

United States District Court Judge Daniel P. Jordan

Judge Jordan received a Bachelor of Business Administration Degree in Economics from the University of Mississippi where he was inducted into the Hall of Fame. He received his Juris Doctor degree from the University of Virginia and was awarded an honorary doctor of law by the Mississippi College School of Law.

Judge Jordan is a former staff member for United States Senator Trent Lott and worked at the United States Department of the Interior during the Reagan administration. From 1993 until his appointment, Judge Jordan practiced law with Butler, Snow, O'Mara, Stevens & Cannada, PLLC, where he served in a number of leadership positions including two elected terms on the firm's Executive Committee. His practice covered a wide variety cases, and he routinely represented clients in complex, high-exposure cases filed in state and federal courts throughout the country.

Judge Jordan has also served in various civic and bar related capacities. He is a benchler in the Charles Clark chapter of the Inns of Court, a past president of the Jackson Young Lawyers Association, and a past chair of the Litigation Section of the Mississippi Bar. In 2005, he received the Hinds County Bar Association's annual pro bono award, and in 2009, he and others received the Pro Bono Pioneer Award presented by the Mississippi Volunteer Lawyers Project.

Judge Jordan was unanimously confirmed by the United States Senate on July 20, 2006, and on August 8, 2006, was sworn in as one of the youngest United States district court judges in the country. Since then, he has handled over 3,000 civil and criminal cases and has served on various court-related committees, including the Fifth Circuit Judicial Council. He is the President-Elect of the Fifth Circuit District Judges Association and Chairman of the Fifth Circuit Civil Pattern Jury Instruction Committee.

One of Judge Jordan's court-related interests is information technology. In 2016, the Chief Justice reappointed him to a second term on the Committee on Information Technology for U.S. Courts, he is a charter member of the Fifth Circuit Information Technology Committee, a past chair of the Courtroom Technology Subcommittee for U.S. Courts, and he chairs the Southern District of Mississippi Information Technology Committee.

Judge Jordan is a frequent speaker on court-related issues and serves as an adjunct professor at the Mississippi College School of Law.

How to Persuade a Judge—The Art of Legal Writing
By
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United States District Court Judge

Parties often win or lose significant legal disputes based on nothing more than an attorney's written words. Yet some attorneys take a perfunctory approach to legal writing, making little effort to present their positions in a persuasive or helpful way. This article examines how judges read legal briefs and how they react to what you write. Its goal is to identify the hallmarks of successful legal writing. In the most general terms, you must know your audience and submit briefs that are clear, concise, and persuasive.¹

I. Know your audience.

What may prove compelling to one judge may fail to persuade another. And the judge may not be your initial audience. At the federal level, some judges engage at the initial stages of crafting the order while others allow their law clerks to read the memoranda and prepare a draft order before the judge ever sees your work. Be aware that your initial target audience may be an attorney one year removed from law school.

State courts are different. State court judges labor under heavy dockets with virtually no help. Some judges tell me they have no time to read briefs and therefore base rulings on oral argument. Others read everything. While you must assume the judge will read your work, even a deliberate reader will have little patience for long and unclear briefs.

¹The basics of effective legal writing are well known, and many of these concepts have been reflected in numerous publications. There is perhaps no better place to start than *The Elements of Style*. Bryan Garner's *The Winning Brief* is exceptional—as are his many other books on this subject. Another useful resource is *Thinking Like a Writer, A Lawyer's Guide to Effective Writing and Editing* by Stephen V. Armstrong & Timothy P. Terrell. This paper draws heavily from these sources.

II. Know the ways to persuade.

There is no one approach that will always work—every case is different. The key is to determine the best means for persuading your judge in light of the strengths and weaknesses of the particular case. There are many forms of persuasion at your disposal, but Aristotle identified three that remain compelling—ethos, pathos, and logos.

A. Ethos

Ethos is an appeal based on the character of the speaker. In the legal context, it is impermissible for an attorney to vouch for her case or client. But that does not eliminate ethos. Your credibility and reputation will affect your success.

Greg Maddux proves this point. Have you ever wondered why Maddux got more close calls than rookie pitchers? I doubt any major-league umpire would admit bias, but perhaps Maddux got the calls because the umpires knew that Maddux threw strikes. Attorneys are no different. Judges talk, and they know who does great work and who can and cannot be trusted. This is not to say that judges intentionally alter rulings to favor certain attorneys. But the line between success and failure is often thin, and your reputation can affect the judge's attitude toward your arguments.

