WRITING FOR EXPERT READERS

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Excellent advocacy, whether written or oral, requires careful attention to the needs and expectations of the audience. It is not enough to find a correct argument; the advocate must make that argument in a way that will actually persuade the decisionmaker. As former Eleventh Circuit Judge John Godbold explained, "[a]ll is in vain unless the court understands."[1] As a practical matter, an appellate court will receive an argument first—and perhaps only—by *reading* it. Appellate judges read written briefs in every case; they hear oral arguments in only some cases. For an appellate advocate, then, excellent representation means (at least) writing an effective brief.

To write an effective brief, the advocate should consider the likely reading habits of the judges who will decide the case. Appellate judges, like all lawyers, read legal texts not simply to gain information but to understand legal rules, to make sense of one set of rules in light of another, and to compare and contrast one set of facts with another. With limited time, lawyers read at several levels, strategically looking for information that they think will be important for specific purposes. Among law-trained readers, "novices" and "experts" have different habits in reading.[2] By experience and necessity, appellate judges are expert readers.

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1. John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 803 (1977).

2. *See* discussion *infra* Part II.

Studies of lawyers' reading habits show that expert readers (1) use their background knowledge and experience to make sense of new information, (2) take care to understand context before details, (3) skim and skip around documents to find information that is likely to be important for a specific purpose, and (4) ask questions of the text as they read.[3] An effective brief makes reading easier for expert readers who practice some or all of these habits.

Part I of this article describes several "levels" of reading that enable genuine understanding. Lawyers (and judges) routinely read at all of those levels, for specific purposes. Part II recounts the studies comparing the reading habits of novice and expert legal readers, showing that experienced lawyers (including judges) read cases, statutes, and briefs in particular ways to achieve certain goals. Part III then argues that appellate advocates, recognizing that they write for expert readers, should employ techniques that make reading easier and more satisfying for the judge at every level. In the end, the old rules of good writing are still good rules—because they respond to the needs and habits of expert readers.

I. READING LAW GENERALLY

In 1972, Mortimer J. Adler and Charles Van Doren published *How to Read a Book: The Classic Guide to Intelligent Reading*.[4] Adler and Van Doren promoted "intelligent reading" as a means to achieve personal and social enlightenment. Reading good books, they argued, rewards the reader in two ways: "First, there is the improvement in your reading skill that occurs when you successfully tackle a good, difficult work. Second—and this in the long run is much more important—a good book can teach you about the world and about yourself,"

3. *See* discussion *infra* Part II.

4. MORTIMER J. ADLER & CHARLES VAN DOREN, HOW TO READ A BOOK: THE CLASSIC GUIDE TO INTELLIGENT READING (rev. ed. 1972).

because "you [become] more deeply aware of the great and enduring truths of human life."[5]

Lawyers, like other readers, may seek to discover such truths, but that is rarely necessary to handle a matter for a client. Reading for understanding, not just information, is lawyers' work in every matter. To gain understanding, lawyers should read any legal authority at four distinct "levels of reading": elementary reading, inspectional reading, analytical reading, and comparative reading.[6]

A. Elementary Reading

The first level of reading, called "elementary reading," involves simply identifying the words in a sentence, recognizing their ordinary meanings, and so discerning—in the simplest sense—the thought expressed in the sentence.[7] The critical question at this level is, "What does the sentence say?"[8]

Even this elementary level of reading is important for lawyers, who know that specific words may have significant legal consequences. Think "shall" versus "may" or "means" versus "includes." Then think of all the judicial opinions that focus on statutory or dictionary definitions. Precision is a hallmark of legal writing, because a legislature's choice of one statutory term rather than another, or the parties' agreement on one contract term or another, may have significant practical consequences. In their reading as in their writing, lawyers must pay close attention to the specific words that the author(s) chose to communicate the message.

5. *Id.* at 340–41.
6. *Id.* at 16.
7. *Id.* at 17–18.
8. *Id.* at 17.

B. Inspectional Reading

Adler and Van Doren's second level of reading, called "inspectional reading," involves the reader's effort to "get the most out of a book within a given time—usually a relatively short time, and always (by definition) too short a time to get out of the book everything that can be gotten."[9] This is not speed-reading; rather, it is "skimming systematically," or skimming for a purpose.[10] This "inspectional reading" aims to understand as much about the book as its surface will tell—the general subject matter, the organization of constituent parts, and the relation of each part to the whole.[11] Beyond asking what the sentences say, at this level the reader asks, "What is this book about?" and "What is its structure?"[12] In other words, the reader seeks to discern the overall *context* of the book before diving into the details.

At this level, the reader's "main aim is to discover whether the book requires a more careful reading," employing a "threshing process that helps [the reader] separate the chaff from the real kernels of nourishment."[13] The title, the table of contents, and the index of a book provide the kinds of information necessary for this threshing process.[14] The chapter titles and the introductory and summary sentences at the beginning and end of each chapter provide more specific information.[15] Topic or thesis sentences at the start of each paragraph provide even more context. All those parts of a book disclose the general subject matter of the book, the organization of the component parts, and the main ideas that the author set out to communicate. Through this kind of inspectional reading, the reader

9. *Id.* at 18.
10. *Id.* (emphasis omitted).
11. *Id.*
12. *Id.*
13. *Id.* at 32.
14. *Id.* at 32–34.
15. *Id.* at 35.

seeks to identify the "forest" before examining the "trees."

A lawyer reading a statute or a case performs this same kind of inspectional reading. To get a sense of the context in which a statutory provision appears, a lawyer should identify the subject matter of the title of the code containing the provision; scan that title to see the various kinds of provisions that it contains; and then locate the specific provision of interest among the others. Even that skimming process may give the lawyer more knowledge of the subject matter than he had before, and understanding the context in which the provision appears may prove useful in predicting how a court will interpret the provision. Equally important, this skimming process might convince the lawyer that a particular provision is not relevant to the question he needs to answer and thus may be set aside.

