

CHAPTER SIX

Writing a Persuasive Supreme Court Brief

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This chapter's focus is how to use persuasive legal writing when crafting a brief to the Texas Supreme Court. The author examines a variety of techniques the practitioner should use—all designed to help the Supreme Court decide the case before it

§6.1 INTRODUCTION

Most legal writing is driven by the needs of the writer. The writer is either a lawyer or someone desperately trying to sound like a lawyer. "Sounding like a lawyer" usually means emulating a style that is confident, arrogant, pedantic, and blustery. Accordingly, legal writing may be much more concerned with what the writer has learned, thought about, or feels compelled to express, than how a usually unidentified government lawyer will respond to what is written. Those things are certainly important, for without the writer's learning and thinking and expressing, there would be nothing to write about and nothing to read. But the writer's unwavering focus should be on the audience and how it will receive and respond to the written discourse. To be an effective communicator to the audience, a writer should understand who the likely readers are, the conditions under which they work, the goal of the written product presented to them, and how they use that product to do their job. Understanding those concepts will enable the writer to apply some common sense to the writing task, so that the written product will make it easier for readers—the Justices and Court attorneys of the Texas Supreme Court—to do their job. The fruits of their labors, in turn, will be better opinions, which are more likely to wisely mold the jurisprudence of the state and to do justice to both parties.

§ 6.2 IDENTIFYING THE AUDIENCE: WHO IT IS AND WHO IT ISN'T

The first step in understanding the audience is to identify it. Although the writer may feel a need to please several different people, there is only one audience that matters: the Supreme Court

That certainly means the Justices, but it also includes the important group of supporting lawyers that have titles like briefing attorney, staff attorney, research attorney, or law clerk, which will be referred to collectively as "Court attorneys." The only acceptable purpose of a Supreme Court brief is to assist the Justices and Court attorneys to write an opinion that is either consistent with the applicable law or a well-reasoned extension or modification of existing law, and secondarily, the brief must be favorable to the client.

In contrast, there are a number of inappropriate audiences and purposes that much more commonly color the writing of a brief. A Supreme Court brief should never be written to give voice to the pain or frustration of a client. It should not be written to convince opposing counsel that the writer is right and they are wrong. It should not be written to attempt to intimidate the opposing party to settle. It should not be written to impress other attorneys in the firm, or cocounsel. And most of all, it should not be written to amuse or gratify the writer. The brief may incidentally accomplish any or all of these goals, but if it is written with these purposes foremost in mind, the likelihood of achieving the real purpose of the brief will be diminished.

A brief should be written as if the only people who ever will read it are the Justices and Court attorneys. Any temptation to pander to one of the audiences or purposes mentioned *in* the preceding paragraph should be banished from the consciousness of the writer. The writer's sole goal should be to further the interests of justice and of the client, and anything calculated to further the writer's personal interests, career, or ego is likely to be counterproductive to the paramount goal of serving the jurisprudence and the client.

§ 6.3 UNDERSTANDING THE CONDITIONS UNDER WHICH THE AUDIENCE DOES ITS JOB

Aware that the only audience that matters is the Court, consider several truths about Justices and Court attorneys, which are often disregarded by appellate writers:

- They may justifiably feel overworked, underpaid, overextended, understaffed, and unappreciated.
- They almost always read a brief as part of a stack of other briefs.

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- They have much, much less time to spend on a particular case than the brief-writer has spent on it. More important, they have much less time to spend on that case than the writer would like for them to spend on it.
- They know much less about the facts of any case than the brief-writer does.
- They probably know considerably less about the particular area of the law addressed in a brief when it is first read than the writer knew when writing it.
- They are much less likely to be impressed with clever or impassioned writing than the writer. They are not reading the brief to be impressed or entertained, but to obtain the information they need to dispose of the case as expeditiously as possible.
- In every case, a Court attorney checks the brief thoroughly, verifying record cites, reading the law that is cited, and conducting independent legal research.
- Despite what disgruntled advocates may say about personal prejudices and agendas, the Justices universally care about following the law and reaching a just result, within the framework of whatever personal biases or prejudices they as human beings bring to any decision-making process.
- Although they care deeply about getting each case right, they unavoidably care much less about reaching a particular result than the writer does.

