2002

The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write

Kristen Konrad Robbins-Tiscione
Georgetown University Law Center, kkt7@law.georgetown.edu

8 Legal Writing 257-284 (2002)

The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write

8 Legal Writing 257-284 (2002)

Kristen K. Robbins Tiscione
Professor of Legal Research and Writing
Georgetown University Law Center
kkt7@law.georgetown.edu

The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write

*Kristen K. Robbins**

A recent survey indicates that what troubles federal judges most is not what lawyers say but what they fail to say when writing briefs.[1] Although lawyers do a good job articulating legal issues and citing controlling, relevant legal authority, they are not doing enough with the law itself. Only fifty-six percent of the judges surveyed said that lawyers "always" or "usually" make their client's best arguments. Fifty-eight percent of the judges rated the quality of the legal analysis as just "good," as opposed to "excellent" or "very good." The problem seems to be that briefs lack rigorous analysis, and the bulk of the work is left to busy judges. Many judges also indicated that lawyers often make redundant or weak arguments that detract from the good ones. What judges really want is shorter, harder hitting briefs.

I. INTRODUCTION

Lawyers are always admonishing lawyers to keep their audience in mind when they write: "[I]f you want to persuade judges and win legal arguments, you must understand what judges want and need, and adjust your presentation to satisfy them."[2] Although some judges have articulated what they do and do not find persua-

---

* Kristen K. Robbins is a Professor of Legal Research and Writing at Georgetown University Law Center. Before joining the Georgetown faculty in 1994, she practiced commercial litigation with Kirkland & Ellis in Washington, D.C. Professor Robbins earned her J.D. from Georgetown University Law Center in 1987 and her B.A. from Wellesley College in 1982.

[1] Several research assistants and members of the Georgetown University family made this survey possible. I extend my heartfelt thanks to Erin Stockley, Michael Doherty, Carlos Gonzalez, Nicole Anzuoni, Lisa Sharlach, Joe Pettit, and Mike McGuire for helping me with this project.

[2] Jason Vail, *What Judges Want: Pitching to Your Audience*, 60 Or. St. B. Bull. 35 (Oct. 1999); *see* Maureen B. Collins, *Writing with Your Audience in Mind*, 87 Ill. B.J. 285 (May 1999); Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, 20 Litig. 6 (Winter 1994); Susan R. Kaplan, *Finding Your Audience*, 183 N.J. Law. 34 (Mar./Apr. 1997).

sive,[3] "what judges want and need" remains to some extent a mystery. Knowing your audience and knowing how best to persuade it are two different things; one does not necessarily follow from the other.[4] Indeed, how audience concerns can and do affect writing is a complex and fascinating process.[5]

Lawyers assume that judges can be researched and anticipated, and that a better understanding of a given judge will produce better results for their clients. A lawyer typically investigates a particular judge's background and reads her opinions before crafting his arguments to that judge for the first time. Knowing that a judge has had experience with a particular area of the law and whether she has strong opinions on issues relating to the lawyer's case is critical.

To write persuasively, however, a lawyer should know about more than just the judge's educational background and knowledge of the subject matter. He needs to know the judge's expectations with regard to the writing itself: What does she think is the goal of brief writing? What does she consider the most important characteristic of a well-written brief? What does she consider a well-reasoned argument? Does she expect to read well-reasoned arguments when she picks up a brief for the first time? Is she interested in reading all potential arguments or just the strongest ones? How much does she pay attention to grammar, punctuation, and spelling? What about citations? In short, what is her overall attitude toward lawyers and the way they write?

---

[3] *See e.g.* Joel F. Dubina, *Effective Appellate Advocacy*, 20 Litig. 3 (Winter 1994); Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325.

[4] The challenge that audience poses is confounded in the context of legal writing because lawyers write to please clients and supervising attorneys, as well as to persuade judges. "Writing a document for multiple audiences is difficult, particularly when each audience has a different background and reads it for a different purpose." Debra R. Cohen, *Competent Legal Writing — A Lawyer's Professional Responsibility*, 67 U. Cin. L. Rev. 491, 498 (1999) (footnote omitted).