Similarly, the first step in understanding a case is skimming the prefatory information—the caption, the syllabus, and the headnotes—to determine what kind of case it is, what kind of court decided it, and the kinds of legal rules that are discussed in it. That basic information allows the lawyer to determine at the outset whether the case is worth reading in detail. If the lawyer determines that the case is worth reading further, then skimming for the procedural posture allows the lawyer to place the case in its immediate legal context. Is this an appeal from a final judgment or an interlocutory order? Is this a proceeding to review an order of an administrative agency? Did the lower court or agency grant full relief, or only partial relief, to one or more parties? That basic information helps the lawyer understand the scope of review, the frame for the substantive legal analysis.

Quickly reading for background and context—identifying the forest before examining the trees—is a critical step in understanding a case as well as a statute.

C. Analytical Reading

Adler and Van Doren's third level of reading, called "analytical reading," is "the best and most complete reading that is possible given unlimited time."[16] At this level, the reader pores over sentences to understand their precise meaning, makes connections between sentences and paragraphs, and asks questions of the text before him. "Reading a book analytically," Adler and Van Doren wrote, "is chewing and digesting it."[17] The reader's goal should be to state *in his own words* the essential claim or argument of the book.[18] At that point, the reader has "come[] to terms with [the] author and grasps his propositions and reasoning," and in that way "shares the author's mind."[19]

But that is not all. Once a reader accurately understands the author's claims and arguments, then the reader should ask whether, or to what extent, those claims and arguments are *true*. An author may say whatever the author likes, but it is true or not true—persuasive or not persuasive—because of the *reasons* the author gives. Reading for understanding, not just information, involves not only paraphrasing the author's position but also "talking back" to the author, asking whether that position is uninformed, or misinformed, or illogical, or incomplete.[20]

Lawyers should do this kind of analytical reading as a matter of course. For a lawyer, "chewing and digesting" a legal authority means word-by-word, sentence-by-

16. *Id*. at 19.

17. *Id*.

18. *See id*. at 125. "If, when you are asked to explain what the author means by a particular sentence, all you can do is repeat his very words, with some minor alterations in their order, you had better suspect that you do not know what he means." *Id*. at 125–26.

19. *Id.* at 153.

20. *See id*. at 156. Importantly, this kind of critical analysis can only take place once the reader has fully understood the author's position; the reader must suspend judgment or criticism until she can accurately explain the author's argument and reasoning. *See id*. at 142 ("Do not begin to talk back until you have listened carefully and are sure you understand.").

sentence, paragraph-by-paragraph examination of the relevant text. Analytically reading a statute means identifying defined terms, uncovering ordinary meanings of undefined terms, accounting for cross-references to other provisions, and considering relevant canons of interpretation. Statutes have specific structures, with subsections and paragraphs and clauses that relate to each other in specific ways. A lawyer should follow the subdivisions closely, paying attention to syntax and punctuation, with the goal of achieving an accurate paraphrase. The lawyer must try to determine the plain meaning of a statutory provision, using every available textual aid, and then consider extra-textual sources to resolve any ambiguities. Until the lawyer can restate the point of the provision simply but precisely, explaining how it works in the ordinary case, she has not really understood the statute.

Likewise, analytically reading a case means (1) identifying the specific legal rules that the court applied, (2) recognizing the kinds of authorities on which the court relied, (3) understanding how the court applied the legal rules to the material facts, and (4) identifying the court's resolution of specific issues as well as its disposition of the case as a whole. Along the way, the lawyer must pay careful attention to the court's phrasing of important rules, including any tests or elements or factors to consider. Just as important is the way the court actually handled the tests or elements or factors in the context of specific facts. How the court applied the rules sometimes reveals more than the statements of the rules themselves. And of course, lawyers must pay close attention to the citations—not just because we all did our duty and learned the language of citation in law school, but because the citations show us how the court's analysis follows (or does not follow) other authorities. Did the court cite any controlling authorities for the critical rule that it applied? If not, why not? Did the court cite "old" authorities when newer authorities were available? If so, why? Sometimes the court's choice of

authorities reveals something important about the court's understanding of the rule.

And after all that, when the lawyer finally understands the key point of the statute or the case—and is able to explain precisely and concisely what the statute does or what the case stands for—the lawyer should also ask, "Does this rule make sense?" and "Are these reasons sufficient to justify this result?" The point is not criticism for its own sake, but more complete understanding of the rule and its reasons. The lawyer should imagine a different rule and think about the costs and benefits of one rule as opposed to the other, so that the lawyer may see potential arguments for a specific case.

Obviously, this kind of reading takes more time and more attention to detail than inspectional reading. If inspectional reading focused on the forest, analytical reading focuses—in detail—on the trees. A lawyer must understand both.

D. Comparative Reading

Adler and Van Doren's fourth level of reading, called "syntopical reading" or "comparative" reading, requires the reader to consider a book in relation to other books addressing the same or similar subjects.[21] The purpose of this kind of reading is to identify the ways in which one author agrees or disagrees with other authors' approaches to the same or similar questions.[22] The reader undertakes this "most complex and systematic type of reading" so that he may develop his own analysis of the subject, informed by various sources (not just one book).[23]

Lawyers perform this kind of comparative reading all the time. To give sound advice, to predict how a court may decide a particular dispute, or to make a compelling

21. *Id.* at 20.
22. *Id.* at 318–20.
23. *Id.* at 20.

argument, a lawyer must be able to put several authorities together and recognize material similarities and differences among them. Perhaps the lawyer will synthesize a rule from the results and reasoning in several cases in a jurisdiction. Perhaps he will analogize an out-of-jurisdiction case to his own case or distinguish a seemingly controlling precedent. All that involves comparative reading.