In short, the practitioner is writing for an audience that is always pressed for time and that is fundamentally concerned with getting the law right. Accordingly, it becomes particularly important to write briefs that:

- Are short enough that they do not waste the reader's precious time;
- Are clear and simple enough that they can be understood in one continuous read-through;
- Appear objective;

- Provide thoughtful reasons for reaching a desired result, rather than a shallow presentation of words lifted out of context from cases, rules, or statutes; and
- Reflect a sense of fairness and justice.

These realities should have a profound impact on how a brief is written.

§ 6.4 PROVIDING THE AUDIENCE WITH THE INFORMATION IT NEEDS TO DO ITS JOB

A Justice or Court attorney reading a brief probably either is preparing a pre-submission memo, preparing for oral argument, or preparing to write an opinion. In order to do any of those things, certain information is needed from the brief. To give the Court what it needs, a brief should fulfill several minimum requirements:

- It should tell the Court everything it needs to know about the underlying facts and procedural developments with precise citations to the reporter's record or the clerk's record to support every factual statement. It should point the Court to exactly where in the record error was preserved. The reader should not have additional questions about the record that are unanswered by the brief.
- It should attach copies of all critical documents in an appendix. This not only includes the documents required by the Rules (judgment, jury charge, etc.), but also things like contracts, real estate documents, expert reports, or selected pages from the reporter's record—tabbed, indexed, and no longer than necessary. The reader should not have to go pull the record to make sense out of an argument. Neither should the reader have to wade through a voluminous, unindexed appendix searching for relevant documents.
- It should provide citations and analysis of the law, including, where applicable, the most recent law from the Supreme Court, the most recent law from the courts of appeals (if it has been a while since the Supreme Court addressed the issue), and the most frequently cited authority on the subject. Authorities that may be

construed as not supporting the position being presented should be disclosed and distinguished, not disregarded. Although the Court will confirm the research, the brief should show the Court where to start the research, and there should be no major surprises as the research progresses.

- It should contain arguments that make sense, that sound fair and reasonable, and that the Court would be proud to express in an opinion as its own.
- It should address every nonfrivolous argument raised by the opposing party.

In short, a helpful brief should provide everything that the Court needs to write a thorough and well-reasoned opinion, as expeditiously as possible, without having to undertake any part of the process on its own.

§ 6.5 ASSISTING THE AUDIENCE TO DO ITS JOB JUSTLY

The practitioner should write a brief with two goals in mind, and, most important, those goals should be in this order: (1) to assist the Court to reach the right result and (2) to assist the Court in reaching a result that favors the client. All too often, writers rush past the first goal in their haste to reach the second goal. But the hard truth is that adherence to the first goal makes the realization of the second goal much more likely.

If the reader of the brief begins to believe that the writer is willing to say anything to win—whether or not it is supported by the record, whether or not it is supported by the applicable law, whether or not it makes any sense—then the writer loses all credibility, and the reader ceases to believe or to be persuaded by anything the writer has to say. On the other hand, if the reader begins to get the feeling that the writer is not an obstructionist adversary trying to hide the truth, but, instead, is the Court's ally in trying to reach the right result, the writer has a much greater chance of being an effective and persuasive advocate. This can be accomplished by:

- Rigorously adhering to the record and the applicable law, even when they do not support the writer's client. If the writer tries to stretch the facts or the legal authorities, a Court attorney checking the brief will read the pertinent parts of the record and the applicable law, and the writer's attempted distortion will be

discovered. Not only will the attempt to stretch the record or the law be unsuccessful, but the writer will lose credibility for even attempting the distortion.

