CHAPTER EIGHT

EFFECTIVE LEGAL WRITING IN THE COURT OF APPEALS

(Effective Legal Writing of Briefs helps in ADR)

NOT AN EXPERT, BUT PREFER REALISM AND IMPRESSIONISM TO ABSTRACT:

Although I have reviewed appellate briefs in our court for almost twenty-five years, I do not profess to be an expert at providing any absolute rule of thumb for an approach to effective legal writing to be used in persuading the appellate court as to the merits of your case. Judges have their own ideas as to style, so what I say here should not be taken as the "law and gospel." The words, phrases, and overall approach you utilize in painting a picture to the court of what has occurred in your case will generally differ from lawyer to lawyer, just as legal opinions written by various judges differ. Lawyers and judges are about fifteen percent lawyer and judge and about eighty-five percent people. The legal writing contained in your brief is addressed to judges, who are not only legal technicians but also living, breathing human beings, with human tendencies and differing views. One lawyer may paint us a picture of his case in terms of realism, as would a Giotto di Bondone or a Tiziano Vecelli; another may present his case impressionisticly, as through the eyes of a Claude Monet or a Pierre Renoir. Yet another may attempt the great Vincent van Gogh's post-impressionistic portrayal. The

abstract approach of a Georges Braque, in equivalent legal terms, would be inappropriate, as Braque generally does not make all his thoughts readily accessible to the viewer.

BRIEF IS THE REAL KEY:

It has been said that in order to win one's case, one should try to concentrate on proficiency in articulating the facts. Former Justice Robert H. Jackson states that most contentions of law are won or lost on the facts.[1] Justice Brandeis said, "Let me write the statement of facts, and I care not who argues the law."[2] Other experts, however, may advise appellate advocates to concentrate on legal, not factual, grounds. Some may advise that the appellate argument can be more important than the brief. I concur with the late Justice Albert Tate, Jr., who believed that the brief is the real key to assisting the court. He said, "It is a mistake for counsel to rely upon his oral argument to win the appeal."[3]

LOOK TO THE RECORD. NOTE A.B.C.'S OF EFFECTIVE LEGAL WRITING:

The real facts must come from the record and not the brief, and an able, articulate, ardent appellate advocate who

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[1]Jackson, "Advocacy," 37 ABA Journal, 801, 803 (1951).

[2]Brown, "Legal Training as a Qualification for Modern Diplomacy," 10 Yale Law Report No. 2, Spring 1964, p. 22 at p. 23.

[3]Tate, "The Appellate Advocate in the Appellate Court," 13 La. Bar Journal 107 (August 1965).

desires to approach appellate practice as an art will not misstate the facts in the record. Someone has said that if you misstate the law you might only be regarded as ignorant, but if you misstate the facts you are violating all of our appellate rules, as well as placing both your intelligence and your integrity in doubt. Keep in mind that your appellate brief is usually read several times before and after oral argument. We may take it home with us and study it. It may be referred to and reread up until the drafting of our opinion is completed. An appellate artist can draw a workable road map without incorporating roadblocks. You may recall the ABC's of good legal writing: Always Be Careful about Accuracy; about bestowing Brevity on a brief; and about couching your thoughts in words which exhibit cogency and Clarity. ABC: Accuracy, Brevity, Clarity. When you have checked your brief for these qualities and have re-edited, pared down, and streamlined your brief, you may call it "a better brief" or "a brief-lite."

A SUMMARY IS IMPORTANT AT THE BEGINNING AND END:

The practitioner in Georgia could greatly assist the courts, in my opinion, by including in the brief, in the front and again in the conclusion, a short summary or complete capsule of the facts and law necessary for a favorable decision. This could be combined with an eloquent appeal to the court's sense of justice as to why your position is sound. This practice is recommended for effective legal writing in the advocacy program at Harvard Law School.[4] When a judge is

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[4]Introduction to Advocacy, Harvard Law School (Foundation Press, 1981), Third Edition, pp. 42 & 53.

reading and rereading and referring to your briefs, he may want, on some occasions, just to reread your summary. Many times a lawyer omits putting his best foot forward at the conclusion of his brief. This is particularly true in criminal cases, applications for interlocutory appeals, and petitions for discretionary appeals. In developing the art of appellate advocacy, the beginning and end of your brief provide extra opportunities to persuade the court. The conclusion gives you a final chance to convince the court about your case. Former Chief Justice Harold Hill of the Georgia Supreme Court has given good advice: "Plant a flag in your furrow, and say, 'Look, here it is' . . . An appellate court can't find a needle in a cornfield but it cannot overlook a boulder in a furrow." Justice Hill has said to put your best foot forward, and this can be done in the beginning and end, alpha and omega, of the brief. You need to continue making your main arguments under your "point headings," in the middle of your brief, but also give us that capsule summary at the front and back.

