

Focus | Appellate Law/Business Litigation

Structure in Legal Writing

BY STEPHEN J. HAMMER

Pluck any popular legal writing book off the shelf, and you will learn much: how to avoid dangling modifiers, when to split an infinitive, and (the issue that divides the appellate bar like no other) whether to use one space or two after a period. As vital as mastering those fine points of usage is, however, becoming an adept legal writer also requires developing a more fundamental skill: learning how to organize arguments in a logical, readable, and persuasive structure. One of the judges for whom I had the honor to clerk—Chief Judge Jeffrey Sutton of the Sixth Circuit—was particularly focused on structure in legal writing, and the lessons I learned from him form the basis for much of what follows.

The Pyramid of Legal Writing

When considering how to prioritize your development as a legal writer,

imagine a pyramid. At the top are sentence-level composition skills—choosing the right words, putting them in the right order, and giving them the right emphasis. When you envision the greatest legal writers—the Marshalls, Jacksons, and Scalias of the world—chances are you remember them for their vivid turns of phrase.

“We must never forget that it is a constitution we are expounding.” “We are not final because we are infallible, but we are infallible only because we are final.” “But this wolf comes as a wolf.”

Indelible as those lines are, however, such verbal craftsmanship is the *capstone* of effective legal writing, not its *foundation*. The broad base of the pyramid of legal writing—the skill with far greater impact on your effectiveness—is argument structure. That is because a reader will tolerate inelegant language but will toss aside a confusingly organized brief. So mastering structure should be your first order of business. You can go far toward

that end by following two basic principles: rule/application and positive/negative.

Rule/Application

Rule/application is the common-sense idea that any piece of legal analysis should first set out the rule governing the issue at hand before applying that rule to the facts. Hardly revolutionary. Yet pick up any draft brief, and rather than a clear rule statement, you will likely find a rule that develops bit-by-bit through the argument, accumulating nuances, caveats, and exceptions like barnacles on the hull of a transoceanic liner. That is a problem because changing the rule as the analysis progresses will perplex the reader about what it was you set out to prove in the first place. For example, a motion to hold proceedings in abeyance might start by saying that such relief is warranted when it would promote judicial economy but later note that granting an abeyance would cause no prejudice—leaving the reader guessing where prejudice fits into the framework. To avoid that confusion, keep it simple: tell the reader the governing rule, and then show the reader that the rule is satisfied.

Positive/Negative

The positive/negative concept is almost as simple, yet even more elusive in practice. It means beginning with a complete affirmative argument for your position before turning to address the reasons why the other side's argument fails. In a dispute over statutory interpretation, your positive case might set out the statute's text, explain that dictionary defini-

tions support your reading of the key term, argue that statutory context reinforces your understanding, and demonstrate that statutory history corroborates the same. Then, and only then, should you turn in your negative case to show why the other side's competing arguments are wrong.

Once again, this principle might seem so basic as to be unworthy of a title. But examine a draft brief, and you will probably find positive and negative arguments heedlessly jumbled up. A poorly written brief might start by arguing that one definition of a statutory term applies, then refute the other side's contention that a different definition controls, then assert that a canon of construction governs, then counter the other side's argument that an exception to that canon is triggered, and so on. The end result is that the reader never gets a clear picture of your best case. When organizing your legal writing, tell the reader *why you are right* before you explain *why the other side is wrong*.

Honing Your Craft

The virtue of these principles is that they are readily adaptable to any form of legal analysis. They work just as well for a summer associate memo as they do for a Supreme Court merits brief. So, wherever you find yourself in the legal writing hierarchy, you can make your work more compelling by attending to these principles. While they might not have the panache of a single space after a period, they will bring you closer to the first goal of any legal writer—persuading your reader. **HN**

Stephen J. Hammer is an Associate at Gibson, Dunn & Crutcher LLP. He can be reached at shammer@gibsondunn.com.

Join the Texas UPL Committee

The **Unauthorized Practice of Law Committee (UPLC)** is comprised of nine volunteers who are appointed for three-year terms. The UPLC is authorized to investigate and eliminate the unauthorized practice of law. Members of the UPLC volunteer to help with cease-and-desist letters and injunction lawsuits. Serving on this committee is an excellent opportunity to get involved, network, meet people, and develop business.

Sign up at <https://tinyurl.com/UPLCommittee>

DVAP'S FINEST



Courtney Gilberg Partner at Sidley

How did you first get involved in pro bono?

I've been doing pro bono since my days as a summer associate. My firm at the time staffed one of DVAP's intake clinics and I participated. I recall it being such a meaningful team-bonding experience because not only were we learning how to do new things together, but we were making a real difference in the clients' lives.

Describe your most compelling pro bono case.

My very first expunction case I took was for a woman who was having trouble passing professional background checks due to a very dated misdemeanor on her record. The circumstances under which she had received the misdemeanor were somewhat out of her control, so the lasting effect on her ability to earn a living was even more frustrating for her. We successfully expunged the case from her record. Months later she reached out with a personal thank you note to let me know how things were changing for her and what an impact my work had made on her life. I still have it as a reminder of why this work matters.

Why do you do pro bono?

For me it brings perspective to what it means to be a lawyer. It's easy to get caught up in the M&A work I do every day and lose sight of how my skills (both legal skills and critical thinking skills) are valuable assets that can serve a greater good. The pro bono work I do is a good reminder of the value I can bring to someone's life outside of my normal skill set.

What impact has pro bono service had on your career?

It has made me feel like a more well-rounded and grounded person. I believe strongly in using the resources I have to give back to the community, so having the opportunity to do pro bono on a regular basis helps make this goal a reality.

What is the most unexpected benefit you have received from doing pro bono?

Fellowship with my Sidley colleagues. There are so many opportunities to do pro bono work together, which is a nice change of pace from the work we do every day and it is even more fulfilling that we get to work in teams to make an impact.



DVAP Pro Bono: It's like billable hours for your soul.

To volunteer or make a donation, call 214-748-1234, x2234.

Entertainment Committee Luncheons

Join us at the Arts District Mansion

Interfaith Luncheon

Wednesday, October 14, Noon

Veteran's Day Luncheon

Wednesday, November 11, Noon

For more information, visit dallasbar.org.