But even Maddux wasn't perfect. Everyone makes mistakes—I make them all the time. What you must avoid at all costs are repeated mistakes, or worse yet, intentional misconduct that destroys your reputation. Consider the following examples:

1. ignoring clear and binding precedent—everyone is going to miss a case or two, but when you cite cases from all over the country and skip the ones from the Mississippi Supreme Court, it appears intentional;
2. misrepresenting case holdings;

3. manipulating the record evidence—make every effort to present the facts in an objective manner free from spin the record will not support;
4. misrepresenting opposing counsel’s argument; and
5. saving critical issues for rebuttal—this practice is improper and looks like a cheap trick; whether at trial or in motion practice, the court should not allow you to raise new issues in rebuttal. *See Gillaspy v. Dallas Indep. Sch. Dist.*, 278 F. App’x 307, 315 (5th Cir. 2008) (“It is the practice of . . . the district courts to refuse to consider arguments raised for the first time in reply briefs.”).

All of this boils down to the crucial need for candor. If the court catches you in a lie, you may not recover. And when you misrepresent, you send the message that you cannot otherwise prevail. When this occurs, I make a conscious effort to focus on the merits alone, but other judges may not give you that second chance. Remember, you are trying to persuade a judge to take your side of an otherwise close issue. Disingenuous arguments hurt your cause.

Candor is also your ethical responsibility as an officer of the court. Rule 3.3 of the Rules of Professional Conduct requires candor toward the tribunal:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Finally, you will gain credibility by conceding the obvious. If you simply cannot prevail absent a change in the law, either concede the point or make the case for a change. I once heard

a lecturer state that Abraham Lincoln was known to use this approach in trial. He would tell the jury that his opponent was correct on a certain issue and then explain why it did not matter. Simply put, you gain credibility when you concede that which you cannot otherwise defend. Making a half-hearted or misleading attempt to prevail on a meaningless issue diminishes your standing.

B. Pathos

Merriam-Webster defines pathos as “an emotion of sympathetic pity.” Former Chief Judge of the Fifth Circuit Court of Appeals Charles Clark was known to ask his law clerks: “Where are the equities?” Here again, you must know your audience. Some judges are more susceptible to an emotional plea than others, but all judges are human. You must explain the stakes. Do so vividly, with concrete language, and make sure the information is accurate and relevant to the case. Although this is sometimes an easier task when representing a badly injured plaintiff, good defense lawyers find the societal reasons why the court should favor their client’s position.

C. Logos

Logos is an appeal based on logic or reason. Defendants often rely on this form of persuasion: “No one denies that Ms. Smith was badly injured, but the saw was not the proximate cause of the injury.” But a good defense lawyer should not rely on logos alone, any more than a good plaintiff’s lawyer should rely solely on pathos.

After you convince the judge that a ruling for your client feels just, you must give the judge the tools to do so. Unfortunately, some briefs simply ignore this step. It is not enough to tell the court your client is now horribly disfigured. You must state a legally cognizable

argument, explain the applicable law, and support the argument with record evidence.

Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1997).

On the other end of the spectrum, we find the data dump. These briefs provide pages and pages of case citations on a wide variety of topics, but they never tell the court how those cases apply to the facts or which of the many theories the party is actually pursuing. What most judges appreciate is a concise analysis that identifies the correct issues and authority, and then applies the authority to clearly identified record evidence.

III. Write clearly.

I became a substantially better attorney when I learned that I might become a judge. For some reason, I had never asked myself this simple question: “How would I respond to this as a judge?” This inquiry forced me to write more clearly and concisely, which starts with organization.

A. Organize your thoughts.

Sir Winston Churchill is sometimes credited with writing, “If I had more time, I would have written you a shorter letter.” Compare that to William Faulkner’s statement, “I never know what I think about something until I read what I’ve written on it.” Faulkner’s approach might lead to a Nobel Prize for Literature, but it will not help you win your case. You must instead organize your thoughts before you start writing. Failure to do so will produce a longer than necessary memorandum that confuses and frustrates your reader.

As for the organization itself, facts are almost always easier to follow when presented in chronological order. Time lines, which can be attached as exhibits, are also helpful. Regarding your analysis, legal arguments should be separated into distinct sections. You should address each point then move to the next issue. Memoranda that jump around in time and intermingle legal arguments are difficult, and sometimes impossible, to follow.