[5] "An essential part of the writing process is to determine the intended audience and then write for that audience. Although this is simple to state, it is hard to implement." Cohen, *supra* n. 5, at 497 (footnote omitted). "The audience as it exists in the writers' consciousness and as it shapes the text is a complex set of conventions, estimations, implied responses and attitudes." Douglas B. Park, *The Meanings of "Audience"*, 44 College English 247, 313–314 (1982); *see* Lisa S. Ede, *On Audience and Composition*, 30 College Comp. & Commun. 291 (1979), in which Ede points out that "[c]onsider your audience" is "one of the most quoted and least understood of what might, for lack of a better term, be called composition commonplaces."

In 1980, Fred Pfister and Joanne Petrick published a heuristic model for analyzing audience in written discourse.[6] The model provides detailed questions for all kinds of writers to consider in anticipating their audience. The questions address four categories of information: 1) the nature of the audience itself, 2) the relationship between the audience and the subject matter of the writing, 3) the relationship between the audience and the writer, and 4) the best methods for persuading the audience.[7] Lawyers generally have access to information regarding the first two categories, but

---

[6] *See* Fred R. Pfister & Joanne F. Petrick, *A Heuristic Model for Creating a Writer's Audience*, 31 College Comp. & Commun. 213 (1980).

[7] A Heuristic Model for Audience Analysis in Written Discourse

The Environment of the Audience **Audience/Self**	What is his/her physical, social, and economic status? (age, environment, health, ethnic ties, class, income) What is his/her educational and cultural experience? Especially with certain patterns of written discourse? What are his/her ethical concerns and hierarchy of values? (home, family, job success, religion, money, car, social acceptance) What are his/her common myths and prejudices?
The Subject Interpreted by the Audience **Audience/Subject**	How much does the reader know about what I want to say? What is the opinion of the reader about my subject? How strong is that opinion? How willing is she to act on that opinion? Why does he/she react the way he/she does?
The Relationship of the Audience and the Writer **Audience/Writer**	What is the reader's knowledge and attitude about me? What are our shared experiences, attitudes, interests, values, myths, prejudices? What is my purpose(s)/aim(s) in addressing this audience? Is this an appropriate audience for this subject? What is the role I wish to assign to the audience? What role do I want to assume for the audience?
What are the best methods the writer can use to achieve cooperation/persuasion/identification with the audience? **Audience/Form**	What pattern/mode/development is appropriate? What tone? What diction, level of diction? What level of syntactic sophistication?

Id. at 214.

this survey provides new and valuable information regarding the third and fourth categories: how judges feel about the way lawyers write and what they consider good legal writing.[8] In short, it gives us a better idea of what judges "want and need." By anticipating judicial audience in a broader sense, lawyers should achieve better writing and, in turn, better results.[9]

II. SURVEY DESIGN

The survey consisted of twenty-nine questions, divided into four sections.[10] The first section questioned judges about the goals of written advocacy and asked them how often the briefs they read meet those goals. The second section focused on the briefs themselves and asked judges to rate the quality of the writing in a variety of areas, including analysis, organization, tone, style, and mechanics.[11] Sections III and IV invited written comments on the

---

[8] Several articles explore the nature of legal writing and the traditional reasons it is generally regarded as poor. *E.g.* Matthew J. Arnold, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 Cap. U. L. Rev. 227 (1995); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333 (1987); Steven Stark, *Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389 (1984). To my knowledge, however, this is the only direct survey of the federal judiciary's attitudes toward advocates' writing.

[9] Although the assumption here that writing a better brief makes a difference in terms of ultimate outcome is quite common, it is subject to debate. The assumption is rooted in the notion that writers who are fully socialized into a particular discourse community will be more successful communicators. *E.g.* Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 Leg. Writing 1 (1991). Developing a better understanding of the judiciary's expectations, therefore, hastens that socialization process.

Moreover, the adversarial system is based, in part, on the idea that judges should make decisions in response to the arguments presented by the advocates. As Justice Scalia has stated, "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see U.S. v. Cherif*, 943 F.2d 692, 699 (7th Cir. 1991) (holding certain arguments were waived because the appellant failed to present any argument in connection with the claimed errors). Therefore, a better-presented argument should yield better results.
Finally, the Rules of Professional Conduct mandate that advocates represent their clients with diligence and zeal. *E.g.* D.C. R. Prof. Conduct 1.3(a) (2001) ("A lawyer shall represent a client zealously and diligently within the bounds of the law."); *id.* 1.3(b)(2) (2001) ("A lawyer shall not intentionally: Prejudice or damage a client during the course of the professional relationship."); *see* Md. R. Prof. Conduct 1.3 (2001); Va. R. Prof. Conduct 1.3 (2000). This ethical responsibility seems to require that advocates write the best arguments they can and factor judicial expectations, when available, into their writing process.