- Making candid admissions and conceding nondispositive points that cannot be won anyway. If an opponent's argument rings true, the writer will only lose credibility by resorting to the knee-jerk reaction of saying that everything the other side says is wrong. In those situations it is extremely effective to admit the point and move on to find other stronger reasons to prevail, or to try to find a way to neutralize the point by embracing it and finding something about it that can be turned around to cut the other way.
- Acknowledging adverse facts and arguments rather than ignoring them and hoping the Court will not notice. It will. Either these facts or arguments will be mentioned in the opposing brief or the Court's attorneys will uncover these matters on their own, without any guidance from the advocate about how to put them in context. The writer is much better off addressing unfavorable facts arguments and coming to grips with them.

It is naive to assume that every case has only one issue, only one right result, and only one way to get there. The only challenge to this approach is when the correct result and the desired result appear to be at odds with one another. The challenge for the practitioner is to find a way to make the result favoring the client to be a right result in the case, even if not the only right result. If that challenge cannot be met, the practitioner should seriously consider whether to undertake the appeal and should counsel with the client about whether the appeal is worth pursuing.

§ 6.6 ASSISTING THE AUDIENCE TO DO ITS JOB EFFICIENTLY

The Court has limited time and energy to devote to reading any brief. If the writer wants the Court to read the brief understand it, use it in drafting the opinion, and wants the reader to feel good about both the writer and the client, the writer should make that experience as easy and pleasant as possible. Some suggestions:

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- Structure the argument so that it can be easily followed and understood- The human mind cannot process and retain unstructured information. Even brilliant thoughts, if spilled out onto the page in a rambling stream of consciousness, will be lost on the reader. The writer's thoughts should be structured, presented in a logical order, and give the reader signals to make the structure clear through the use of headings and subheadings.
- Write with simplicity and clarity. Those two qualities are not the same—it is possible for an argument to be simple, but still unclear, and it is possible (though quite difficult) to make a complex argument clear. But simplicity and clarity often go hand in hand, and the writer should strive for both. It is impossible to judge the clarity of one's own work. The writer reading the brief is reminded of the thought when writing it, and while that connection may be clear in the writer's mind, it may not be as clear to someone who did not conceive the thought in the first place. Having others read the written product—especially someone who is as unfamiliar with the subject matter as the Court will be when it first reads the brief—is the only reliable way to determine whether the meaning is clear and whether misunderstanding is possible. If one reader reads something the wrong way, it is possible that a reader on the Court will have the same response. Try to write and rewrite with the goal of minimizing the possibility of any misunderstanding.
- Write prose that flows, analytically and lyrically. The goal should be a product that the reader can read from beginning to end without stopping, without having to reread a sentence because the meaning is unclear, without having to go back and reread prior portions of the text to make sense of the current sentence, and without having the feeling that something is jarringly out of context. An entire brief that flows is easy to read but it is extremely difficult to write. A product of that sort requires a lot of work. The more work the writer does on the front end, the less work the reader has to do when using the brief to reach a conclusion and write an opinion.
- Strive for brevity. Most readers of briefs would rather be doing something other than reading briefs. Even when reading a good brief, there is exultation in completion, and unnecessary length can delay that feeling. In choosing words, constructing a sense, crafting a paragraph, or drafting an argument, remember that

shorter is often better. It may not satisfy the writer's ego as much, but it will be appreciated by the reader.

- Create a product that is easy on the eyes. Make sure there is ample white space on the page. Make liberal use of spacing. Choose fonts that are comfortable to look at and large enough to be read by readers with declining vision. Make sure the document filed with the Court is clean and free of distracting errors.

In short, create a product that is easy to read, easy to understand, flows smoothly from one thought to the next, and does not feel like too much of an imposition on the reader.

