

## Tips for Better Brief Writing and Oral Argument

by Hon. Donald C. Ashmanskas, US Magistrate, District of Oregon (deceased)

### BRIEF WRITING

1. **Concede Nothing**: Judges are impressed by tough lawyers. Make your opponent fight for every inch of ground, no matter how indefensible your position. If your opponent says today is Monday, move to strike for lack of personal knowledge. If you are persistent, you'll eventually wear the other side down.
2. **Use the Shotgun Approach**: Make as many arguments as possible, no matter how weak. When in doubt, most judges just tote up the points, e.g., "plaintiff has ten arguments in her favor, defendant only one, so plaintiff must have the stronger case."
3. **Phrase Every Argument in the Alternative**: If the complaint accuses your client of violating NEPA by not preparing an environmental impact statement, you should simultaneously argue that your client: (a) fully complied with all NEPA requirements for this project; (b) fully complied with NEPA for a prior project, and this is just a continuation of that project; (c) was not required to comply with NEPA; (d) complied with NEPA in spirit; (e) plaintiff lacks standing to contest your failure to comply with NEPA; or (f)....
4. **Don't Give Away the Surprise Ending**: Briefs are like mystery novels – you don't want to ruin the suspense by revealing the surprise ending too early. Use the first 34 pages of your brief to lay out the most complicated legal puzzle imaginable. Only after you have completely befuddled the other side (and the judge as well) should you play your ace in the hole. "In any event, this is all academic because [fill in the blank]." The judge will be awed by your legal tour de force.
5. **Use All 35 Pages**: One of the most embarrassing things you can do as a lawyer is to file a 15-page brief when the local rules allow up to 35 pages. Your little brief looks wimpy sitting on the table next to your opponent's power-brief with its 49 attached exhibits all housed in deluxe

wood-grain binders. You might as well attach a note saying: “Sorry, but my client has a very weak case and I can’t think of any other arguments to make on her behalf.” If you run out of things to say, just repeat the same arguments over again. No one will notice.

6. **Always Attach Exhibits:** Exhibits lend an air of authority to a brief. It is no longer just a lawyer making an argument; how you have documentary proof of your client’s position. If you don’t have any exhibits, invent some. It really doesn’t matter what you use because, if they are fat enough and contain lots of technical-sounding fine print and rows of numbers, no one will read them anyhow.

7. **Ignore Controlling Authority:** A lot of lawyers assume they have an ethical duty to cite controlling authority contrary to the position advocated by their client; that is nonsense. By definition, if the judge doesn’t follow a case, then it is not controlling. If it is not controlling, then you have no ethical obligation to cite the case. Seems simple enough to me.

8. **Use String Citations:** Anyone can cite the latest Ninth Circuit authority. What really impresses the judge is citing a long list of pre-World War II cases from district courts in Louisiana and Mississippi that your law clerk cribbed from an old ALR article.

9. **Cite Corpus Juris Secundum:** Can’t find a case on point? Just cite CJS. It is comprehensive, authoritative and those Latin titles get the judge every time. It always worked for Perry Mason. In a pinch, the *Harvard Law Review* will suffice.

10. **Don’t Shepardize:** Shepardizing is expensive. If you cite a few dozen cases in a brief (or, for you string-citers, perhaps a few hundred cases), that adds up to a lot of pocket change, not to mention the time involved. Don’t waste your money – the odds are that the key cases you cited are still good law. If they aren’t, you’re cooked and there is nothing you can do about it anyhow so, why throw good money after bad?

11. **Cite Out-of-Circuit Authority:** I don’t know why people think the Ninth Circuit is so special – it’s just one of thirteen circuits. If Ninth Circuit case law doesn’t favor your client, then

cite a circuit that is more hospitable. Timid attorneys may want to put a little “but cf. XYZ (9<sup>th</sup> Cir. 1993)” at the end of the string-citation to avoid possible ethical problems. Alternatively, point out that the Ninth Circuit’s position has not been followed by other circuits and urge the trial judge to overrule the Ninth Circuit. **Example:** “The circuits (with the sole exception of the Ninth Circuit) are unanimous in holding that the Civil Rights Act of 1991 is not retroactive. The Ninth Circuit’s position is clearly an aberration and should not be followed.”