B. Tell the reader what to expect.

IRAC remains the best way to present your arguments—identify the Issue, state the Rule, Analyze, and Conclude. And while most attorneys follow IRAC to some extent, many fail to properly identify the issues at the beginning of their briefs and instead provide a formalistic introductory paragraph that says nothing about the case. The judge already knows that “the instant action is presently before the court, by and through the undersigned counsel of record.” So instead, tell the reader what the case is about in the first sentence (*e.g.*, “This products-liability case is before the Court on Defendant’s motion for summary judgment.”). By the end of the introductory paragraph, the reader should have a general idea why the motion should be granted or denied (*e.g.*, “The Court should deny Defendant’s motion because there is conflicting testimony regarding the cause of the accident.”). More complex motions often necessitate a more detailed introduction that concisely lists the various legal issues.

Keep in mind that the reader knows nothing about your case when he or she picks up your brief. Yet some attorneys plow into the facts without identifying the type of case or the legal issues presented in the motion. When that happens, the reader will naturally attempt to issue spot and will constantly wonder whether each fact is important, and if so, how it might fit within various potential theories: “This must be an important date, I wonder if they are about to

argue statute of limitations?” This mental exercise wastes time and distracts the reader. Worse still, it causes the judge to pause or jump around in your brief to determine what is important. If you tell the judge the purpose of your brief, then he or she will know why the facts you have provided are important and will subconsciously view the facts in light of your position.

Faulkner’s *The Sound and the Fury* illustrates this point. After reading the first fifteen pages, an internet blogger observed: “‘This is going to be one of *those* books,’ and I checked to see how many pages there were. I had no idea what was going on, there were all these italicized parts, and jumping around in time and place, and more characters than you could picture.” This is how I sometimes feel when I read legal briefs: “This is going to be one of *those* briefs.”

To avoid these frustrations, you must take the reader by the hand and explain where you are going. This does not mean, however, that you must spell out your entire argument. The goal is to tell the reader what to expect in a way that flows naturally through the brief. You can accomplish that goal by beginning with a concise introduction followed by section headings that alert the reader and separate your thoughts. Continue at the paragraph level with topic sentences that reference the main point from the previous paragraph and then highlight what is to come (see the topic sentence for this paragraph). You should likewise begin sentences with significant words or phrases from the previous sentences and make sure every sentence flows from the topic sentence.

C. Be concise.

Around 935 B.C., Solomon wrote, “The more the words the less the meaning.” Ecclesiastes 6:11. Nearly 3000 years later, William Strunk, Jr. explained in *The Elements of Style*:

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short or avoid all detail and treat subjects only in outline, but that every word tell.

But making a memorandum short does not make it concise. The key is to remove the extraneous to highlight the essential. For example, the Gettysburg Address lasted two minutes and is considered one of the greatest speeches in American history. The published version of *Brown v. Board of Education* is two pages long. You may have 35 pages in federal court, but you are not required to use them all.

The use of parentheticals with case citations is helpful in this regard because they quickly tell the reader why the cited case is relevant. Sometimes the holding is so generic that there is no need to read the opinion. Other times, the parenthetical tells the judge that the case is important and deserves a closer look.

Another way to ensure concise writing is to develop a good draft and then strip two pages from it. This exercise will focus your attention on what the judge truly needs to consider and will force you to delete unnecessary facts, legalese, and other verbiage. In addition, you can reduce the number of pages by eliminating poor word choices that add length and sacrifice clarity. The following examples are all well known, but they provide a proofing checklist that will improve your writing:

- Use concrete language.

Not this: Working too quickly will lead to underutilization.

But this: Haste makes waste.

- Write in the active rather than passive voice.

Not this: The accident was caused by Mr. Smith.

But this: Mr. Smith caused the accident.

- Use base verbs, not nominalizations.

Not this: It is a violation of the rule.

But this: It violates the rule.

- Avoid the negative.

Not this: Smith did not address.

But this: Smith failed to address.

- Avoid unclear pronouns.

Not this: He signed it.

But this: Mr. Jones signed the contract.

There are exceptions to these rules. You may, for example, wish to use the passive voice to deemphasize a point. And writing in the negative sometimes gives a sentence punch. Still, these basic rules will improve your writing.

D. Clearly cite the record.

Jerry Maguire said it best, “Help me help you!” Generally speaking, you must support your legal arguments with proper record evidence properly cited in your memorandum. This is, of course, what Rule 56 requires. Once the moving party presents a properly supported motion under Rule 56, the nonmoving party must then go beyond the pleadings and designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Or as amended Rule 56(c) now states, “A party asserting that a fact cannot be or is genuinely disputed must support the assertion by” either “citing to particular parts of materials in

the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute” Fed. R. Civ. P. 56(c)(A), (B).