§ 6.7 ASSISTING THE AUDIENCE TO DO ITS JOB IN A MANNER THAT IT MAY FIND PERSUASIVE

There are no tricks or secrets or shortcuts to persuading the Supreme Court. The writer simply needs to present the most logical, compelling argument and to do so in a credible and professional manner. It is a wonderful thing for a lawyer to be passionate about the plight of the client. But a writer who is truly passionate about obtaining a favorable result for the client on appeal will rein in the passionate prose. A reader who is already inclined to agree with the position being expressed may be entertained by vigorous attacks on the other side or emotional wailing about the end of the world as we know it. But the writer has not advanced the argument in any meaningful way. On the other hand, a reader who is leaning against the argument presented may be offended—certainly not persuaded—by strong language. And an undecided reader, probably will wonder why the writer has to resort to histrionics, rather than calm, rational reasoning and may suspect that there must be something wanting in the argument:

Nevertheless, write with conviction and confidence. If the writer doesn't sound convinced by an argument, the Court is not likely to be. Courts expect lawyers to be advocates to a certain extent, and if the writer seems hesitant to take a position, the reader will believe that there is no position to take.

Legal writing also is much more persuasive when the writer writes with wisdom rather than with cleverness. Cleverness is shallow, insubstantial, and trivializing. It often results in failed attempts at humor or annoyingly technical "gotcha" arguments that the reader is likely to perceive as

something the writer resorts to because good arguments are lacking. Wisdom is deeper, more honorable, and makes the reader feel a part of something good and noble. A wise argument is not only substantively sound, but it also explains why it is the right thing to do.

Another important element in persuasion is credibility. A reader is more receptive to and persuaded by a credible writer. If the writer loses credibility with that reader, everything written will be viewed with skepticism and must be verified before being accepted as true. An appellate lawyer's reputation for credibility may take years to cultivate. It can be lost in a single sentence. The only way to avoid that consequence is to be meticulously accurate and scrupulously honest in everything written.

§ 6.8 THE CONSEQUENCES OF FAILING TO GIVE THE AUDIENCE WHAT IT NEEDS TO DO ITS JOB

If the writer fails to provide the Justices and Court attorneys with the information they need, the consequences will be generally negative, but the specific consequences will depend on the individual and the circumstances. In some instances, the reader may assume that the writer has not provided supporting record citations, legal authorities, or convincing arguments because they do not exist. In many instances, the reader will expend the additional effort to search the record, do the legal research, or try to find winning arguments. Not knowing the record or the particular area of the law as well as the writer, the reader may not find the information. Even if found, the extra effort may cause the reader resentment and frustration, resulting in and a loss of respect and credibility la-the writer. Those things, by themselves, are not likely to cause a decision-maker to consciously change the outcome of a case. In a close case, however, the cumulative effect of those factors could erect an unconscious barrier that should be avoided at all costs.

§ 6.9 WRITING A WINNING BRIEF

There is no secret to writing a winning brief every time. Every case is different, and every brief is different. There is no universal blueprint for writing a winning brief. There are no magic words that should be used in every brief and no secrets to get into the mind of the Justices to entice them to vote a certain way. The best way to write an effective brief is to cultivate the attitude of a learned and conscientious colleague of the Court, trying to assist the Court in reaching a decision

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that correctly states the law for the bench and bar and fairly resolves the dispute between the parties. At all times, the writer should assume the role of a Justice or Court attorney, reading a stack of briefs to prepare for drafting a pre- submission memo, hearing oral argument, or writing an opinion. The writer should think about what would be helpful, easy to read, and persuasive and then write something that fulfills those goals, and gives the audience what it needs to do its job expeditiously and justly.

An effective brief does not require brilliance or eloquence. It can be constructed with tools that we all have in our toolbox:

The masters of... [brief-writing]... know the Way, for they listen to the voice within them, the [Voice](#) of wisdom and simplicity, the voice that reasons beyond Cleverness and knows beyond Knowledge. That voice is not just the power and property of a few, but has been given to everyone. Those who pay attention to it are often treated as exceptions to a rule, rather than as examples of the rule in operation, a rule that can apply to anyone who makes use of it.

BENJAMIN HOFF, THE TAO OF POOH 154-55.

The barriers to writing an effective brief are more attitudinal than they are matters of raw intelligence, innate eloquence, erudition, resources, or technology. The proper attitude starts with being highly cognizant of the likely audience and giving that audience what it needs to do its job, with wisdom and simplicity.