TIPS FROM BLECKLEY AND CLARK:

Two of Georgia's greatest judges and most effective practitioners of legal writing are former Chief Justice Logan E. Bleckley of the Georgia Supreme Court and former Court of Appeals Judge H. Sol Clark. Judge Clark, with regard to brief-writing and oral argument, advises you to get to the point: "Tell it early, tell it short, tell it plain . . . and go for the jugular." Former Chief Justice Bleckley provides articulate and animated advice as to both the importance and limitations of artful appellate advocacy: "The bar is no place for sham or dissimulation, whether in speech or action. In legal attack and defense, there is a field for strategy, but none for stratagem. Litigation, though contest, is not war but peace; its rights are pacific, and so are its methods and morality. It accepts the

service of art in the sense of skill and in the sense of address, but not in the low sense of artifice, trick, trap, subterfuge or chicanery . . . . Truth as a whole, being divisible, we may divide it, utter some and keep back the rest, but we are not at liberty to cut it into slices so minute that what we put forth will mislead or deceive. We are bound to give our communications bulk enough to make them rightly understood, when fairly interpreted, so far as they go. Like some drugs, truth is often poisonous in small doses. We must take care to issue it in doses large enough, if not to medicate, at least to be harmless, and, in paying all of our debts, to over-pay rather than fall short." Bleckley's most prolific legal writings have been published as a memorial by the Georgia Bar Association,[5] and in a well-written article appearing in the State Bar Journal, Clark has provided "Tips for the Lawyer" in these important areas.[6]

WIT & WISDOM IN A CASE:

Lawsuits in the trial and appellate courts are serious business. In the opinion of the writer, humor has no place in the legal writing of briefs or in opinions, except in the approximately one or two percent of the cases where humorous facts are built in and are a part of the case. In this small minority of situations it would be improper, as well as impossible, to dissect, disinfect, dilute, and deneuter the

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[5]Georgia Bar Assn, A Memorial of Logan Edwin Bleckley, Mercer Univ. Press (1982).

[6]Clark, "Writing Georgia Appellate Briefs," 15 Ga. State Bar Journal 107 (February 1979).

humor from the case. This also applies in that small group of child molestation or pornography cases where the language and acts are repulsive, disgusting, offensive, and violent. If these humorous or revolting facts are relevant to a decision in the case, the legal writer must deal with them in a proper fashion, even though it is a sordid picture, as they are a part of the case. Thousands of these Georgia cases have been collected and published.[7]

BETTER BRIEFS BETTER OPINIONS:

The judge must understand the attorney's legal position. If we do not understand your position, it is not going to help us, and if it doesn't help us, it is not going to help you. Better briefs will produce better opinions. As you articulate your case, you may or may not want it said in your case, what was said by Justice Starnes: "A very striking and interesting degree of professional talent was displayed by our young brother, who presented this view of his case -- an order of talent which, if he chooses, may insure him professional eminence; and what is better, distinguished capacity for usefulness among his fellow men. It cost us no small effort to disentangle what we conceive to be the true distinction in the case, from the ingenious web of his plausible and earnest argument."[8] One of our able former judges on this court, Judge Bernard Clay Gardner, has provided two gems of sage advice: "(1) Stay in your office, or keep the store. (2) Make certain that all your papers, pleadings, and documents are prepared on time and with care and thoroughness so that they

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[7]Respess, Wit and Wisdom of Georgia Law, 1989.

[8]Groce v. Rittenberry, 14 Ga. 232, 235 (1853).

are always in good order."[9] This latter suggestion points up effective legal writing.

ABILITY TO EXPRESS IDEAS ACCURATELY IS LIFE AND DEATH OF A CASE:

In summary, it is appropriate to emphasize that one's ability to use language effectively in daily life is directly proportional to one's success in personal relations, in business, and in one's profession. If this is true of people in general, how much more so is it true for persons like the attorney, whose very livelihood is dependent on an ability to state facts accurately, to explain clearly what may be confused or abstruse, and to persuade others of the correctness of the position he or she is espousing. Moreover, the attorney's ability to formulate and express ideas accurately, clearly, and persuasively may make be a life-or-death matter to his clients and can spell the difference between whether justice is done or injustice is permitted to prevail.

WELL CHOSEN WORDS..CORRECT CONNOTATION AND ACCURATE DENOTATION:

In writing briefs the attorney should strive to present his facts and his argument in well-chosen words, carrying the correct connotation as well as the accurate denotation. The words should be correctly spelled (why make the reader wonder what you're trying to say?) and should be arranged in sentences that are grammatically correct and free of awkwardness and anticlimax. But effective use of language in legal writing requires more than accuracy, grammatical

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[9]Deen & Henwood, Georgia's Appellate Judiciary (Harrison Co., 1987), p. 215.

correctness, and logical sentence structure. The sentences should be placed in logical paragraphs so organized as to let the reader know what the author/attorney is attempting to communicate in that paragraph, and also to convince the reader that the author is thinking rather than merely transcribing. How many times have you read (but surely not written!) a Statement of Facts which merely says, "The first witness was Mr. John Doe. He testified that . . . He also said . . . He then testified that . . ." and so on and on for a couple of pages? Such writing gives no indication either that the writer is painting an intelligent picture of what has occurred, or that he credits his reader with the possession of any intellectual ability. The Statement of Facts should be complete but need not consist of a series of "He said . . ." sentences. Rather, it should summarize the testimony in such a way as to indicate the relationships among the various facts and to make clear exactly what the various bits of evidence are and, by implication, what they signify. All of the above, in my opinion, adds up to advancing the art and skill of effective legal writing in the Georgia Court of Appeals -- without painting yourself into a corner!

THE BEST BRIEF AND BEST LAW HELPS:

In the words of Justice Bleckley: "No matter how able a judge may be, it is at last the critical scrutiny of the printed page that determines his place in the minds of others, especially after his own day."[10] It is also the critical scrutiny of the printed page that most of the time will determine the effectiveness of attorneys in winning their cases in our court. There are exceptions, of course. Former Judge Johnson

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[10]Ibid. at 193.

Murphy Claggett Townsend told the anecdote about a lawyer who implied, when arguing a case in Judge Townsend's court, that he had the best brief. Judge Townsend spoke up and said, "Yes, but the other lawyer had the best law."[11]

[11] Ibid. at 219.