

Brief Writing: The Basics and Beyond¹

“Discussing new trends in brief writing, structure, and presentation, including: shaping the facts; working with a complex record; preservation of issues; standards of review; formulating arguments; and making a forceful case for the relief requested.”

- I. Before the writing begins
 - a. Prepare a checklist
 - b. Assemble what you need
 - i. The record on appeal (MCR 7.210)
 - ii. Transcript(s) (MCR 7.210(B))
 - iii. Exhibits (MCR 7.210(C))
 - c. Thinking before writing
- II. Proper length and form (MCR 7.212(B))
 - a. 50 pages or fewer, exclusive of tables, indexes, and appendices
 - b. Page count (state court appeals) vs Word count (federal court appeals)
 - c. Font
 - d. Double-spaced
 - e. What if you need more pages?
 - i. File a motion for leave to file a longer brief at least 21 days before the due date of the brief. Note: such motions are generally viewed as disfavored
 - f. Can parties file a joint brief? Yes, but the joint brief is still subject to the 50-page limit, and it must be clearly designated as a joint brief. (IOP 7.212(E))

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- III. Contents of a Brief, generally (MCR 7.212(C))
- IV. Pay attention to headings that form your Table of Contents
 - a. Garner-style
- V. Index of Authorities (what gets included)
- VI. Statement of questions involved
 - a. The “deep issue” Garner-style vs the traditional style
- VII. Statement of facts and proceedings
 - a. Working with and citing to the record
 - b. Extra-record evidence: Options for what to do if you need to add it, or if your opponent has added it without permission
- VIII. Argument.
 - a. What are the issues?
 - b. Constructing persuasive and informative argument headings
 - c. Pay attention to which standard of review applies to each issue
- IX. Reply Briefs (MCR 7.212(G))
 - a. What is important to go into a reply brief (rebuttal) and what should stay out (merely repeating your merits brief)
- X. A separately filed appendix (MCR 7.212(J))
 - a. Know the new Court Rule on mandatory appendices
 - b. Best tips/practices on implementing the new Court Rule in practice
- XI. Other references

- a. The Scribes Journal of Legal Writing
- b. State Bar of Michigan Bar Journal “Plain Language” column
- c. “The Winning Brief,” by Bryan Garner
- d. WMU Cooley Law School Law Review annual Distinguished Brief Award winning briefs. These briefs are judged on seven criteria: (1) questions presented, (2) point headings, (3) statement of the case, (4) argument and analysis, (5) style, (6) mechanics, and (7) best overall brief.
 - i. 2017: *Nexteer Automotive Group v. Mando American Corp.*; and *AFT v. State of Michigan*
 - ii. 2016: *Fremont Ins. Co. v. Gro-Green Farms Inc.*; and *Reffitt v. Bachi-Reffitt*
 - iii. 2015: *People v. Lockridge*; and *People v. Uribe*; and *People v. Seewald*



Is Your Brief Conversational? It Should Be

By: Michael J. Cook, *Collins Einhorn Farrell PC*

Executive Summary

Legal briefs are often written to sound non-conversational, filled with old dead words and phrases such as “henceforth” and “wherefore.” By removing these dead words and phrases from your legal briefs, and making your brief sound more conversational, your argument will come across more clearly to your readers (i.e. judges and their law clerks).

Introduction

My undergraduate major wasn't English.¹ I can't map a sentence. And I would probably split an infinitive. So I'm not about to drone on about dangling participles and other grammar rules. But I talk to people. I've been doing it my entire life—well, most of it anyways. Most attorneys have talked to other people too. Yet legal briefs are often written to sound non-conversational. They're stilted, stuffy, and hard to read. They don't need to be. If you can talk to people, then your writing can be conversational—even in legal briefs. And your readers (judges, clients, law clerks, and any other human) will appreciate it.

Plain ol' stuffiness

I cringe—literally cringe—when I see stuffy words. I don't mean those \$10 words that some people learn at expensive colleges. I mean: henceforth, wherein, at bar, aforementioned, therein, and/or, wherefore, whereas, provided that. The list goes on. I know where lawyers learn those words. So do you. It wasn't in grade school, high school, or even college. It was law school.

Lawyers learn dead words and phrases when they're reading cases from 18-something-or-other. Yes, they are “dead.” Where else do you see or hear them? Nowhere. Absolutely, positively nowhere. Lawyers learn them by reading old texts that they struggle to understand and, for psychological reasons beyond my understanding, insist on breathing life back into them. So these lifeless words lumber, lurch, and stagger around briefs. They terrorize text like the walking dead that they are.

