularly if you use a fancy word, you must be 110% certain that its use is correct and appropriate. No mistakes if you're doing that move.

8. Think about imagery.

- Are your word choices consistent with the images your prose portrays?
- My best example of this was when I wrote a brief on what's called the “suit” issue. The question is whether insurance companies must pay for defense costs incurred in EPA administrative proceedings governing the clean up of a site, it being disputed that administrative proceedings were “suits” that must be defended by the insurers. When doing my final edit, I realized that I always used the phrase “EPA proceedings at Iron Mountain.” But I thought this was better: “proceedings before the EPA at Iron Mountain.” The imagery of the former is some sort of clinical, disembodied procedure, “EPA Proceedings”; the imagery of the latter however seems clear: “proceedings before the EPA” – don't you imagine some court or hearing?

9. Paragraphs Have a Thesis and Purpose

- You must ask: what is the point of this paragraph? Why is it here?
- Each paragraph should be moving some ball forward, advancing some legal or factual proposition that you want the decision maker to accept.

- There is a tremendous amount of what I call observation in briefs: discussing a case and what it says, but not then tying it down to your concrete context or the proposition you are advancing and what that case means for you.
- Always ask, what is the proposition that I am advancing? Is the discussion of the case, for example, really one independent reason why we're right about something. If that's its purpose, that case discussion should be directed to the proposition, how that proposition applies here, and why that case shows that that proposition is true here.

10. Say it once.

- This applies both to sentences and to paragraphs.
- Any time that you find that you (or your edite-e) have used the same sentence or made essentially the same point, there is an organizational problem.
 - Either you are being redundant, or
 - You said a similar thing because the two points in fact are related – in which case they should be crunched together as part of a single argument.
- This works every time.

11. Say more with less – or with fewer words.

- I find that the process of editing and rewriting may result in the number of pages being the same but the content seemingly to double. If you find that you're doing this, you're really improving the brief.

12. Using cases well either offensively or defensively is a much desired and rare ability.

- Using cases means understanding the facts of the case and how the rulings that you're interested in arise out of its factual (and sometimes even historical) context.

- It means further understanding your facts, and relating your facts to the facts in the case as appropriate.
- It sometimes means arguing that your court should look at the result in a particular case on the facts, but ignore its reasoning, because you're offering a different, more persuasive, or still-valid way of accomplishing the same result.
- Using the other side's cases to disembowel their brief is delicious.
 - That also means: read and understand the cases you cite; don't rely on great language alone.

13. Use cases; do not let cases use you.

- You are an advocate. Your job is to make argument. You should therefore think about your argument and what makes sense, and then use the cases to support it.
- Briefs are not surveys of cases. It is not proper in a brief or a memo to string together discussions of bunches of cases. The rhetorical structure of such an argument is that “they did it, you should too.” It does not offer the reader/judge the reason why he or she should follow those decisions. When you are using cases to support your argument, you still get whatever argument-from-authority that you get in a bare recitation of cases and you have additional argument. In any event, it usually doesn't matter what other cases have done; the question is what should be done in your case, and why is it that in your case you win. Use the cases to support that.
- Another way of putting the point: that type of case-report montage approach to brief writing really only strings together observations. A bunch of independent points is not an argument.
- When you find you've done this type of case reportage, you usually can jump to a higher level of abstraction and abstract the principles from the cases in formulating an overall argument – and then you use the cases as supports.

- You will usually shorten the brief considerably by doing this, and even if it doesn't shorten the argument, the brief absolutely will be strengthened significantly.
- This is the type of rewrite that can double or more than double the argumentative content of the same or even fewer pages in the brief.
- We've done several amicus briefs in this style that were able to cover the same ground in 10 pages as what other briefs quite literally did in 40.

14. Write facts like a story.

- When writing your facts, tell a story. Construct a narrative, not a bare chronological recitation.
- Does your story have characters? Are they virtuous or malefactors?
- Use a story tone.

