

Strategic Legal Writing

10 Top Tips from a lawyer
(who writes for a living)*

&

10 Top Tips from a Legal Affairs Journalist
(who writes for a living)#

for

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TAB 1: SELECTED BIBLIOGRAPHY

TAB 2: IMPORTANCE OF THE TABLE OF CONTENTS

**TAB 3: IMPORTANCE OF TELLING A STORY & IMPORTANCE OF
SETTING THE ISSUES (i.e., TAKING CHARGE, DRIVING THE CAR)**

A: First draft

B: Middle draft

C: Final draft

**TAB 4: EXAMPLE OF GOOD STORYTELLING, PARALLELISM & HIGH
SENSE OF ORGANIZATION**

**TAB 5: EXAMPLE OF GOOD OPENING – SETTING THE
SCENE/ENCAPSULATING IT (OR TRYING TO) IN ONE
PARAGRAPH**

A: First draft

B: Final draft

TAB 6: USE OF SIMPLE CHARTS AS PART OF TEXT

No. 1: Many people write to show how smart they are – so don't; Good writing = reader feels smart; bad writing = reader feels dumb

1. Legal writing differs from other sorts of writing in that it is singularly directed toward persuading the reader (a trial judge, tribunal member, arbitrator or other decision-maker) to accept a certain position. Everything that counsel submits should put into the reader's mind the information and motivation necessary for a favourable decision. Appeal books, factums and everything else are devoted to that goal and nothing less. You're not writing to entertain, show how smart you are, how many authorities you can cite for one proposition, or even writing to inform. You're writing to **persuade**.
2. Write in ordinary simple-to-understand language. If you're writing it and it makes you feel smart, it probably makes the reader feel dumb. Good writing makes the reader feel smart. Bad writing makes the reader feel dumb.

No. 2: Be strategic & tactical – on the page

3. It's important to be strategic and be a tactician on your feet in the courtroom – it's just as important to be strategic and be a tactician on the page. It takes hard work, but the finished product is worth the effort – we all know a long dictated letter is a lot easier to do than a short one (and we can all recognize a far-too-long dictated letter too).

No. 3: Be simple, without being simplistic – find the balance

4. Keep your message simple. Ideas still need to be big, but to be effective they must be clear and focused. Try to be simple enough that a stranger, preferably even a non-lawyer, can read and understand it.

No. 4: Best argument – an explanation

5. The best argument is that which seems merely an explanation. Essentially, you know you have created a strong marketing argument when your prospects respond by saying, "That makes sense".

No. 5: Who are you writing for – not you

6. For example, when you become a lawyer & you're applying for leave in the S.C.C. (but the same goes for other courts and tribunals too) time permitting, scan applications over the last several years; what got accepted and what got rejected in the area of your appeal. It's possible to get a clear read on the kind of cases the Court is interested in. If there is a pattern, make sure you draft your application such that it relates to one of these "hot" issues. A related

consideration is whether leave has already been granted to a similar case whose coattails you can ride in on. If you're going fishing for trout, don't bait your hook with pike food. If you know who the judge(s)/members of tribunal are going to be, do an electronic search of their name; that may give you an idea of how the wind's blowing.

No. 6: People are visual – so look @ how things look; Reader-friendly writing

7. Law students and lawyers spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

8. Legibility (easy reading) is fundamental to readability (easy understanding). Good legibility is determined by font choice and the relationships between type size, line length and spacing (between letters, words, lines and paragraphs). An effective document is one that conveys your message well and quickly. A number of simple, but important, rules of thumb include:

- don't rely entirely on standard prose block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader;
- use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., 1(a)(i)). If you feel the need to go beyond that then chances are you've overused headings (you aren't drafting legislation after all). Avoid roman numerals – they look too much like a foreign language;
- if the items listed have no rank ordering, then bullets are preferable to numbered lists;
- never use a font smaller than 10 or larger than 12 for the main body of the text;
- avoid lines that are entirely capitalized – their uniform size makes them difficult to read;
- avoid underlining – it's a throwback to the days of typewriters. Use italics or boldface to add emphasis;

- there is evidence that justified right margins make text harder to read, so it may be best to use ragged right margins for factums;
- align headings to the left in a larger, bolded font. Use a smaller bolded font for sub-headings;
- readers like “white space”, and makes the rest more easily absorbed.

No. 7: Nothing is absolute

9. Absolute expressions (*all, always, every, invariably, never, none, totally, undoubtedly*) are rarely accurate and should be used lightly.