At this fourth, most advanced, level of reading, the lawyer's knowledge and experience add the most value. Indeed, "[t]he most important factor that affects comprehension ability is the knowledge that the reader brings to the page," which enables the reader to interact with the text (and its author).[24] As a lawyer gains knowledge and experience in a particular area, she is better equipped to ask questions of the text, to challenge assumptions in the text, and to appreciate how various rules or facts combine to produce a result. At the same time, greater knowledge and experience enable the lawyer to recognize possible analogies or distinctions. In research, the lawyer considers the fact pattern and procedural posture of one case in relation to the fact patterns and procedural postures of similar cases. She thinks about how the courts in a series of cases described and applied the same or similar legal rules, and she asks herself whether one case is more or less like her own case and thus more or less useful in answering her specific question.

To summarize these four levels of reading, Adler and Van Doren say that an active reader should ask four questions:

1. "What is the book about as a whole?"
2. "What is being said in detail, and how?"
3. "Is the book true, in whole or part?" and
4. "What of it?"[25]

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24. Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657, 657 (1996).

25. ADLER & VAN DOREN, *supra* note 4, at 46–47.

These kinds of questions are plainly relevant to lawyers reading legal authorities. A lawyer reading any statute or judicial opinion should ask:

1. What is the context of the statute or the case?
2. What is the specific rule and rationale?
3. Is the rule a good rule, in light of simple logic or fairness or efficiency (or some other basis for judgment)?
4. What difference does this statute or case make to my purpose?

According to Adler and Van Doren, simply knowing the questions to ask is not enough: "You must remember to ask them as you read. The *habit* of doing that is the mark of a demanding reader."[26]

II. EXPERTS VERSUS NOVICES

The kind of reading that lawyers must do is demanding work. Whether they are reading constitutions or statutes or cases or contracts, lawyers must understand the meaning of written words so they can apply those words to their clients' problems. They must read carefully, critically, with a mind open to alternatives. That skill is learned through experience. Thus, it is no surprise that more experienced lawyers are better readers than less experienced lawyers. Beginning with Mary Lundeberg's study of reading strategies used by law students, professors, and attorneys in 1987,[27] several studies have identified the different reading habits of "novice" legal readers (typically law students) and "expert" legal readers (experienced lawyers and professors).[28]

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26. *Id*. at 48 (emphasis original).

27. Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RSCH. Q. 407 (1987) (observing the reading habits of eight law professors, two attorneys, and ten non-law-trained individuals with at least one graduate degree).

28. *See, e.g*., Jane Bloom Grise, *Critical Reading Instruction: The Road to Successful Legal Writing Skills*, 18 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 259 (2017) (observing the reading habits of 24 first-semester law students); Leah

In general, novices read a judicial opinion "inflexibly," from beginning to end.[29] They pay little attention to context, such as the names (or kinds) of parties or the judge or the date of the opinion.[30] They typically read every sentence with more or less equal care (and at the same speed)—often failing to distinguish holdings from dicta—and they rarely ask questions of the text.[31] When novices encounter difficulties in a legal text, they often make a guess and move on rather than resolve the difficulties first.[32] In other words, novices typically read to *finish*, not to *understand*.

Expert readers handle a judicial opinion differently. They spend more time getting the context first—identifying the parties, the judge, the date of the opinion, and other information that helps the reader situate the case among broad categories of cases that the reader has seen before.[33] Experts do not read a case inflexibly, from beginning to end; rather, they often skim headnotes and headings and skip around parts of the case to find different kinds of information.[34] They often go to the end

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M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 B.Y.U. Educ. & L.J. 53 (2008) [hereinafter Christensen, *Paradox of Legal Expertise*] (observing the reading habits of ten law students, eight attorneys, and two judges); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997) (observing the reading habits of four law students and one law professor).

29. Christensen, *Paradox of Legal Expertise*, supra note 28, at 55.

30. *Id.* at 58–59; Lundeberg, supra note 27, at 413.

31. Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 84; Grise, *supra note* 28, at 279; Dewitz, *supra* note 24, at 663; Lundeberg, *supra* note 27, at 416–17. For the novice, "[e]very detail has an equal importance because [he] does not yet know what to take in and what to discard as irrelevant." Leah M. Christensen, *The Psychology Behind Case Briefing: A Powerful Cognitive Schema*, 29 CAMPBELL L. REV. 5, 13 (2006) [hereinafter Christensen, *Case Briefing*].

32. Grise, *supra* note 28, at 279.

33. Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 67; Grise, *supra* note 28, at 277; Lundeberg, *supra* note 27, at 412–14, 416 ("Experts spent more time, proportionally, than novices in overviewing the case and reading the first page.").

34. Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 82–83; Grise, *supra* note 28, at 277–78; Dewitz, *supra* note 24, at 658 ("Experts use their knowledge of [the structure of judicial opinions] to guide their comprehension.

of the case to read the ultimate disposition before going back to read the explanation more carefully.[35] They read background information more quickly, and they slow down over information that they think will be important for their purpose.[36] When experts encounter difficulties in a text, they ask questions and find answers before moving on.[37] Experts re-read cases, or parts of cases, to nail down important points.[38] Much more than novices, experts "generate their own hypotheticals to determine how the decision might be applied to a new factual situation."[39] And they think about how one case relates to others that they have read.[40]

The essential difference between novices and experts is the use of background knowledge and experience in reading any new case.[41] The novice lacks much background knowledge and experience, and so (naturally) reads each new case as if it were the only case on point.[42] That may explain why the novice pays little

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The expert reader will first locate the facts of the case, then the decision, and finally read to understand the rationale behind the reasoning.").

35. Lundeberg, *supra* note 27, at 413 ("One of the first strategies the experts used . . . was to flip to the end of [the case], and mark the decision . . . . The experts, on some level, knew that having this information prior to reading the rest of the case would be beneficial.").

