



For Your Next Brief (or the One You're Working on Now)

Leaving Out the Parts That Readers Skip

By Susan Audey

A recent post on Ken Davis's *Manage Your Writing* blog challenged writers to "leave out the parts that readers skip"—taking his cue from author Elmore Leonard who gave this response when asked by why his books were so popular and easy to read. Available at <http://www.manageyourwriting.com/2012/04/this-week-leave-out-the-parts-that-readers.html> (last visited June 5, 2012). If only brief writers could do the same. We are married, however, to our legal terminology, indoctrinated by rote patterns of motion practice and briefing formalities, and stubbornly resistant to changing well-honed but ill-advised writing habits. But try. Here are four "parts" to consider leaving out of your next brief.

One-Sentence, "Whether" Issue Statements

A one-sentence issue statement at the beginning of an appellate brief tells your reader absolutely nothing about a case and makes it likely that the reader will skip the statement of issues. Consider drafting instead a "deep-issue" statement, which includes a major premise, meaning the controlling legal point, a minor premise and weaving in relevant facts, and a conclusion framed as a question for a court. See Bryan A. Garner, *The Winning Brief* 86 (2d ed. 2004).

Not quite a "deep-issue" but fairly close, is one of the issues in the Solicitor Petition for Writ of Certiorari from the Solicitor General in *Dep't of Health & Human Serv. v. Florida*, Case No. 11-398, granted and presently pending before the United States Supreme Court:

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The question presented is:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

Although the statute citation provides a degree of clutter, the issue as framed begins with the controlling law and ends with the question before the Court. As framed, it also gives a reader a hint of what the writer will argue. Compare the less informative, one-sentence, "whether" issue presented in the state Respondents' Brief in the same case:

Whether Congress has the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

"Deep-issue" statements have uses beyond appellate briefs. A writer can alter them easily to use in lower court briefs in introductory statements.

Disproportionate Recitations of Well-Established Standards

We do not need to go on for two pages discussing the standard for a summary judgment or any other well-established standard. Your reader probably will skip it. A two- to four-sentence preliminary paragraph that states generally the standard is more than sufficient. The better practice is to state generally the standard in a preliminary paragraph and then to weave the more specific standard or standards, by application, into your argument. This makes your brief less "top heavy" and will increase the likelihood that someone will read or at least skim those sections.

Inordinate Citations

Unless your reader finds the proposition that you advance particularly interesting when he or she first reads it, he or she will most likely skip case citations in general. This likelihood multiplies when you cite more than two cases for any one particular proposition. Consider citing only one, or at the most two, cases for each proposition. And if a proposition calls for more than two case citations because you need to provide a state-, a district-, or a jurisdiction-

Writers' Corner, continued on page 68



■ Susan Audey practices in the appellate and legal issues group of the Cleveland office of Tucker Ellis LLP. She is active in the local bar association's certified grievance and bar admissions committees, has taught brief writing at Cleveland-Marshall College of Law, and is a frequent presenter on brief writing for local and state bar associations. She is a member of the DRI Appellate Advocacy and Product Liability Committees.

Writers' Corner, from page 60
specific survey of law, then provide an explanatory parenthetical, or you will have guaranteed that your reader will skip right over the disproportionate citation.

Excessive Block Quotations

One way to ensure that your reader will skip parts of your brief is to include several block quotations—particularly one after another. Merely excerpting large segments

of quoted text in serial order neither directs your reader to those parts that you consider important nor shows that you undertook any type of analysis of the quoted material. If you don't direct your reader, the reader likely will skip a block quotation altogether. The better practice is to choose the material that you wish to quote selectively and to weave it into your argument. This practice shows that you've analyzed the material and formulated an argument around it.

These are just some of the parts of a brief that readers commonly will skip. There are others. Take a look at briefs written by colleagues or opponents. What parts did you skip? Now take a look at the brief that you're drafting. Would a reader do the same to your brief? If so, take out the red pen, or hit the "delete" button, and edit away. Your reader will thank you for it and may just find your brief a joy to read. 