By Wayne Schiess

Writing to the Trial Judge©

Part One—For motions

During a career, a trial lawyer will write hundreds—if not thousands—of papers directed at trial judges. Yet so much of what is written for trial judges is not well suited to that audience. Too often, we lawyers treat judges as if they were reading machines—obligated to read what we submit, no matter how difficult it is.

But trial judges, as an audience, are operating under demanding circumstances:

- Trial judges are busy, yet many court papers require them to plow through lengthy preliminaries.
- Trial judges deal with many different matters, yet many court papers bury the critical point—what separates this case from others—in undifferentiated blocks of text.
- Trial judges must make informed decisions, yet some court papers fudge on the facts or the law, or both.

This article can't fix all the problems with writing for trial judges, but Part I offers three suggestions for motions that will help you get the trial judge's attention, keep it, and deserve it.

Use a bold synopsis

Do you begin your court papers by introducing the parties and the procedural background? Stop it.

You're squandering a great chance to get your point across. One experienced practitioner and expert writer, Beverly Ray Burlingame, put it this way:

> *By devoting the entire opening paragraph to restating the needlessly long title, lawyers waste judges' time and sacrifice a valuable chance for persuasion.*[1]

So put a summary of your point or points up front. Giving a summary at the beginning is not a new idea. Many legal-writing professionals recommend putting the conclusion up front. Here's a sampling of quotations:

> *Virtually all analytical or persuasive writing should have a summary on page one.*
>
> —*Bryan Garner,* Legal Writing in Plain English.[2]

> *Try to begin the document and the main divisions with one or two paragraphs that introduce and summarize what follows, including your answer.*
>
> —*Joseph Kimble,* The Elements of Plain Language.[3]

> *In each part of your legal analysis, give the bottom line first.*
>
> —*Irwin Alterman,* Plain & Accurate Style in Court Papers.[4]

> *All briefs should have a first-page, introductory summary, whether the rules require one or not.*
>
> —*Steven D. Stark,* Writing to Win.[5]

So in any court paper, put a summary right at the beginning. Whether you state the issue, summarize your position, or assert the correct result, you should do it up front. Yet too many court papers don't.

I recommend that when you submit a motion to a trial judge, you begin with a bold synopsis, an idea I wrote about in a *Texas Bar Journal* piece called "The Bold Synopsis: A Way to Improve Your Motions."[6] It's an excellent way to put a summary right up front. To use it, write a one- or two-sentence summary of your point, highlight it with boldface text, and set it off with indentations.

To see how it works, compare these before-and-after examples of trial motions:

Before—a typical first page

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT & BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CHRIS SMITH AND READY-FOODS, INC., D/B/A ARBY'S, collectively ("Defendants"), pursuant to Rule 166a, and move this Court to grant summary judgment against all claims of Remy Gonzalez ("Plaintiff"), in the above-referenced matter. . . .

This standard opener tells the judge almost nothing about the issue and nothing specific about the grounds for the motion. It is all preliminary. Instead, get right to the point; tell the judge the purpose of the motion, specifically, right at the beginning.

After—with a bold synopsis

Motion for Summary Judgment

Chris Smith and Arby's move for summary judgment because they were never the plaintiff's employer under Texas law. In addition, the plaintiff has not exhausted his administrative remedies.

1. Background . . .

Here's another before-and-after example. Notice that the writer takes up a good portion of the original opener with defining party names. If that is necessary at all, the first paragraph is not the place to do it. Get the judge focused on your points, not on the parties' defined names:

Before—a typical opener

PLAINTIFF'S TRIAL BRIEF

Plaintiff, Reginald E. Curtis ("Curtis"), files his Trial Brief in his suit against the Texas Commission on Wages ("TCW") and the Texas Labor Commission ("TLC") (collectively, "Defendants"), as follows . . .

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After—with a bold synopsis

Plaintiff's Trial Brief

The EEOC's conclusions and factual findings should be admitted into evidence here. Its hearings involved the same parties in this suit, and its conclusions and factual findings are highly probative of discrimination.

1. Background . . . .

Trial judges are busy. The bold synopsis—or any up-front summary—will help the judge by putting the critical information first. That way, the judge does not waste time searching through your document, looking for the point. Judges will appreciate that.

Organize overtly

Now, suppose that the judge has the time to read your whole document. How will the judge differentiate your case, your issues, your points, from all the other cases on the docket? The best way to ensure that a trial judge will understand your case is to make the organization of your paper obvious. Make your organizational plan overt.

Section headings

To do that, one good technique is to use short, boldface headings for each new section. By using short, boldface headings, you allow the judge, at any point in the text, to refer to a subject heading and quickly know where she is. Headings are cues to large-scale organization. For example:

Motion in Limine

This motion asks the court to exclude evidence that Regional Hospital fired Nurse Esther Green. The firing was a "subsequent remedial measure" and is inadmissible under Rule 407.

1. Background. This case was filed on . . .

2. Authority. Under the Federal Rules of Evidence . . .

3. Argument. Evidence of Nurse Green's dismissal is not admissible . . .

The busy judge may want to skip ahead to the critical information, and the headings allow that. The busy judge may forget what's going on in your case, and the headings bring the judge's attention back into focus. In short, the headings make it easy on the busy judge. And that's good.

Enumeration and tabulation

To cue the judge about the small-scale organization, I recommend that legal writers break up long or complex ideas into smaller chunks of text. Use enumeration (*1, 2, 3* or *a, b, c*) and tabulation (setting off text with hard returns or bullets) to help you organize the text, highlight important material, and cue the judge about the structure of the paragraphs and sentences—the small-scale organization. In other words, these techniques tell the judge where you are with this idea, as opposed to where you are in this document.