36. Grise, *supra* note 28, at 279 (stating that "experts vary their speed depending upon content"); Dewitz, *supra* note 24, at 663 (stating that "the novice reads each portion of a case at an almost equal rate, albeit slower than the expert"); Lundeberg, *supra* note 27, at 416 ("With their knowledge both of the text type and of law, experts showed greater flexibility in rate of reading.").

37. Grise, *supra* note 28, at 279.

38. Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 83; Grise, *supra* note 28, at 280.

39. Grise, *supra* note 28, at 280; *see* Lundeberg, *supra* note 27, at 414 (stating that unlike the novices in her study, almost half of the experts "inferred hypothetical legal situations based on the case given").

40. Grise, *supra* note 28, at 281.

41. Dewitz, *supra* note 24, at 657–58 ("The most important factor that affects comprehension ability is the knowledge that the reader brings to the page. . . . [T]he novice is at a serious disadvantage compared to the expert, but that is why she goes to law school."). *See also* Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 66; Christensen, *Case Briefing*, *supra* note 31, at 8.

42. *See* Laura A. Webb, *Why Legal Writers Should Think Like Teachers*, 67 J. LEGAL EDUC. 315, 318 (2017) (stating that "[n]ovices . . . may not immediately identify the background knowledge and structure that can assist them in solving

attention to context. The novice also lacks experience reading judicial opinions—and thus lacks awareness of typical structural and organizational cues for identifying different kinds of information.[43] That may explain why the novice reads opinions inflexibly and at a mostly uniform speed. By contrast, the expert immediately situates the case among all the others he has read and determines *what kind of case* it is and *how it came out* before diving into the details.[44] Once he identifies the case as "a contracts case" (most generally) or "a consideration case" (more specifically) or "a trial court ruling on a motion for summary judgment based on lack of consideration" (even more specifically), the expert reads the case in light of his knowledge and experience with respect to key aspects of the case.[45]

In addition to making better use of background knowledge and experience, expert readers also read with a specific purpose more than novices do.[46] The expert typically reads a case to achieve some goal related to the representation—*e.g.*, preparing for a client meeting, advising the client on next steps, predicting the outcome of a dispute, or putting together a motion or brief.[47] With

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a problem, nor are they able to make the same connections as experts among bits of information").

43. *See* Dewitz, *supra* note 24, at 658 ("The more a reader knows about the structure or organization of a text the more smoothly comprehension can proceed. . . . Legal cases and legal briefs present new text structures and a new challenge for just-graduated college students who have spent four years reading narratives or expository text structures."); Grise, *supra* note 28, at 278 (explaining that "good readers selectively read important sections of text and look for key words and patterns in text").

44. Dewitz, *supra* note 24, at 658.

45. Webb, *supra* note 42, at 318 (explaining that "[e]xperts quickly recognize appropriate context and background information for a given problem, even if it is not provided to them," and they "quickly recognize patterns in knowledge, new information, and new problems").

46. Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 55 (observing that "[t]he experts connected to the purpose of their reading more consistently than the novices"); *id.* at 66 (explaining that "the experts 'connected to the purpose' of the reading . . . far more often than the novices").

47. *See id.* at 66; James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 J. LEG. WRITING INST. 35, 35 (1991) ("What is important to stress is that, like most of us who read on the job, lawyers do so with specific goals in mind. They read in order to accomplish certain tasks—to

that specific purpose in mind, the expert prioritizes her reading to find the kinds of information that will be most important to her task; the result is that the expert reads more flexibly and more efficiently than the novice.[48] The expert's clear purpose, combined with her background knowledge and experience, directs the expert's reading—making the process more intentional, more active, and more efficient.

These novice-versus-expert studies suggest that experienced lawyers actively engage in all four levels of reading that Adler and Van Doren described—most importantly, inspectional, analytical, and comparative reading. The experts in these studies spent time in a skimming or threshing process to start, identifying the nature of the case and the general subject matter of the legal issues to be addressed. They prioritized understanding the context before the details. That is inspectional reading. The experts then engaged in analytical reading, focusing their attention (and slowing their pace) to understand the specific legal rules and material facts that led to the ultimate result. When they encountered difficulties, they asked questions of the text and found answers before moving on. Finally, the experts engaged in comparative reading by hypothesizing how the case might apply to similar situations or how the case might be distinguished from other cases the experts had read.

III. WRITING FOR EXPERT READERS

If experienced lawyers generally read this way, then we may assume that most appellate judges read this way. Indeed, appellate judges may be the most expert of expert legal readers. To start, most appellate judges are experienced lawyers themselves. When they became judges, they refined their reading skills by necessity.

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prepare an answer to an interrogatory, to help a client with a problem, or to screen an argument on appeal.").

48. *See* Christensen, *Paradox of Legal Expertise*, *supra* note 28, at 55.

Just to clear their dockets, appellate judges must read thousands of pages of written documents—motions, briefs, and record documents—efficiently. And what is their purpose in reading? To identify and answer specific legal questions.

So how should an advocate write for expert readers like these? The goal of advocacy is to convince the court, but "[b]efore counsel can convince he must inform. He must cause the court to understand him."[49] For the purpose of achieving that kind of understanding, the old rules of good legal writing are still good rules. If you want to be understood—and not misunderstood—in one reading, then you must keep the judge focused on the substance, not distractions; you must make your most important points simply and forcefully; you must provide critical information in places where the judge expects to find it; and you must communicate efficiently in language that is familiar to the judge. In other words, you should write briefs that make all four levels of reading easier for the judge.

A. Make Elementary Reading Easier

When the judge reads your brief, "[e]very intellectual pore is open to receive help and guidance. . . . That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication."[50] You might not be able to make hard legal issues seem easy, but you should try to make that first level of reading—elementary reading—easy for the judge.