I see three recurring issues with respect to these rules: (1) lack of any supporting evidence; (2) incompetent record evidence; and (3) evidence that is either not cited or is cited but in a confusing way. Starting with the first two, you must support your position with evidence in a form that “would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2). Failing to provide any record evidence or relying on inadmissible evidence like hearsay will not prevent summary judgment. *See, e.g., QT Trading, L.P. v. M/V SAGA MORUS*, 641 F.3d 105, 111 (5th Cir. 2011) (affirming summary judgment where plaintiff “fail[ed] to offer any evidence . . . beyond its conclusory assertion”); *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (“Material that is inadmissible will not be considered on a motion for summary judgment”); *Black v. Miss. Dep’t of Human Servs.*, No. 3:11cv16–DPJ–FKB, 2012 WL 3061677, at *1 (S.D. Miss. July 26, 2012) (examining amended rules and noting that “if a party has failed to offer evidence in an admissible format, the opposing party should object pursuant to Rule 56(c)(2)”).²

The third issue often occurs when attorneys attempt to cover their bases by attaching each page of every deposition and document in the case without providing specific cites to the record. Under the amended version of Rule 56(c) of the Federal Rules of Civil Procedure, the court may now disregard all such evidence. *See also Fuentes v. Postmaster Gen. of USPS*, 282 F. App’x 296, 300 (5th Cir. 2008) (observing that district court is “under no duty to sift through the record in search of evidence to support a party’s opposition to summary judgment”). Submitting

²This issue occurs in a surprisingly high percentage of memoranda where parties argue facts that are not reflected in the record. Save your breath.

hundreds—and sometimes thousands—of pages of documents without telling the court where to look is legally insufficient and will not leave a favorable impression with the judge.

Other attorneys provide confusing record cites that make it difficult to find the referenced documents. For example, I once ruled on a motion for summary judgment for which the parties collectively submitted close to 2,000 pages of record evidence. One party cited to random bates numbers instead of the exhibit numbers. That same party cited affidavit statements regarding specific documents, but failed to attach the documents to the affidavits or tell me where to find the documents in the record. In general, you will help your judge by doing the following:

- Provide a list and brief description of your exhibits, by exhibit number, at the end of your motion.
- When docketing attachments on CM/ECF, remember to comply with Local Uniform Civil Rule 7(b)(2), which states that “[a]ll supporting exhibits must be denominated in the court’s electronic filing system by both an exhibit letter or number and a meaningful description.”
- Unless there are only a few exhibits, provide the exhibit number when citing documents or deposition testimony (*e.g.*, “Ex. A, Wilson Dep. at 6.”). Many attorneys provide a footnote at the beginning of the brief indicating where each deposition can be found in the record. While that is helpful, I prefer a cite to the exhibit number so there is no need to circle back to the footnote before looking for the exhibit on CM/ECF.

These are not hard and fast rules, but ask yourself, “If I didn’t know this case, could I quickly find this document?” If the answer is “no,” then find a better way to cite the evidence.

IV. Win with style.

The following tools will make your writing more inviting:

- Break up the page. A series of long paragraphs is visually intimidating, hard to follow, and less engaging.
- Avoid full justification. Full justification changes spacing and is subconsciously distracting.

- Use bullet points where appropriate.
- Use subject headings.
- Consider importing digital images into your brief. If there is a key contract provision, diagram, or photograph, embed it into the body of your memorandum so the judge can see it without leaving your brief to examine your exhibits.

V. Practice pointers

A. Observe deadlines.

Judges hate deciding motions to strike due to a party's failure to act timely, especially when it impacts the outcome of a case. No judge wants to be the bad guy, and the entire exercise of ruling on such motions is a sideshow. Cases should be decided on their merits. There are times, however, when binding precedent dictates dismissal for failure to meet deadlines. And even when more discretion exists, there comes a point when disregard for the court's deadlines requires a harsh result. If you are a habitual offender, you may exhaust the court's goodwill.

B. Avoid personal attacks.

The case is not about you or opposing counsel. I was taught never to personalize letters or briefs. Rather than saying "Defense *counsel* argues," say "Defendant argues." More significantly though, avoid personal attacks. Personal attacks are not persuasive and never well received. So while you should observe that your opponent misquoted the case, there is no need to add that she did so "disingenuously and in a blatant attempt to mislead this honorable court." The court will know whether it was intentional. That said, at some point enough is enough and you should feel free to unload. Just be sure you are right.

Finally, be careful what you write in e-mail or letters. E-mail in particular seems to increase bravado, and lawyers will say things in that format that they would never say in person

or in a brief. When they do, they should anticipate seeing their “nastygram” attached as an exhibit to their opponent’s next motion.