Just to clarify what I mean by enumeration and tabulation, here are some examples:

An example of enumeration:

Legal documents should be (1) lettered, (2) numbered, or (3) tabulated.

An example of tabulation:

Legal documents should be
- lettered,
- numbered, or
- tabulated.

An example of enumeration and tabulation:

Legal documents should be
1. lettered,
2. numbered, or
3. tabulated.

Even for something as common as reciting of a rule of law, you can use tabulation to present the rule in a clear and direct way:

Instead of this:

To decide if the limits on selling the plaintiff's car are valid, courts have distinguished between a "direct and total deprivation" of the right to sell, and "mere impingement" of that right. *Spielman-Fond, Inc v Hanson's, Inc,* 379 F Supp 997, 999 (D Ariz 1973). A direct and total deprivation of the right to sell is more serious. Id. It means preventing the sale by seizing the car or by enforcing statutory or contractual terms that prohibit the sale. Id. Mere impingement simply means discouraging the sale or making it more difficult. Id.

Try this:

Rule of Law. To decide if the limits on selling the plaintiff's car are valid, courts have distinguished between

1. a "direct and total deprivation" of the right to sell, and
2. "mere impingement" of that right.

Spielman-Fond, Inc v Hanson's, Inc, 379 F Supp 997, 999 (D Ariz 1973). A direct and total deprivation of the right to sell is more serious. Id. It means preventing the sale by seizing the car or by enforcing statutory or contractual terms that prohibit the sale. Id. Mere impingement simply means discouraging the sale or making it more difficult. Id.

With boldface headings, enumeration, and tabulation, your documents will stand out. Your points will be understandable. Your case will capture the judge's attention.

Be honest

In his excellent book *Writing to Win: The Legal Writer,* Steven Stark lists "Thirteen Rules of Professionalism in Legal Writing." Here are the first four rules:

1. Never lie, under any circumstance.
2. Don't use euphemisms to disguise the truth.
3. If it's not required, hedging is a form of dishonesty.
4. Avoid the use of hyperbole to distort the truth of your assertions.[7]

Wow. Do you get the impression that Stark, a former judicial clerk and an experienced litigator, is big on honesty? Well, trial judges are, too. Consider a quotation on honesty and candor from Judge Stanley Sporkin, formerly of the federal district court in Washington, D.C.

> *A lawyer's credibility with the judge . . . is the key to any litigation. Candor is essential. Be honest with the judge . . . .*[8]

So in every court paper you submit to a trial judge, be honest.

Be honest about the facts

Tell the truth about the facts of your case. Don't omit relevant facts, even if they are unfavorable. Don't fudge. And by fudge, I mean to falsify or fake. If you fudge, you risk your credibility. Remember that several potential audiences can scrutinize your court paper besides your colleagues and your own client: the trial judge, the judge's clerk, and—since most court papers are public documents—the press. Someone will figure out that you've fudged on the truth and bring it to the judge's attention.

And don't forget opposing counsel. One experienced litigator reminded me that in a lawsuit, opposing counsel is getting paid to look for your mistakes: "With a paid critic always checking your work, it just doesn't make sense to fudge."[9]

If you do fudge, you'll lose credibility with the judge, and that might mean sanctions or bar discipline. So write about the facts as favorably as possible for your client, but write honestly.

Be honest about the law.

Sometimes amateurs make mistakes in this area, like the student in this story, who omitted part of the rule of law:

> *In the case the students were working on, the rule was that the court should look at five factors to determine the reliability of a witness. Tom chose to discuss only three of the factors and omit the two that hurt his case. [His writing instructor] commented on this problem by writing, "What about the other two factors?" [Tom responded], "Why put them in? They kill my case."*[10]

That's a naive mistake by a novice legal writer, and I hope it doesn't sound familiar. You can't afford to make that mistake. Read the cases you cite, report their holdings accurately, and check thoroughly to be sure that your cases are still good law.

But why? In Tom's case, the writing instructor had the right response. If you don't report the rule of law accurately, the instructor said, "the State [opposing counsel] will seize on your omission and argue your lack of candor to the court."[11] If you are dishonest about the law, opposing counsel will not let the judge forget it. Judge Sporkin put it this way:

> *If you try to spin a court by hiding a key decision that goes against you, the chances are the judge will find out about the decision either from your adversary or from a law clerk. At that point, your credibility is zero.*[12]

An up-front summary, an obvious organizational plan, and honesty: three writing skills that will please trial judges—and might even surprise them. ✦

This article is excerpted from *Writing for the Legal Audience,* published by Carolina Academic Press.

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FOOTNOTES

1. Beverly Ray Burlingame, *On Beginning a Court Paper,* 6 Scribes J. Legal Writing 160, 161 (1996–1997) (reprinted in 82 Mich. B.J. 42 (Nov. 2003)).
2. Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 58 (U. Chicago Press 2001).
3. Joseph Kimble, *The Elements of Plain Language,* 81 Mich. B.J. 44 (Oct. 2002); see also Joseph Kimble, *First Things First, The Lost Art of Summarizing,* 8 Scribes J. Legal Writing 103 (2001–2002).
4. Irwin Alterman, *Plain & Accurate Style in Court Papers* 97 (ALI-ABA 1987).
5. Steven D. Stark, *Writing to Win: The Legal Writer* 144 (Main Street Books 1999).
6. Wayne Schiess, *The Bold Synopsis: A Way to Improve Your Motions,* 63 Tex. B.J. 1030 (Dec. 2000).
7. Stark, supra note 5, at 269.
8. Stanley Sporkin, *The Inside Scoop,* 27 Litigation 3, 3 (Spring 2001).
9. Kamela Bridges, comments to the author.
10. Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective,* 2 J. Legal Writing Inst. 145, 165 (1996).
11. Id.
12. Sporkin, supra note 8, at 3.