First, write plain English, using short, familiar words as much as possible. For some issues, technical language is necessary; most of the time, plain English is

49. Godbold, *supra* note 1, at 802. *See also* Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, 20 LITIGATION 6, 12 (1994) (stating that "judges must understand and remember your position before they can agree with it").

50. Godbold, *supra* note 1, at 808.

appropriate.[51] If you must use technical language, then be sure to explain the unfamiliar terms. As much as possible, avoid "stuffy" language; write the way a reasonably educated person would talk.[52] A few examples:

"Stuffy"	Better
the case at bar the instant case	this case / here
prior to	before
subsequent to	after
due to the fact that for the reason that	because
inter alia	among other things / among others

For these and more examples, see *The Redbook* (§ 12). As *The Elements of Style* puts it (for writers generally), "[a]void the elaborate, the pretentious, the coy, and the cute."[53]

Second, as much as possible, use the parties' names (and meaningful short forms) rather than litigation titles (such as "Plaintiff" or "Appellant/Cross-Appellee").[54] The

51. *Id.* at 811 ("Communicate with the court, by pen and by voice, in terms as simple and as easily understood as the subject matter permits.").

52. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 247 (5th ed. 2023) ("A lawyer should keep in mind that the purpose of communication is to communicate, and this can't be done if the reader or listener doesn't understand the words used."); Ross Guberman, *Judges Speaking Softly: What They Long for When They Read*, 44 LITIG., Summer 2018, at 48, 50; Joseph Kimble, *A Better First Paragraph, Please*, 101 JUDICATURE 45, 45 (2017).

53. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 71 (4th ed. 2000).

54. *See* FED. R. APP. P. 28(d) ("In briefs and at oral argument, counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names or the designations used in the

judge will have an easier time understanding a story that involves real people and entities than a story involving Third-Party Defendants or Respondents/Cross-Petitioners. Of course, there will be exceptions: Husband and Wife are appropriate labels in a divorce case, especially if they share the same last name. The critical question is what reference will be easiest for the judge to remember. The judge should not need to make a cheat sheet to remember who's who in the lawsuit.

Third, the parties *in your case* should have names, but the parties *in other cases* that you might discuss (in text or parentheticals) should not. Presumably you want the judge to remember the names of the parties in your case. But the names of parties in other cases are probably extraneous details that the judge does not need to remember.

Fourth, as much as possible, use words rather than acronyms. Words are easier to read than blocks of capital letters. Of course, if the acronym is so commonly used that any reader would recognize the reference easily—think CIA, FBI, FDA, NAACP, NATO—then use the acronym.[55] Read your draft out loud. If you find yourself skipping over an acronym, then use words instead.

Fifth, produce a clean document—free from typos, grammatical errors, punctuation errors, citation errors, and violations of formatting rules. You want the judge to focus on the *content* of your document, but those kinds of errors are distracting. They are "artificial obstacles" to communication, the kinds you always want to avoid.[56]

B. Make Inspectional Reading Easier

Some judges say they read briefs from cover to cover. Some say they start with the summary of argument; others say they start with the statement of issues; still

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lower court or agency proceeding, or such descriptive terms as 'the employee,' 'the injured person,' 'the taxpayer,' 'the ship,' 'the stevedore.'").

55. Guberman, *supra* note 52, at 48; Joseph Kimble, *Another Plea to Hold the Acronyms*, 105 JUDICATURE 82, 82 (2021).

56. Godbold, *supra* note 1, at 808.

others say they start with the statement of facts. You might not know exactly how a particular judge will read your next brief, but you may assume that any judge with limited time wants to get to the point of the case quickly. Like other expert readers, your judge probably will skim and skip around a document to find the overall structure, the overall argument, and the key substantive points before diving into the details. So make the overall structure of your argument easy to identify, and give the judge opportunities to find previews and summaries throughout the brief.

First, before you start writing, make an outline. An expert reader will look for the "skeleton" of your brief—the structure, the connections, the overall plan—so make sure there is one to find. "Choose a suitable design" before you begin to write, "and hold to it."[57]

One way to start thinking about your outline is to ask *how a judge probably would think through the issues*. As Judge Godbold explained, the advocate "must, in imagination, change places with the court."[58] Analyze your issues *objectively* before you argue them *persuasively*. As you read through cases addressing your issues, try to identify a common structure in the discussion sections of the opinions. Take that "baseline" structure and then think about where your strongest and weakest arguments fit in that structure. Ideally, you will be able to make your strongest argument in the same place where a judge is likely to look for it. But it may be that your strongest argument comes out of order in relation to the baseline structure. In that case, ask *how you want the judge to think through the issues*—and how you can arrange the relevant points in a logical way, even if that is slightly different from the baseline structure.

Imagine an appeal presenting the issue whether the district court properly denied the defendant's motion to suppress evidence obtained in a warrantless search of

57. STRUNK & WHITE, *supra* note 53, at 24 ("The first principle of composition . . . is to foresee or determine the shape of what is to come and pursue that shape.").

58. Godbold, *supra* note 1, at 809.

the defendant's car. Both parties predict that a court would analyze the issue by asking three questions: (1) Did the officers have probable cause to search the car? (2) Was the car operable? and (3) Did the defendant consent to the search? The parties might outline their arguments slightly differently:

Defendant's outline

I. The warrantless search was improper because the automobile exception did not apply.

   A. The officers did not have probable cause to search the car.

   B. The car was not operable.

II. Johnson did not consent to the search.

Government's outline

I. Johnson consented to the search.

II. Even if Johnson did not consent, the officers did not need a warrant because the automobile exception applied.

   A. The officers had probable cause to conduct a search.

   B. Johnson's car was operable.

From these basic outlines—both of which address the same issues—a judge could predict that the defendant's strongest argument will be that the officers lacked probable cause and the Government's strongest argument will be that the defendant consented to the search.