15. Do not adopt the tone of a "lawyer."

- When you try to write with authority by being a lawyer or voicing the law, you will obscure and leaden your prose.
- I think you should adopt a "talking" tone, as opposed to a "writing" tone to your prose. Obviously, I don't mean chatty, but if you try to construct your language more akin to speech, you will lighten it, it will likely be more natural, and it will be easier for the reader to swim through.
- I laugh sometimes at the constructs that flow from lawyer's fingertips. Sometimes you have to realize that you're a human being and maybe you should try to communicate like one.
- Another way of capturing the point is this: When writing, say it plainly.

16. If you are going to take a shot at the other side, take a shot.

- Sometimes mudslinging is appropriate. When it is, go for it. Take your shot.
- Don't use just rhetoric – or more precisely, don't have rhetoric power the point of your shot. Lay out whatever your beef is and go for it.
- But – Do not hint about mud, do not indicate some epithet. If you are not going for it, mud and the like must be stripped from your prose.
- That is the rule. It forces you to prove it or shut up. But if you can prove it, go for it.
- So what do you do if you want to throw mud but you can't because of the rule. It is perfectly fine to make factual report, to adopt what has been characterized of my writing as a “heavy hearted” tone, or a there-they-go-again tone.
- Following the prove-it-or-shut-up rule also avoids the boy who cried wolf problem, which is a sure way to lose credibility with the court over time.
- It's not that you should be cautious in making points or be wary of using vigorous or even strong language. Just know that that rhetorical tone carries with it a level of prove-up to the reader, which can be a very heavy burden.
- Relatedly, if you are going to use strong language, a powerful epithet, what have you, do not use it first, before laying the groundwork for the reader. Particularly when the charge or rhetoric is very strong, you don't want to ask your reader to accept such strong terms on faith. You want to educate your reader and bring them along to the same powerful point.
- Your job *is* to look for these points and make them striking for the jugular. But be precise and surgical.

17. Prune paragraphs and points.

- Don't use pages just because you have them. Look at each paragraph and point. Now that it is written as well as it can be, does it move the ball? does it justify lengthening the brief and further burdening the reader? is the paragraph central to the theme or is it more of a tangent?
- Bearing in mind that over-footnoting is a plague (and one that I succumb to), take paragraphs and parts of paragraphs from text and move them to footnotes.
 - Then, clean up and tighten the text. Once that's done, you may be able to cut the footnote.
 - Unclutter your brief by moving stuff from text to footnote and, as often as you can, to the great harddisk in the sky. The leaner your brief, the better.

18. Finish the Thought.

- I see in a lot of briefs what might be characterized as “almost arguments.” These are one or two sentence points that imply an argument and seem on first blush to be saying something. But they are not full, freestanding arguments. Usually there is some unstated premise and an almost-stated conclusion.
- You need to set forth the entirety of the point/argument. Usually, adding one or two sentences will do the trick or even adding a clause such as “Because [previously implied premise], . . .”
- You need to stretch out these almost-arguments and set forth and finish the point all the way.

19. Cast points, rules, etc. non-neutrally.

- All your points should have an argumentative cast based on your particular factual or legal circumstances.

- Don't state that "summary judgment is appropriate where there is no dispute of material fact"; say, "summary judgment must be entered in our favor because [or unless] the other party here shows, by competent evidence, that there is a genuine dispute of fact that is material to the outcome here."
- Casting every point in your favor is one of the ways that you can change observations in your briefs to more powerful argument. Everything in your brief should be moving the ball forward in a directive or argumentative way.

20. Organization

- I've already hinted at one of my key points. And I really can't emphasize this enough. In any half-way significant brief, outline your brief completely.
- Whenever I don't do this, because of press of time or whatever, I regret it.
- What do I mean by outlining or a full outline?
- What you end up with is a document that is the functional equivalent of the brief – and usually is longer because of the blank space of the page – in which essentially every sentence of the ultimate brief is set forth in draft form.
 - In other words, you write out full sentence, sometimes full paragraph entries, and case discussions.
 - The point of doing this is to work out your thoughts on paper and your organization before writing the actual document you will submit to the court.
 - I don't have proof (for obvious reasons), but I am absolutely convinced that it will take you no longer to prepare the final document by outlining and then writing versus skipping outlining.
 - I think this is true because what you'll find if you outline in this way is that writing the brief is easy and fun, and all that you are

actually thinking about when composing is the quality of your expression.