[10] A copy of the survey is attached as Appendix A.

[11] Because my interest in legal writing has focused primarily on the construction of legal argument and the effective use of case law, I did not include a section in the survey that addresses statements of fact. Several judges pointed out this omission to me, and in

quality of advocates' writing and how law school writing courses might assist in improving persuasive writing in practice.

III. THE RESULTS OF THE SURVEY

Although I suspected that judges would have strong opinions on this topic, the sheer number and intensity of their responses surprised me. Surveys were sent to all sitting federal judges on the supreme, circuit, and district court level (excluding senior and bankruptcy judges).[12] One Supreme Court justice, 68 (out of 163) circuit judges, and 286 (out of 601) district court judges responded to the survey.[13] These 355 responses represent forty-six percent of all federal judges as of September 1999.[14]

---

hindsight, I wish I had solicited this information.

[12] Confining the survey to the federal judiciary was necessary for logistical and financial reasons.

[13] Responses designated as completed by judges' clerks are not included in the reported results. It is possible that clerks completed surveys without my knowledge. It is also possible that judges completed surveys although their clerks are the primary brief readers and summarize them for the judge. I did not capture that information.

[14] As the table below demonstrates, the survey results have a sampling error of ± three percent, at the ninety-five percent confidence level, given the similarity of the judges' responses. *See* Priscilla Salant & Don A. Dillman, *How to Conduct Your Own Survey* 53–57 (John Wiley & Sons, Inc. 1994). In other words, ninety-five percent of the time, the true values should be within three percent of the stated results:

Sample size for the ninety-five percent confidence level

	± 3% sampling error		±5% sampling error		±10% sampling error	
Population Size	50/50 split	80/20 split	50/50 split	80/20 split	50/50 split	80/20 split
750	441	358	254	185	85	57
1000	516	406	278	198	88	58

Id. at 55.

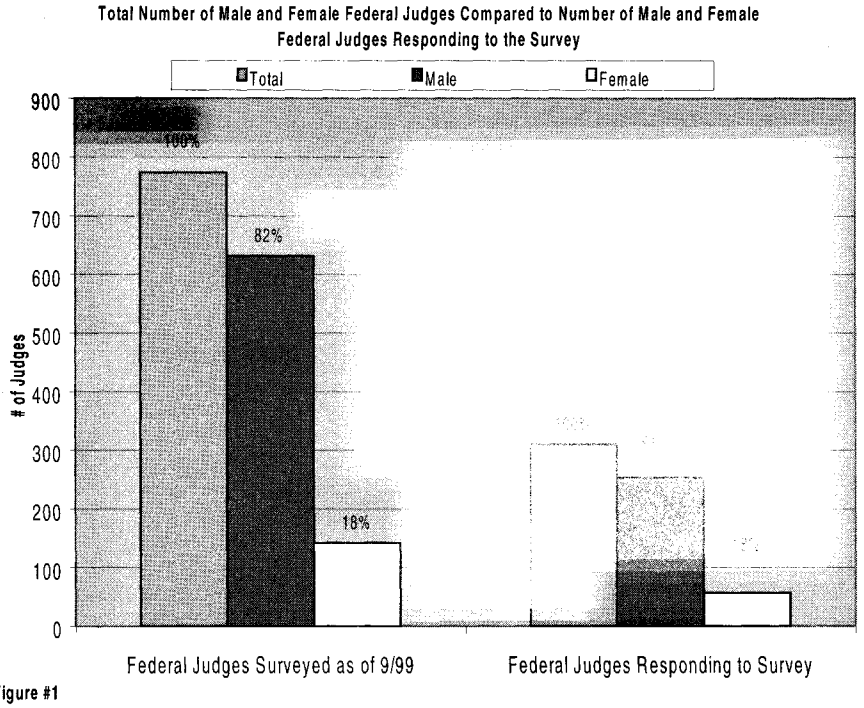

Figure #1

The survey respondents represent the general population in terms of gender and age. Three hundred and ten (310) judges included their name in their response; 253 or eighty-two percent of these respondents were male, and 57 or eighteen percent of these respondents were female. This response rate reflects exactly the percentages of men and women in the federal judiciary. Three hundred and eight (308) of the respondents' ages were readily ascertainable. Of the 308, the vast majority — 248 or roughly eighty-one percent — is between the ages of 50 and 69. Again, as Figures 1 and 2 reflect, this is true in the general population.