An outline need not be *formal*, but it should be *detailed*—noting the key legal authorities and evidence on which each point will rely. The more detailed the outline, the easier the writing will be. You will more likely avoid needless repetition, and your argument will have a clear direction and momentum from start to finish. From the reader's perspective, a brief with this kind of "skeleton"—this clear structure and plan—will be easier to follow and understand.

Second, show your organization in logically coherent, single-sentence headings. Expert readers skim the document to find important information, so make the

most important information easy to find—in headings that look different from the surrounding text. Headings are usually shown in bold type, single-spaced, when everything else is in regular type, double-spaced. Simple, clear headings throughout the text show the sequence of points in your argument; they provide summaries of important points along the way of a longer presentation; and they create space (above and below) that visually signals each new point.[59]

In the argument section of the brief, write single-sentence, argumentative headings that convey the structure of the argument. "By reading the headings alone, the [judge] should be able to understand not only the issues that the brief addresses, but also the writer's position on those issues."[60] The judge should not have to read all the details to understand the argument; the headings should identify the main points, in logical order.

As you write your headings, think about how they will look in the table of contents. Copy all of your headings and subheadings, in order, into a clean document. If you cannot see your complete argument in those headings and subheadings, and if you are not at least tentatively persuaded to accept your conclusion based on those headings, then start over. The judge should be able to read the table of contents alone and understand your big-picture argument. Topical signposts will not achieve that objective; you need succinct, argumentative headings. See the difference:

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59. BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 22 (2d ed. 2013) [hereinafter GARNER, PLAIN ENGLISH] ("State and federal judges routinely emphasize the importance of point headings in briefs. They say that headings and subheadings help them keep their bearings, let them actually see the organization, and afford them mental rest stops. Headings also allow them to focus on the points they're most interested in.").

60. Mary Beth Beazley, *Performance-Focused Technology: Writing (and Reading) Appellate Briefs in the Digital Age*, 15 J. APP. PRAC. & PROCESS 47, 67 (2014); *see also* JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 129–34 (2d ed. 2022); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 376–84 (7th ed. 2018).

Topical signposts	Persuasive headings
I. Hearsay	I. The district court abused its discretion in admitting Johnson's hearsay testimony.
II. Jury instructions	II. The district court's jury instructions misstated the requirements of the Trade Secrets Act.
III. Harmless error	III. The errors were not harmless but substantially affected the jury's verdict.

Sometimes point headings are even more specific, giving the bottom-line *reason* for the conclusion you want the judge to accept:

I. The district court abused its discretion in admitting Johnson's hearsay testimony, which was *not a dying declaration*.
II. The district court's jury instructions, which *omitted the definition of "misappropriation,"* misstated the requirements of the Trade Secrets Act.
III. The errors were not harmless but substantially affected the jury's verdict *because the plaintiff's evidence was entirely circumstantial*.

Headings seem to be less common in the statement of facts, but consider using them to break a long story into smaller, easier-to-read chunks. Identify the best facts for your position and organize the story around those facts. Be careful: Even a persuasive statement of facts should have a "just the facts" tone, and every detail must be *entirely accurate*. This is not the place for argument. Consider these alternative headings in a statement of facts:

Defendant's brief	Government's brief
A. The search	A. "Go ahead, I have nothing to hide."
B. The motion to suppress	B. In the district court, Johnson claimed he never consented to the search.
C. The suppression hearing	C. After an evidentiary hearing, the district court found that Johnson consented to the search.

The topical signposts in the defendant's brief organize the relevant story in three phases: there was a search, and then there was a motion, and then there was a hearing. The headings in the Government's brief organize the story the same way, but they highlight an important fact in each phase—the defendant's own words giving permission to search, the defendant's later claim that he never consented to the search, and the court's finding that the defendant did, in fact, consent. The headings are modest statements of fact, not arguments—but they suggest to the appellate court that the critical issue in the case is whether the defendant's statement, "Go ahead, I have nothing to hide" justified the search.

Third, look for opportunities to preview or summarize throughout the document. Expert readers skim and skip around a document to find important information, so make sure to provide summaries at important points throughout the document. Federal Rule of Appellate Procedure 28 does not say anything about an introduction in an appellate brief. Even if you choose not to include a formal introduction in your brief, look for places throughout the brief to provide something similar—the short version of the story, or your legal position, or both. "One requisite for clear exposition . . . is knowing how to establish a context

before embarking on details. Otherwise, your readers won't know what to make of the details."[61]

Start your statement of facts with a short paragraph identifying the parties and their relationship and summarizing the factual dispute as your client sees it.[62] In this way, you can give the context before the details—which will help the judge make sense of the details. *If you had 30 seconds to explain to a stranger what the dispute really was all about, what would you say?*

Write a clear, straight-to-the-point summary of argument. Although the Federal Rules of Appellate Procedure do not require a summary of argument, the local rules of some courts of appeals do.[63] Take the opportunity to preview the complete argument that you will make, reflecting your big-picture theory of the case. If an expert reader were looking for a bottom-line explanation of your legal argument, the summary of argument should be the best place to find it. *If you had one minute to explain to a stranger why you should win on each of the issues presented in the appeal, what would you say?*

Of course, you should provide previews and summaries throughout your argument, too. Roadmap sentences or paragraphs at the start of each section help your reader keep track of discrete steps in your argument. At any point where you divide one point into two or more subpoints, you need some kind of roadmap.[64] Even a single sentence identifying the two or three elements or factors that you plan to address may suffice to reveal the organization that you will follow. Then,

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61. GARNER, PLAIN ENGLISH, *supra* note 59, at 78.

62. *See id.*; Jane R. Roth & Mani S. Walia, *Words to the Wise Advocate: Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. APP. PRAC. & PROCESS 443, 447 (2010) ("Always recap the entire story quickly in the first paragraph and then move into a chronological presentation beginning in the second paragraph.").