10. Absolutes tend to trigger a reader’s perversity; once told that, “the campaign was a total failure,” many readers begin to hunt for signs of partial success.

11. So avoid what Justice Laskin calls “false intensifiers” such as “certainly,” “clearly,” “absolutely”, which actually weaken rather than strengthen whatever you’re saying.

12. Understatement works much more strategically than overselling.

No. 8: Write visually

13. Pictures, charts and diagrams help communicate. Particularly for legislation or complex corporate relationships, consider a foldout chart.

Options include:

- diagram, in phases, of how matter in litigation occurred
- sequencing, in diagram/written “box” form of what happened
- chart of key relationships/key factual findings you want the judge to rule on/make.

No. 9: Openings

- **Write your theme down – here’s how to start**

14. For best effect, write down your theme before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour. Start “this case is about...”.

- **Openings – crashes, first page, Tim Horton’s**

15. Mr. Justice Estey used to say most plane crashes happen during take-off. Likewise your opening.

16. “The first page rule”. The first page should say it all. Every factum should contain an overview statement (no longer than one paragraph) that tells the reader what the case is about, who did what to whom, what the issues are, and outlines our position on those issues.

17. Tell your story in human terms (my own personal technique is to close the office door, think I’m in a line-up at Tim Horton’s, I’ve just ordered a medium double double, and cashier says “so what’s your case about?”).

- **Opening paragraph – by definition you’ve only one chance to make a good first impression**

18. Having the reader’s attention is a necessary precondition for persuasion. A strong opening statement will grab the reader’s immediate attention by:

- leading with strength. Hit the reader between the eyes with your strongest argument right away;
- express the message clearly and in a way that the reader will have no trouble understanding;
- structure the presentation within the framework of the reader’s knowledge, beliefs and attitudes. People approach problems from a certain perspective, it is your job to make sure that your factum fits into that judge’s perspective.

- **How to stay on theme – use a thesaurus, & make a list of synonyms**

19. Oftentimes, your theme can be tightly articulated by a pithy phrase or even a single word. Reduce your story to a workable outline or a set of topical words and use a dictionary that has synonyms to come up with other words that say the same thing in different degrees of shading, and use these words in painting the picture.

No. 10: Judicial P*ss-off Factors

- **Judicial p*ss-off no. 1 – cite tons of cases (because you’re smart)**

20. Only cite the leading case, or, at most, the two leading cases. Safety lies in authority not in numbers. Citing 15 cases for the same point of law tells the judge one of three things:

- there isn't any real authority for your position
- you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
- you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

21. Two options:

- double-L rule
- triple-L rule
- **(explain verbally).**
- **Judicial p*ss-off no. 2 – put in lots of quotes, long ones (you're smart, remember?)**

22. People hate to (and usually don't) read long block quotations. Paraphrasing is usually a better strategy than direct quotation. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:

- keep it really short
- edit (use three periods...when you edit out)
- add emphasis.
- **Judicial p*ss-off no. 3 – skip the page/para. no – you've read the whole case, so can they; and, you know the whole case cold (because smart is what you are)**

23. Obviously double-check all cites. But also highlight (yup, with a yellow highlighter) each key extract/sentence in your Book of Authorities/ Authorities tab so the judge doesn't have to search for your point. An (acceptable and better) alternative to highlighting is sidelining and underlining the master copy — so you only do it once, it gets copied through to all other copies, and you don't have to highlight in multiplicity.

24. **Always** when citing a case put the actual page/paragraph that your point/quote is on — just giving the judge the standard cite with what page the case starts on and forcing him/her to go read the whole case to find a single sentence is a real judicial piss-off factor — if you're in for a vasectomy why insult the guy (or gal) with the knife?

And last, the power of simplicity

25. The speaker before Abraham Lincoln at Gettysburg on Nov. 18, 1863 was Congressman Edward Everett, who was also a senator, governor of Massachusetts, minister to Great Britain, secretary of state, and also president of Harvard. Some considered him a spell-binding orator – perhaps he did too, because he spoke for two hours. Does anyone remember what he said, or even that he said anything at all? Few. The speaker after – Lincoln – spoke for less than 3 minutes. A total of 272 words. A single paragraph really. Here's that paragraph:

"Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we can not dedicate -- we can not consecrate -- we can not hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth."

Lincoln was mistaken in saying "the world will little note, nor long remember what we say here." A century and a half later, we do note, we do remember – the power of simplicity.

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