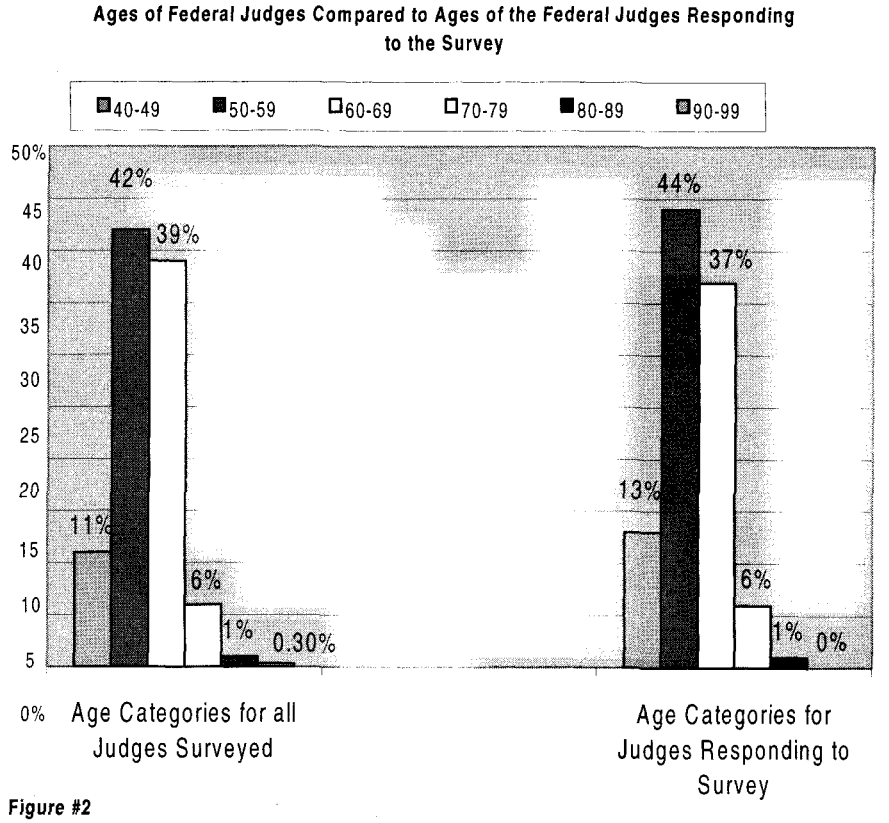

Figure #2

Several judges declined to respond due to a stated policy not to answer surveys. One judge expressed his belief that his duty as a judge is to respond to cases and controversies and nothing else. Many judges also declined to answer because their busy schedules simply did not permit them to give a thoughtful and fair response. One — and only one — judge declined to answer on the ground that the survey was silly. In contrast, the number of responses suggests that many judges were quite interested in and excited by the subject of the survey. A few judges included articles that they liked or had authored on advocacy and writing.[15] One judge graciously offered to visit my students and share his views on good legal writing. Finally, a few of the judges, some of whom did not

[15] Stanley F. Birch, Jr., *Appellate Practice "Helpful Hint"*, 4 Ga. B.J. 60 (June 1999); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567 (1999); Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. Rev. 581 (1999).

respond formally to the survey, submitted their thoughts or additional comments by letter.

Judges were asked to rate legal writing "as a whole," which necessitated their generalizing about all briefs submitted to them. This proved to be a difficult task in some cases.[16] Most judges, however, were willing to accept this inherent weakness in the process and supplemented their answers with written comments where they felt it necessary.