Stop. Please stop. Let those terrible words rest in peace. You know their replacements. You hear and use them every day:

Herein = here

At bar = this case

Provided that = But

So spare the judges. Spare your clients. Spare your colleagues. Spare me, please! Let dead words be dead. Here's a simple, easy-to-follow rule (that I made up): If you wouldn't say it to your mother, don't write it in your motion or brief. That rule fails for people who would say things like “henceforth” when talking to their mother. But no one can help those people.

Contractions: Why don't you like “don't”?

I'm not going to tell you that “y'all” has a place in your brief. It doesn't. But “doesn't”



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IS YOUR BRIEF CONVERSATIONAL?

has a place. The reason is simple: when you write does not, it does not sound like a human. A colleague of mine put it best: Avoiding contractions is fine if your name is Commander Data.²

Here's a simple, easy-to-follow rule (that I made up): If you wouldn't say it to your mother, don't write it in your motion or brief.

Read the New York Times. Or, if that isn't your cup of tea, read the National Review. Better yet, listen to yourself the next time you talk to someone.³ The New York Times, National Review, and **you** use contractions (unless you're Commander Data).

Why do you use contractions? You're a normal person. People use contractions. We understand them. They flow. Don't you want your writing to be understandable? Don't you want it to flow?

Judges (and law clerks) regularly read hundreds of pages of motions and briefs. Don't you want your brief to be the smooth, understandable, and appreciated, easy-glide through all of that rough sledding? You want them to feel like they're having an informed conversation when they read a brief. Right?

Maybe not. Maybe you dislike the judge or the law clerk. Maybe you want them to slog through their day. But I doubt it. And I doubt that your client wants that.

Judges (and law clerks) regularly read hundreds of pages of motions and briefs. Don't you want your brief to be the smooth, understandable, and appreciated, easy-glide through all of that rough sledding?

Capitalization: The hiccup in the lawyer's sentence.

The cold, hard truth is that lawyers have a capitalization addiction. It's an epidemic, actually. We capitalize things that have no Earthly business being capitalized. See what happened there? Earthly can be capitalized at the start of a sentence. But in the middle? You hesitated when you saw that, I'm sure.

I understand those who capitalize "Plaintiff," when referring to the particular plaintiff in their case (guilty, convicted, served my sentence). They're referring to a particular person who they have renamed "Plaintiff." They're wrong. But it's understandable.

If it isn't someone's actual name or the formal title of something given to it by its author, Google it before capitalizing it.

Capitalization is a signal. It triggers something in your reader's brain. Do you want that trigger to Pull at random times Throughout your text? No, you don't. Did you feel it when you read Pull and Throughout? Exercise restraint. It's easier to read and retain a sentence that doesn't have capitalization popping up in the middle of it. So avoid it, if you can.

Here's a basic rule: If it isn't a formal name (Bill Jones, General Motors, Inc., etc.), don't capitalize it. And here's an even better rule: If it isn't someone's actual name or the formal title of something given to it by its author, Google it before capitalizing it. (I Googled whether to capitalize Google and The Chicago Manual of Style said, yes).⁴

So Defendant's Motion for Summary Disposition gets capitalization when you're referring to it by title. But the summary-disposition motion and the motion for summary disposition don't get capitalization because those aren't the full,

formal titles; they're a generic reference to a particular document. And notice how much easier the sentence is to read without the capitalization muddying it up.

Conclusion: Why I'm right and that guy saying henceforth is wrong.

This is the secret that's at the root of this article: Judges and clients are real people, just like you and me. It's true. Judges and clients talk the same way that you and I do. They read the same magazines, newspapers, and blogs that you and I do. They are normal people. As a result, their brains work like normal-people brains. So write for them like they're normal people. Since they're lawyers, some judges will think, "hey, it's 'do not'" or "you can't write 'can't' in a brief." But the irony in that thought will be lost as they ease through your brief.

One last thing: I'm not perfect. Far from it. Anyone can pull my briefs from Michigan's appellate and trial courts and point out errors—grammatical or violations of what I've said in this article. I'm human. Like you, I have time constraints. I need sleep (occasionally). I love spending time with my family (more than occasionally). I have to figure out how to fix the bathroom sink (too specific?). But I endeavor. I try. I'll continue to try. And, for goodness sake, I'll let "henceforth" die the quiet, respectful death that it deserves.

Endnotes

- 1 My major was criminal justice, yet I practice civil litigation. Go figure.
- 2 Commander Data is a character from the television series, Star Trek: The Next Generation. He's an android.
- 3 Don't actually do this though; it's very distracting.
- 4 The Chicago Manual of Style Online, Registered Trademarks, available at <http://www.chicagomanualofstyle.org/qanda/data/faq/topics/RegisteredTrademarks/faq0001.html>.