- You don't have to figure out your theory, the case, or anything else. It's already done in your outline.
 - And you can crank pages very quickly as a result.
- Outlining has several other beneficial effects:
 - Forcing yourself to outline forces you to adhere to outlining conventions to some extent and set forth a proposition that the subpoints support.
 - This is good, because in a brief you in fact are advancing propositions.
 - When you write the paragraph, you know what the proposition is, and your prose will be directed to establishing that proposition.
 - You know what's later in the brief so you can create parallel rhetorical frameworks, imagery, and cross references.
 - You know how to cast your argument sections so that each works with the whole document.
- So, the real process of brief writing is to outline the brief as I have indicated, write the first draft, and then go through all the steps I've just been describing. If you do that, you will create a first-rate product.

Part 2: Document Drafting

Good drafting requires great precision and a very high level of concentration. It is hard because you are simultaneously trying to express complex thoughts into statements prescribing or proscribing certain action within a concrete legal context and because you are trying to create a clear legal document that will hold up in the event of litigation.

1. The first thing you need to do is to separate and understand the legal elements of what you are trying to accomplish in the document.
 - You should have a clear understanding of
 - The particular circumstances governed by the document
 - The conditions for the operation of the obligations in the document
 - The entities governed or bound by the document;
 - The legal action or physical conduct that is to occur in compliance with the document.
 - The precise elements of proof and law concerning any breach, nonperformance, or noncompliance.
 - The consequences for non-compliance and how non-compliance can be enforced.
2. As an overall organizational scheme, you might follow something like this for a contract¹:

Cover Sheet	
Table of Contents	
Recitals	Background & Purpose of Contract Statement of Consideration
Main Clauses	Each Party's Obligations Payment Terms

¹ Adapted from Garner

	Conditions Precedent and Subsequent Duration of Contract
Liability, Damages and Remedies	Liabilities and Subsidiary Responsibilities Limitation of Liability <i>Force Majeure</i> Notice for Breach or Termination Default, Breach Termination Remedies, Restrictions of Remedies Attorney's Fees Damages, Liquidated Damages Mediation & Arbitration
Assignability	Delegation of duties Assignments of rights Allowing or Disallowing Successors
Time	Time for Performance Time of the Essence Extensions, Renewals, Options Time and Manner for Giving Notice Private Statute of Limitations, Sunset Provisions
Housekeeping	Good Faith Obligations Representations Warranties Third-Party Rights Incorporation of other documents or exhibits Severability Clause Merger Clause Choice of Law Choice of Forum Procedure for Amendment/Modification and Effective Date

Concluding Clauses	Procedure for Execution Acknowledgments Signatures Dates
--------------------	---

An overall structure for a settlement agreement could look like this:

Cover	
Table of Contents	
Recitals	Background & Purpose of Settlement Statement of Consideration
Main Clauses	Purpose and Scope Definitions? Payment Terms/Other Conduct Release Conditions Precedent and Subsequent to Main Payment/Release
Liability, Damages and Remedies	Indemnification Obligations Limitations of Liability Liquidated Damages/Specific Performance
Other Obligations	Cooperation Confidentiality, except to enforce NonCooperation with Others
Dispute Resolution	Time and Manner for Giving Notice Mediation/Arbitration/ADR Choice of Law Choice of Forum Attorneys' Fees
Assignability	Delegations of Duties

	Assignments of Rights Allowing or Disallowing Successors
Housekeeping	Representations Warranties Third-Party Rights Incorporation of Exhibits Severability Clause Merger Clause Procedure for Amendment/Modification Definitions? or in Appendix?
Concluding Clauses	Procedure for Execution and Effective Date Signatures Dates

3. At the broad level of organization principles, you may want to adopt the more or less consistent use of the following ordering:

- Broadly applicable before narrowly applicable
- General before specific
- More important before less important
- Rules before exceptions
- Chronological order of contemplated events

4. In setting about drafting, the first thing you must understand are the correct and consistent use of the command words “shall, must, may, will.”

- These words must be used consistently for a consistent meaning in a document or legal uncertainty will result. They must each be used consciously and with a particular meaning in your mind when drafting.
- The single most important rule in this regard is this: “Shall” has one and only one meaning: “has a duty to.”