Four themes emerge from the judges' responses to the survey: First and foremost, judges are critical of lawyers' inability to use relevant, controlling authority to their advantage. The judges seem to think that lawyers can find the law, but they are not doing enough with it; the legal analysis in their briefs is mediocre. Second, judges value well organized, tightly constructed briefs second only to good legal analysis. For efficiency reasons, they seem to prefer traditional methods of organization, such as the use of a summary or roadmap of the arguments to follow and the placement of an advocate's strongest arguments first. Third, "good writing" looks good. Judges value excellence in grammar, punctuation, and spelling as much as they do a fluid writing style and appropriate adversarial tone. Fourth and finally, judges use words like "concise" and "clear" to describe the best briefs. Of all the advice offered by judges to improve legal writing and the teaching of legal writing, the need to be concise and clear appeared most often.

A. Lawyers Need to Engage in More Sophisticated Legal Analysis

From the judges' perspective, lawyers are achieving only half of the overall goals of persuasive writing. Judges were asked to rate the following goals of persuasive writing as essential, very important, somewhat important or not important:

- To identify the legal issue(s) for decision

---

[16] One circuit judge wrote,

> The great difficulty in responding to your survey is that the variance in briefs' quality is huge. Some so muddle the facts and law that teasing any sense out of them is a chore; others elegantly focus on the pertinent material in the law and in the record, so that little more than cogitation is needed from the judge. As a result my survey answers tend to be rather moderate, giving a sort of average answer that doesn't actually apply to that many briefs.

- To inform the court about controlling legal authority
- To make the best arguments for the submitting party
- To refute the opponents' best arguments
- To provide policy reasons for deciding the issue in the submitting party's favor
- To change the law

Not surprisingly, eighty percent or more of the judges rated the first four goals as essential or very important. As Figure 3 illustrates, very few judges considered policy arguments and arguments to change the law as essential or very important.[17]

[17] Appellate and district court judges did not differ greatly with respect to the importance of these latter two goals. Only twenty-four percent of the appellate court judges and eighteen percent of the district court judges said that providing policy reasons is essential or very important; six percent of the appellate court judges compared with seven percent of district court judges said that aiming to change the law is essential or very important.

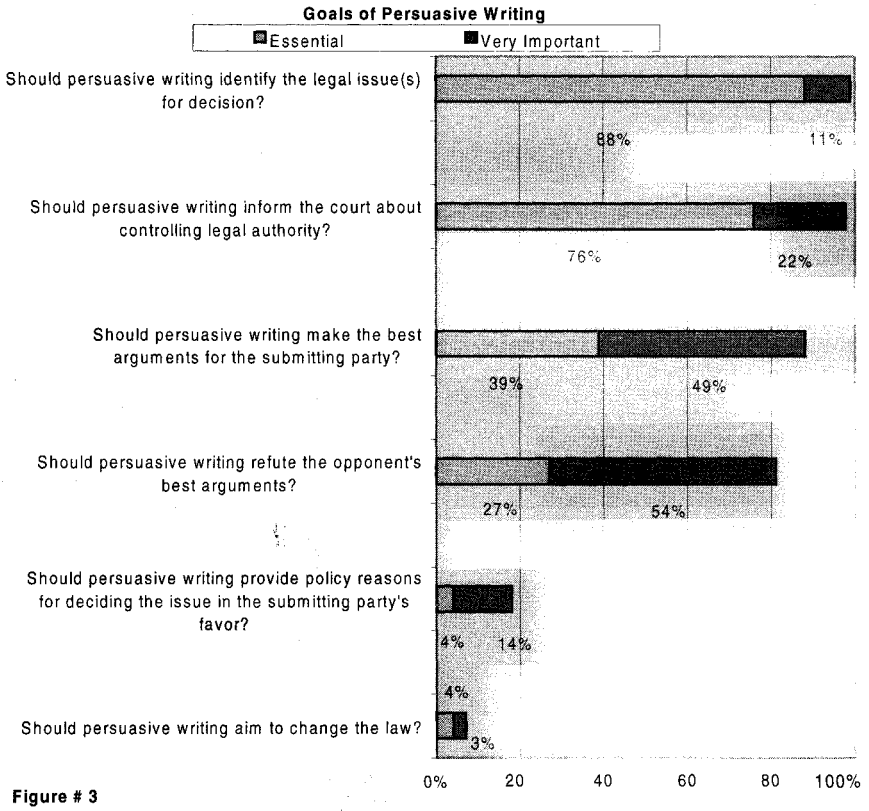
Goals of Persuasive Writing
Essential
Very Important
Should persuasive writing identify the legal issue(s) for decision?
88%
11%
Should persuasive writing inform the court about controlling legal authority?
76%
22%
Should persuasive writing make the best arguments for the submitting party?
39%
49%
Should persuasive writing refute the opponent's best arguments?
27%
54%
Should persuasive writing provide policy reasons for deciding the issue in the submitting party's favor?
4%
14%
Should persuasive writing aim to change the law?
4%
3%
0%
20
40
60
80
100%