63. *See, e.g.*, 11TH CIR. R. 28-1(j) ("The opening briefs of the parties shall also contain a summary of argument, suitably paragraphed, which should be a clear, accurate and succinct condensation of the argument actually made in the body of the brief.").

64. *See* ROCKLIN ET AL., *supra* note 60, at 171–72; SHAPO ET AL., *supra* note 60, at 191.

make sure that the first sentence of each paragraph states the topic or thesis of the paragraph. A judge who is skimming and skipping around the brief in search of the key steps in your argument should be able to find them in these roadmaps and topic or thesis sentences.

C. Make Analytical Reading Easier

To make analytical reading easier, give the judge all the information necessary to understand your position in one reading—every key legal rule and every material fact, in some logical order. "A good argument section is a manual for the judge on how to decide the issue. The advocate should lay it out following the form that a judicial opinion will take; that is, the legal rule, an explanation of it, and then application."[65] Following that format of argument will help ensure that you provide the most important information in the places where the judge will be looking for it. Then provide the information in easily digestible "chunks"—short(ish) sentences in short(ish) paragraphs.[66]

I say "short(ish)" because the point of "chunking" is not to impose artificial limitations on the number of words per sentence or the number of sentences per paragraph. Rather, the point is to "(1) keep *related* pieces together and (2) create chunks that, even if large, help the reader by accessing the reader's contextual knowledge and showing the *structure* of the document."[67]

First, in your choice of words, be *accurate* (correct) all the time; be *precise* (accurate and specific) as to legal rules and important facts. For example, the defendant robbed the bank "in the late afternoon" if the time of day is not important to the legal analysis; the defendant robbed the bank "at 4:57 p.m." if the time of day is important. Give only the details that the judge needs to remember to understand your position.

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65. Roth & Walia, *supra* note 62, at 451.
66. Webb, *supra* note 42, at 328.
67. *Id.* at 329 (emphasis original).

Second, quote critical words and phrases, especially if they come from a controlling legal authority, and stick with the same words or phrases throughout your argument.[68] Judges are lawyers, trained to pay close attention to specific words and phrases; using synonyms or paraphrases may cause your judge to wonder whether you mean something different each time.

Third, as much as possible, write simple sentences with the subjects close to the verbs. Interrupting words or phrases make sentences longer and often make comprehension more difficult.[69] As much as possible, convey a single thought in a single sentence.

Fourth, write cohesive paragraphs in which every sentence relates to the same thought (expressed in the topic or thesis sentence).[70] Do not write page-long paragraphs. Give the reader a visual break with an indent for each new paragraph.

Fifth, use transition words or phrases or "echoes" to link one sentence to the next, and one paragraph to the next. Make the connections explicit. When readers say that there is a "flow" to writing, they usually are referring to these kinds of connections.[71]

Think about the *purpose* of the transition words or phrases you choose.

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68. *See* CAROL M. BAST, INTRODUCTION TO LEGAL RESEARCH AND WRITING 234–35 (2021) ("Elegant variation is terrific for most writing other than legal writing. In legal writing, pick a word to refer to something and use it whenever you refer to the same thing."); Beazley, *supra* note 60, at 62–63 (urging lawyers to "use the same term to refer to the same thing, and different terms to refer to different things").

69. *See* GARNER, PLAIN ENGLISH, *supra* note 59, at 31–32; Webb, *supra* note 42, at 329 (urging writers to "avoid taxing a reader's working memory with long gaps between words that belong together").

70. *See* ROCKLIN ET AL., *supra* note 60, at 134–43; SHAPO ET AL., *supra* note 60, at 189–94.

71. *See* GARNER, PLAIN ENGLISH, *supra* note 59, at 83–87; Webb, *supra* note 42, at 333–35.

To show	Use this transition
Logical sequence	First / second / third / finally Next / also / in addition Further / moreover
Specificity	For example Specifically / in particular Indeed
Causation	Thus / therefore As a result
Contrast	Nevertheless To the contrary / In contrast On the other hand

For additional examples of transitions for specific purposes, see Table 6-R in *An Advocate Persuades*.[72]

Another way to show connections between sentences (or paragraphs) is to "echo" words or phrases from the previous sentence (or the last sentence of the previous paragraph):

> Turner alleges that the contract was *void for illegality*. A contract is *void for illegality* when it calls for a party to perform an illegal act.
>
> Count VI asserts a claim for violation of Adams's *Eighth Amendment right* to be free from cruel and unusual punishment. A prison official violates a prisoner's *Eighth Amendment right* when he demonstrates deliberate indifference to the prisoner's serious medical needs.
>
> A defendant's sentence for a fraud-based offense reflects the amount of *loss* resulting (or intended to result) from the offense. For purposes of Sentencing Guidelines calculations, "*loss* is the greater of *actual or intended loss*." [cite] *Actual loss* is "the reasonably foreseeable pecuniary harm that resulted from the

72. ROCKLIN ET AL., *supra* note 60, at 140; *see* SHAPO ET AL., *supra* note 60 at 194–98.

> offense," while *intended loss* is "the pecuniary harm that was intended to result from the offense." [cite] Whether the court calculates loss based on *actual or intended loss*, the court need only "make a *reasonable estimate* of the loss." [cite]
>
> In this case, the district court made a *reasonable estimate* of the loss by calculating the total line of credit available on the stolen credit cards.

These "echoes" explicitly link one sentence, and one paragraph, to the one before—which makes reading each new sentence or paragraph seem like a natural next step.[73]

Sixth, help the reader verify your assertions and answer the other side's objections. The expert reader will "talk back" to the text, perhaps asking, "Says who?" (questioning an assertion about a legal rule) or "What did the district judge say about that?" (questioning an assertion about a piece of evidence). Presumably you have answers to those questions, so make them easy to find.