- Do not use shall in any other way, even in boilerplate provisions like “notice shall be given by”
- The “shall” rule results in consistent and conscious use of the most important legal words of authority in the document.
- The precise use of the other terms available to you follows naturally once you adopt this strong and exclusive meaning of “shall.” The other typical words of authority are:
 - must
 - may not
 - must not
 - may
 - will
 - is entitled to/is to be
- In constructing your document, use these “legal operand” words consciously and consistently throughout.

5. Definitions

- Definitions are a necessary evil.
- Use the words of definition correctly and consistently:
 - “means”
 - “includes”
 - “does not include”

- I like the “does not include” construction, and I use it in discovery requests in addition to documents. I find it to be clear and direct, and it usually forces you to state more precisely what's in and what's out. I use “does not include” fairly heavily as a device throughout my drafting, and I find it really clarifies a document.
- There is a philosophical debate about whether definitions should go at the beginning or the end of a document. I don't have an opinion on the matter absolutely, but you should know that it is perfectly acceptable to have definitions at the end. I almost always see them at the beginning.
- Tune up your definitions at the end of your drafting process. It's easier, and you'll otherwise do the same work twice, because you always have to check your definitions at the end.
- When you adopt a definition, use it consistently and exclusively.
 - It is amazingly common to see a party defined so as to include its “successors and assigns” and then see in the body of the document so-and-so party “and its successors and assigns.”
 - That is really lazy, stupid drafting.
 - One also sees the flip side where a document will have a definition that is used in many paragraphs, but the drafter writes one paragraph incorporating all or most of the terms included in the definition. This elegant variation introduces ambiguity as to what that paragraph implies as to the meaning of the definition.
 - One way of handling this particular issue is to state that the definition applies in whole or in part (and excluding the particular sentence or phrase from the definition for purposes of that paragraph). If you find the same thing twice in your document, try to economize by using a definition or use the same exact language in both places.
 - One also sees the use of a defined term in a document, and then appended to the defined term is some big “including” clause. An example I just saw

was that such and such applied with respect to any “Person,” which was previously defined to include anyone not the parties, and after the word person there was a string of entities that were intended to be included in the term person, such as the feds, EPA, state environmental agencies, etc. I struck this, because of the way that Person was defined. If the definition of Person is clean and strong, then you should use it in a strong minded way. Get rid of these confessions of uncertainty in terminology by strengthening your definitions.

- Agreements often “pivot” on the definitions. Often, whatever it is you are talking about – what exactly is being released for example – will be defined and circumscribed by the interrelationship between definitions. You should have a very clear understanding in your own mind of what the pivot terms are, and then use them in a strong minded way. If they work properly, a lot of clutter can be eliminated from an agreement.

6. Conditions

- The first thing you need to know about “conditions” is what a “covenant” is. A covenant is a minor promise of performance. A covenant can be breached, without suspending the performance of the other party, if the breach is not a material breach of the contract/agreement as of whole. There may be a damages remedy or set-off for breach of covenant.
- A condition in contrast results automatically in some consequence, usually a forfeiture. There is a very strong judicial reluctance to enforce provisions as true conditions, even if the provision is in a “conditions” section.
- You should know and decide which types of obligations are covenants and which are true conditions.
 - For covenants, use the language of promise. Do not say that something is a “condition” if it is a covenant in hopes of strengthening enforcement of the covenants. This will only dilute the enforcement of the true conditions.
 - For true conditions, use the language of conditions. More important, I think you should express what are the consequences for non-compliance as

part of the articulation of the condition. In other words, something like “non-compliance with this provision will result in the mandatory and irrevocable forfeiture of [whatever].” If it is a true condition, you should be strong minded and honest enough to express it as such.

- The courts will see that at the time of contracting the language was clear and the other party must be presumed to have fully understood the provision and the penalty for noncompliance. It may be appropriate to put a forfeiture condition not in the conditions section but rather in the statement of the main performance obligations under the contract. (In an insurance policy, for example, I'd put it in the insuring agreement itself.)

- Such steps will ensure that the provision is enforced – which is the point.

7. Speak in terms of concrete conduct.

- Write your provisions with actors doing things.

- This forces you to be concrete in directing future action. That is a good thing, because somebody that is uninvolved with the drafting or negotiation will pick up this document and ensure compliance with its terms. You want to tell them what they must do.