Figure # 3

Unfortunately, judges think lawyers meet only half of these goals with any assuring level of consistency.[18] As Figure 4 illustrates, lawyers seem to have little problem identifying the legal issues and presenting the court with relevant, controlling authority. Eighty-six percent of the judges said that advocates "always" or "usually" identify the issues and seventy-nine percent said that advocates "always" or "usually" inform the court about controlling authority.[19]

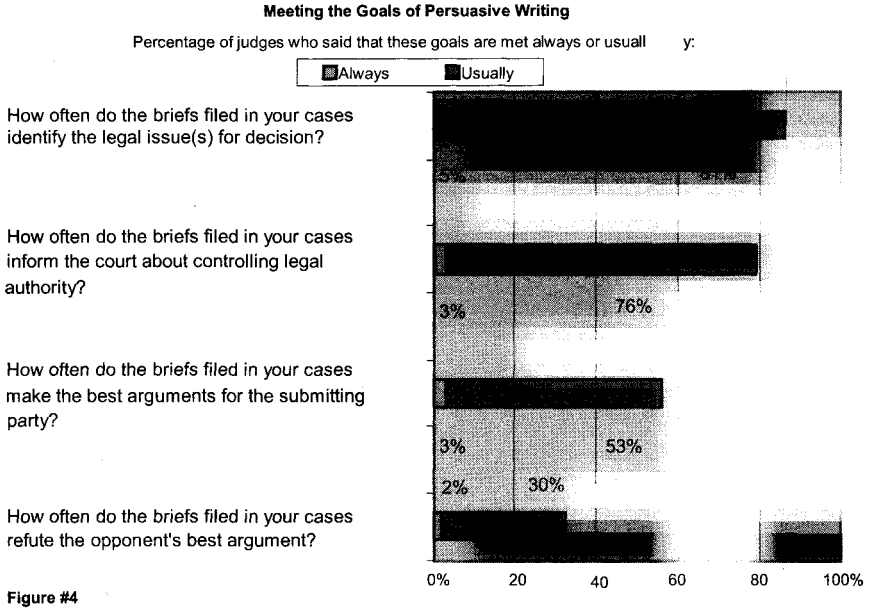

Figure #4

[18] Judges were asked to indicate how often these goals are met: always, usually, sometimes, or never.

[19] Similarly, seventy-two percent of the judges said that advocates "always" or "usually" cite sufficient authority in support of their arguments.

Do advocates cite sufficient authority in support of their arguments?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Sometimes	99	27.9	28.0	28.0
	Usually	250	70.4	70.8	98.9
	Always	4	1.1	1.1	100.0
	Total	353	99.4	100.0	
Missing	0	2	.6		
Total		355	100.0		

Figure #5

Apparently, though, lawyers are not doing enough with the law itself. Only fifty-six percent of the judges think lawyers "always" or "usually" make their clients' best arguments.[20] Perhaps worse, only thirty-one percent think lawyers "always" or "usually" refute their opponents' best arguments.[21] The image that comes to mind is that of the summer associate, who diligently researches a legal issue by submitting a notebook filled with copies of the pertinent cases. "So, what did you find?," asks the assigning partner. "Oh, it's all right here," replies the associate. But the task too often falls to the senior attorney to figure out what the cases *mean* in the given context.

How would you rate the quality of the legal analysis in the briefs you receive?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	4	1.1	1.1	1.1
	Fair	64	18.0	18.3	19.4
	Good	203	57.2	58.0	77.4
	Very Good	76	21.4	21.7	99.1
	Excellent	3	.8	.9	100.0
	Total	350	98.6	100.0	
Missing	0	5	1.4		
Total		355	100.0		

Figure #7

Judges, too, want to know what to make of the applicable law, and lawyers are missing a great opportunity to influence their thinking. Only twenty-three percent of the judges rated the quality of legal analysis in briefs as "excellent" or "very good." As Figure 7

---

[20] Similarly, only fifty-five percent of the judges indicated that advocates "always" or "usually" examine relevant legal issues in appropriate detail.