Provide clean, precise citations for every assertion of law and fact.[74] As much as possible, rely on controlling authorities. The point of citations is not to show how much research you did, but to show how your argument naturally follows from settled law that the judge must apply. "In other decision-making environments, authority may play some role, but first-order substantive considerations typically dominate. In law, however, *authority is dominant*, and only rarely do judges engage in the kind of all-things-considered decision-making that is so pervasive outside of the legal system."[75] If you fail

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73. *See* ROCKLIN ET AL., *supra* note 60, at 136–39; SHAPO ET AL., *supra* note 60, at 201–02.

74. *See* FED. R. APP. P. 28(a)(8) (stating that the argument section of a brief "must contain [the party's] contentions and the reasons for them, with citations to the authorities and parts of the record on which [the party] relies"); 11TH CIR. R. 28-1(k) ("Citations shall reference the specific page number(s) which relate to the proposition for which the case is cited."); 11TH CIR. R. 28-1(i) (stating that "[i]n the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the record").

75. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 67 (2009) (emphasis added).

to cite any authorities for important points, or if you consistently cite out-of-circuit authorities, the judge may suspect that your argument is not well supported by controlling law. Show, don't just tell: Let your citations show the judge that controlling law points in your direction. Similarly, cite the record for every assertion of fact, in a format that will be easy for the judge to decode quickly.

Anticipate the other side's most significant objections (and the judge's likely questions) and provide succinct answers. The judge will read your brief critically, asking questions along the way, so write the brief in a way that answers the obvious questions. Without directly engaging the most important points of disagreement, your brief and the opposing brief will read like "ships that pass in the night." Address the other side's strongest points, even if only briefly.

D. Make Comparative Reading Easier

As an expert reader, the judge probably will read your brief in light of the knowledge and experience gained from handling other cases involving similar issues. To make the judge's comparative reading easier, identify the kinds of background knowledge and experience that are relevant and then show how your case "fits" within a range of other cases addressing the same or similar issues.

First, put your case in the relevant "bucket." Expert readers use their background knowledge and experience to make sense of new information. "Writers need to give readers a structure to build upon and to tell them what, if any, existing knowledge in the [readers'] mind will help them understand the details that follow."[76] As a general matter, "when people are faced with new information, they seek to position it within their existing understanding."[77] So tell the judge at the outset of the

76. Webb, *supra* note 42, at 320.
77. *Id.*

brief *what kind of case* the judge must decide, and *what kinds of issues* you will address. Once you put your case in the relevant "bucket," the judge will know which kinds of knowledge and experience will be useful.

Even describing the relevant "bucket" is an opportunity for persuasion. For example, the Government in a criminal case might describe the case as a routine sentencing appeal where the defendant challenges the reasonableness of the sentence—suggesting that the judge should think about this case among other bottom-line reasonableness cases (which probably resulted in affirmance). On the other hand, the defendant might describe the same case as one involving a sentence that creates unwarranted disparities—suggesting that the judge should think about this case among others where defendants involved in similar criminal conduct received significantly different sentences (some of which may have resulted in reversal). You can describe the appropriate "bucket" for your case in various places in the brief, but the most obvious places are the statement of issues and the summary of argument.

Second, wherever possible, show that your position is consistent with decisions in other, similar cases. Rule-based reasoning is essential to any legal argument. A simple, straightforward syllogism matching legal rules with material facts is necessary to support any sound conclusion.[78] *Start there, but don't stop there.* Analogical reasoning is also important to show how the legal rules work in specific circumstances. And analogies (or distinctions) may help the judge see how your case fits within the constellation of cases that she already knows about.[79] That is another way that you can signal to the

78. *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41–43 (2008).

79. Webb, *supra* note 42, at 334 ("When learners are stumped by a particular problem and then are reminded of a similar problem they found easy to solve, they are more easily able to solve the new problem. Similarly, analogical reasoning in legal documents helps the reader solve the legal problem in a quick and efficient way.").

judge which parts of her knowledge and experience are important.

Third, tell the judge how your case relates to existing law. If your position represents a routine application of settled law to a new fact pattern, say so. If your position represents the next step in a progression of cases addressing new circumstances, say so. Help the judge place your case in context with other cases addressing (more or less) the same issues.

* * *

In any court, in any circumstance, good legal writing communicates a message to a particular audience in a way that the audience will appreciate. "The overarching objective of a brief is to make the court's job easier," and "[e]very other consideration is subordinate."[80] For the appellate advocate, the goal is to make an argument that will be easy for an appellate judge—an expert legal reader—to understand.

To achieve that goal, the advocate should write a brief that makes all four levels of reading easier for the judges who will decide the case. Make elementary reading easier by preferring plain English wherever possible, telling a story with real-life characters (not just titles and acronyms) doing real-life things. Avoid those "artificial obstacles" to communication, such as gratuitous foreign-language phrases and technical jargon. Make inspectional reading easier by thinking hard about the outline of your argument—and even your statement of facts—and arranging simple, clear headings that convey your logic through a clear, discernible structure. Then make analytical reading easier by preferring simple, declarative sentences that keep related words close together; linking related sentences together in cohesive paragraphs; and answering questions that any judge might ask. Finally, make comparative reading easier by showing the judge

80. SCALIA & GARNER, *supra* note 78, at 59.

which parts of her background knowledge and experience will bear on the issues she must consider.

The rules of good legal writing have not changed much over time. These rules work (most of the time) because they reflect, and respond to, the habits of expert legal readers. The brief that is easy to read, easy to follow, and easy to understand is a brief that likely will be more effective in helping the judge understand your client's position. And if the judge understands, then the judge is better positioned to agree. Recognize that the judges deciding your case are expert readers, make your case in a way that responds to the habits of such readers, and help your judges see your case the way you and your client see it.