12. **Attack Your Opponent:** Your opponent is a sleazebag who should not be believed and that is reason enough to rule against him. So be sure you attack your opponent in the brief, call him names and impugn his motives.

13. **Whine:** Few federal judges are young enough to still have small children at home, but all it takes is a pair of whining lawyers to bring back those nostalgic memories of two six-year-olds squabbling. “Judge, his brief is one page too long.” “Judge, he pretended to be negotiating with me while he was secretly preparing a complaint.” It will make the judge feel twenty years younger.

14. **Omit No Defense:** Defenses were put on this earth for only one purpose – to be used by defense attorneys. There’s no sense letting them go to waste. **Example:** A prisoner filed a civil rights action alleging that female clerical employees at a local jail had been viewing strip searches of male inmates through a peep window. The defendants promptly moved to dismiss the inmate’s claim on grounds of qualified immunity, i.e., that they didn’t know that such conduct was wrong. Some attorneys might have trouble asserting that defense with a straight face – but that’s what junior associates are for.

15. **Don’t Read the Cases You Cite:** You’re thumbing through the *Federal Digest* and you find the perfect headnote – you couldn’t have written a better holding if you’d tried. Should you read the case just to be sure it really stands for that proposition? Of course not! Why spoil perfection? A lot of bad things can happen when you go beyond the headnote and read the actual case. You might discover that the court was applying Washington law instead of Oregon law, or that there were some distinguishing circumstances. Ignorance is bliss.

16. **Employ See Creatively**: This is one of the most useful signals in brief writing. For instance, you can cite a terribly complicated case to support an obscure procedural point (which the case does not stand for). No one who reads the case can “see” in it what you could – but are they going to admit that? Of course not, because they don’t want to admit they are not smart enough to see the brilliant point you are making. This strategy works particularly well with law clerks who graduated from big name law schools but are haunted by subconscious feelings of inadequacy.

17. **Argue Issues Not Before the Court**: This strategy works for both briefs and oral arguments. If the issue before the court is not your strongest, don’t fight a losing battle. Change the subject and argue some other issue where you have a chance of prevailing. For instance, if the issue is change of venue, argue the merits of the case, e.g., there no point transferring this case because the defendant can’t win in any court.

18. **A Little Latin Goes a Long Way**<sup>1</sup>:

- A. Because plaintiff has not shown he suffered measurable injury, his claim must be denied.
- B. De minimis non curat lex. Damnum absque injuria. Cadit quaestio.

Which paragraph sounds more authoritative? The second one, of course. Vel caeco apparat. (It would be apparent even to a blind man.) Would you rather tell the jury that your client was “caught between a rock and a hard place,” or “a fronte praecipitium a tergo lupi” (“a precipice in front, wolves behind”)? If the defendant calls your client a “lying cur,” just smile and say: “Proprium humani ingenii est odisse quem laeseris.” (It is human nature to hate a person whom you have injured.) Everyone will assume that if you’re smart enough to use all these Latin phrases, the rest of your arguments must be of a similar caliber. Experto credite.

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<sup>1</sup> If you don’t know any Latin, ask your local bookstore to order copies of Eugene Ehrlich’s *Amo, Amas, Amat and More: How to Use Latin to Your Own Advantage and to the Astonishment of Others* (Harper & Row 1985); Richard A. Branyon’s *Latin Phrases & Quotations* (Hippocrene Books 1994) and Henry Beard’s *Latin for All Occasions* (Random House 1990) and *Latin For Even More Occasions* (Random House 1991).

19. **Don't Search for Recent Decisions:** The job of a law clerk can be tedious. One of the few pleasures they get is to uncover a recent decision that neither party cited. Why deprive them of that pleasure by reading slip opinions or doing a Westlaw search?