- Really think through the mechanics of any performance.

- How is payment to be made? Check or wire transfer? Check by mail? Is the release being provided effective upon receipt of the check or when it clears?

- You need to state what each person is supposed to do when some covered event occurs.

- You should decide what should happen if the conduct is not done or done properly and how that determination is made and by whom and when.

8. Parallelism and formatting

- Break up long provisions into separately spaced paragraphs for visual clarity.
- This also usually helps in drafting clarity too, because it forces you to state the items using proper parallel structure.
- Be precisely and consistently parallel through out an agreement, if you use the term “causes of action, allegations or obligations” in one place, use it and only it throughout.

9. Numbering and cross-references.

- I tend to like the 1.1, 2.2.1 type of numeration over Roman outline form. The reason is simple. It is an unmistakable numbering system. It is immediately intelligible, easily to navigate, and clear.
- Regardless of the numbering system used, whenever you cross-reference in some manner, you must expressly set forth what is being cross-referenced.
 - In other words, don't have a term and then say “as hereinafter defined,” say “defined in paragraph 3.2.” Don't say “as provided herein,” say “as provided for in Paragraphs 13.2 and 17.1.” You should figure out the cross-references and hard wire them.
 - This obviously increases precision.
 - This forces you to think the issues through.
 - It precludes a court from implying a relationship with some other provision in the document.
- I go further and use the construction “as defined in the first sentence of this paragraph 4.3.”
 - You'll find that this type of bulleted cross-referencing will encourage you to break up provisions into sub paragraphs and the like to increase precision.

- Doug just argued a case in the Virginia Supreme Court where an insurance policy added a form of coverage by endorsement and then incorporated the terms of the policy proper “to the extent they do not conflict.”
- You've got to be kidding. How could such a provision not spawn litigation?

10. Reps and Warranties

- Representations and Warranties are not the same thing. The terms are neither interchangeable nor redundant, and how we've come to the place where it is routine to have parties “represent and warrant” something is a mystery to me.
- A warranty is a statement that a condition or circumstance is true. A breach of a warranty, if proved, automatically has drastic consequences.
- A representation is a statement that a condition or statement is true made in good faith after taking appropriate steps to become informed about the subject. There are escape valves for a breach of representation; there are none for breach of warranty (more or less).
- Identify as of what moment the rep or warranty is being made and whether it survives execution/closing (and if so, for how long).
- Know which one you are doing, and do it. But don't rep and warrant, please.

11. Assignment and Delegation

- Again, these do not mean the same thing. Please use them accurately. You delegate duties; you assign rights. Rights are ordinarily freely assignable. Duties may not be; they may be non-delegable.
- By the way, you should think about whether you want them to be non-delegable or not – and say so.

12. Promises, Promises

- The document comprises the promises of the parties. After you get the wherefore's over with, and you invoke the “parties agree” mantra, you should not use the phrase “promise” or “agree” again. In the body of an agreement, do not say “party x agrees to” Say that “party x will, must or shall” do something.
- Focus on the action you want done. Every provision in the agreement is a provision the signatory agreed to.

13. Page Numbering

- I think all documents should be paginated using the “Page 1 of ___” format.

14. Execution

- You need to think about the physical process of signing the document and the creation of originals for the parties' files.
- I recently did a four or five party agreement where I used the following method:
 - Each signatory signed on a separate page.
 - I sent each one five copies of that page plus the agreement for execution. Each then signed all five copies of the same page and overnighted them back to me. I in turn sent to each party the original signature pages from the other four parties. This resulted in each party having an agreement with five original signatures.
- You can also do a roundrobin, where it is sent from one party to another (or multiple copies are sent from one to another).
- Obviously, everyone can get together in one place and sign duplicate copies.

15. Make Boilerplate Your Own

- You are responsible for everything in your document.
- There's a lot of gobbledygook in boilerplate. If you lift a provision from somebody else's document, you must have it conform to your document and you must understand its meaning and application.

16. Authority

- You must understand which entities have power to perform certain acts or provide certain releases.
- A subsidiary may not be able to release the rights of its parent or obligate the parent to perform conduct.
- Think specifically about the authority and powers of the signatory entities (particularly as defined).