20. **Let Your Opponent Do Your Research:** Don't have time to research the theories of your case? No problem. Include the whole kitchen sink in your complaint and let the other side sort them out in its motion to dismiss. Or maybe the judge's law clerk can figure out which theories are viable.

21. **Always Get the Last Word:** If your opponent files a reply brief, then you *must* file a supplemental response. If she files a sur-reply brief, then you immediately file another supplemental response. Following oral argument, send the judge a letter responding to your opponent's points. A letter is more effective than a brief because the judge won't realize it is a brief in disguise until he has begun to read it. The better letters start by discussing some innocuous procedural matter and then digressing to merits almost as an afterthought, or so the reader would believe.

22. **Assume the Judge Knows Everything About Your Case:** You've been working on this case for months. You know the facts and the relevant law, and so should the judge. After all, if she wasn't so smart she wouldn't be a judge. So, when writing a brief, just dive right into your arguments without any introduction or background. Don't bother including a capsule summary of your argument at the beginning – the judge will figure it out eventually.

Conversely, you should assume the judge knows nothing about basic legal principles. A classic example is a major law firm that devoted ten pages of a brief to explain the concept of stare decisis to a veteran trial judge. Unfortunately, the “controlling” case was construing California law and the judge was applying Oregon law. Oh well, non omnia possumus omnes. (No one can be an expert in all things.)

23. **File Your Brief Late:** The best time to file a brief is Friday afternoon at 4:30 for an oral argument on Monday. That's particularly effective when the judge's law clerk has already finished her memo and now has to stay all weekend to revise it. You are assured of getting the last word. You should also mail a copy to your opponent on Friday afternoon. With some luck, he won't receive it until oral argument is over.

24. **Cite Unavailable Materials:** When citing unpublished district court opinions or similar materials, never attach a copy to your brief. If the judge can't read the case you've cited, he'll have to take your word on its contents. That also applies to obscure 19<sup>th</sup> Century treatises, or \$600/year industry newsletters.

25. **Move to Strike:** Federal judges love motions to strike. Don't like something in your opponent's complaint? Move to strike the offending words. If your opponent files affidavits opposing your summary judgment motion, move to strike the entire affidavits or particular sentences in them. If you prevail on the motion to strike, you win the case since your summary judgment motion is now unopposed.

Don't make the mistake of thinking a motion to strike is unnecessary because the judge knows the rules of evidence and is perfectly capable of ignoring irrelevant statements, hearsay or argument. The judge will be grateful for an opportunity to rule on another motion. Nowadays, federal judges have so little on their calendars they look forward to all the extra work they can get.

A novel spin off is to file a motion to strike your opponent's affidavits on grounds the facts stated therein were wrong – and thus there are no disputed material facts and you are entitled to summary judgment as a matter of law.

26. **Don't Proofread Your Brief:** Some attorneys waste valuable time proofreading a brief in the mistaken belief that typographical or collating errors reflect badly on the quality of their legal research. Wrong, wrong, wrong! Experienced attorneys know these errors actually make a brief more effective. Why? Because if the pages are out of order, the law clerk can't just whiz

through the brief – she has to stop and sort the pages. Smart lawyers not only collate the pages out of sequence, but also make sure the pages are not numbered. Now the law clerk must read each page carefully to ensure one idea follows the next. What more could you ask?

Another tip: If you omit key words, paragraphs or sentences, the law clerk must try to decipher what you meant to say – and they may come up with a better argument than the one you had in mind. You also get to file an amended brief with the corrections, which the law clerk must read carefully to compare the two documents, one line at a time, to determine which changes you made.

27. **Don't Identify the Changes in Amended Documents:** When filing an amended document (e.g., complaint, brief), do NOT attach a cover letter listing the changes. That way the reader must carefully compare the two documents, one line at a time, to determine what changes you have made. Sure that's rude, but at least you know the law clerk will carefully read your brief.

28. **Put the Wrong Case Number in the Caption of Your Brief:** If the case number is wrong, the brief may be sent to the wrong judge or incorrectly docketed. That holds true for any filing. A surefire way to maximize confusion.

29. **The End of the World is Near:** No brief is complete without a description of the parade of horrors that will result if your opponent prevails. This is not just a motion to extend discovery. The future of the universe is at stake.

30. **Always Request Expedited Consideration:** If you file a plain vanilla motion, it will ordinarily not be heard for another five weeks. Smart lawyers always request “expedited consideration.” Most of the time, it really is an emergency because you waited until the last minute to file the motion. Even if it isn't a true emergency, you should still act like it is. You don't want the judge to get the idea that your motion isn't very important. See “The End of the World is Near,” supra.

## ORAL ARGUMENT

31. **Demand Oral Argument Whether You Need It or Not:** That adds a lot of billable hours (e.g., travel time).
32. **Read Your Brief to the Judge:** The judge may say she's read your brief, but she's just trying to make herself look good. Deep down, you know she's lying. So read her your brief word-for-word. You'll be glad you did.
33. **Don't Let the Judge Interrupt Your Presentation:** You've spent all week preparing your presentation – and it's a work of art. No one who hears your speech could possibly rule against you. The problem is, the judge won't let you give your speech. He keeps interrupting you with questions on subjects you don't even care to discuss. How rude! Tell the judge politely but firmly that you will be happy to answer any of his questions, but only after you've finished making your presentation.
34. **Cite New Cases and Theories:** Use oral argument as an opportunity to surprise your opponent (and judge) by citing new theories and cases you didn't mention in your briefs. If you're lucky, your opponent will be unable to refute your argument because he has never even heard of the case you just cited.
35. **Bad Mouth the Judge in Front of His Staff:** One of our more flamboyant local attorneys warmed up for oral argument by loudly complaining about: (a) having been removed to federal court; and (b) having to appear before a magistrate judge who is not even a real judge. The attorney made sure the judge's law clerk, courtroom deputy and judicial assistant were all present to witness the performance.
36. **Ignore the Standard of Review:** Standards of review are a real pain. They take up valuable space in your brief, they interrupt the flow of your argument and they are a pain to research. My advice is to ignore them. If it is a summary judgment motion, everyone knows the standard of review so you don't need to include it. If it is any other type of motion, you probably

have no idea what the standard of review is and don't really care either. If the other side is so concerned about the proper standard of review, let them research it.

Should the judge be so foolish as to inquire at oral argument (and thereby admit that he doesn't know the standard), simply say: "The standard of review is irrelevant, Your Honor, because my client would prevail regardless of which standard is applied."

37. **Cancel at the Last Minute**: If you know two weeks before oral argument that you'll be withdrawing your motion, or have reached a stipulation with your opponent, why spoil the fun by calling the court to cancel the argument? Leave it on the calendar so the judge won't be bothered by booking other engagements and the law clerk isn't deprived of a chance to write a fascinating memo on the Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986.

38. **Talk Fast so the Court Reporter Can't Keep Up**: Self-explanatory.

39: **Use It or Lose It**: You've written the speech of your life but, before you can deliver it, your opponent stands and announces that he won't contest your motion; or the judge announces that he's inclined to rule in your favor – and you haven't even said a word. What rotten luck! Now no one will have an opportunity to hear your great speech. There is no satisfaction from the meek surrender of a cowardly foe – you want to vanquish him on the field of battle. Even worse, your client is in the audience and you're wondering how on earth you will be able to justify that huge bill you're going to send her.

My advice is to give the speech anyhow. Refuse to accept your opponent's meek capitulation. The calendar shows one-half hour allotted for oral arguments and, by golly, you're going to use it even if the outcome is a foregone conclusion. Your client will be impressed and don't worry about all those horror stories of lawyers talking their way out of a victory they had already won – that only happens to other lawyers.