Do advocates examine the relevant legal issues in appropriate detail?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Sometimes	158	44.5	44.6	44.6
	Usually	196	55.2	55.4	100.0
	Total	354	99.7	100.0	
Missing	0	1	.3		
Total		355	100.0		

Figure #6

[21] As one judge indicated, an essential goal of persuasive writing is to "join the issue with the opponent's position . . . [.] Too often I see two different lawsuits being argued."

illustrates, most judges — fifty-eight percent — rated it as just "good." Although many judges indicated that the quality of legal analysis in briefs varies greatly, the lost opportunity to explain the import of the cited law comes through clearly in many of the judges' comments:

- Frequently analysis is superficial, relying on the case or cases that the writer subjectively thinks are helpful without sufficiently recognizing and rebutting contrary readings and without explaining how the law has developed.
- The bulk of briefs . . . lack thoroughness regarding legal analysis.
- Counsel tends to state what they think is sufficient, but often will not adequately discuss the various implications of the issues.
- Too much of the brief is devoted to issues that are not in substantial dispute or there is too much emphasis on a point where the court is unlikely to base its decision.
- Counsel often waste words on trivial issues and neglect to focus more on the application of controlling case law to the particular facts of a case.
- Most of the briefs lack proper analysis of legal and factual issues. They ignore or gloss over obvious weaknesses in their argument and fail to address the compelling counterpoints of the other side.
- Advocates do not always apply relevant legal issues to the facts of the case at bar.
- Too often all lawyers do is cite cases. Rarely do they go a good job in analysis.
- We often get the feeling (law clerks and me) that the parties are satisfied simply to identify issues and leave the rigorous research and analysis to the court.

When lawyers do apply the controlling law to the facts, they are only moderately successful. Only nineteen percent of judges consider advocates' use of precedent in analogizing or distinguishing cases to be "excellent" or "very good"; no judges rated advocates' use of precedent as "excellent." As Figure 8 illustrates, fifty-four percent rated the use of precedent as "good," and twenty-five

percent rated it as just "fair." One judge damned with faint praise the average lawyer's ability to analyze precedent: "[T]he majority of advocates are able to analogize or distinguish on a somewhat superficial, though not necessarily inapplicable, level." Another judge wrote, "The briefs are usually technically sufficient in the sense that they distinguish (or attempt to distinguish) factual differences (and sometime legal differences) between cases. They are often not good at grasping issue or thematic similarities and differences."

How would you rate the quality of advocates' use of existing precedent in analogizing favorable cases and distinguishing unfavorable cases?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	7	2.0	2.0	2.0
	Fair	89	25.1	25.4	27.4
	Good	189	53.2	53.8	81.2
	Very Good	66	18.6	18.8	100.0
	Total	351	98.9	100.0	
Missing	0	4	1.1		
Total		355	100.0		

Figure #8

Fortunately, there is *some* good news with respect to lawyers' current use of the law in persuasive writing. Judith Fischer reported in 1997 that "[m]isstatements of the law comprise a major category of attorney briefing errors."[22] Fischer cited several cases, state and federal, in which the attorneys' failure to state the law accurately led to a variety of sanctions, including discipline by the appropriate bar, malpractice suits and judicial rebuke.[23] The good news is that most federal judges *think* that lawyers are doing a decent job representing the law accurately. As Figure 9 illustrates, only three percent of the judges said that lawyers "always" or "usually" misrepresent the law they are citing in support of their arguments, and a mere 0.6% said that lawyers "usually" cite to "bad" law (i.e., reversed cases, repealed statutes, etc.)[24] The over-

---

[22] Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 5 (1997). Fischer cites federal and state cases in which courts have sanctioned lawyers for problems with poor organization and style, wordiness, poor grammar, spelling and typographical errors, punctuation errors, and citation errors. *See id.* at 20–30.

[23] *See id.* at 5–19.

[24] Judges were asked to indicate how often these mistakes occur: always, usually, sometimes, or never.

whelming majority of the judges indicated that lawyers only "sometimes" make these mistakes. The judges' handwritten comments indicate that when lawyers do misstate the law, these misstatements take the form of citing cases for propositions they do not support.[25]

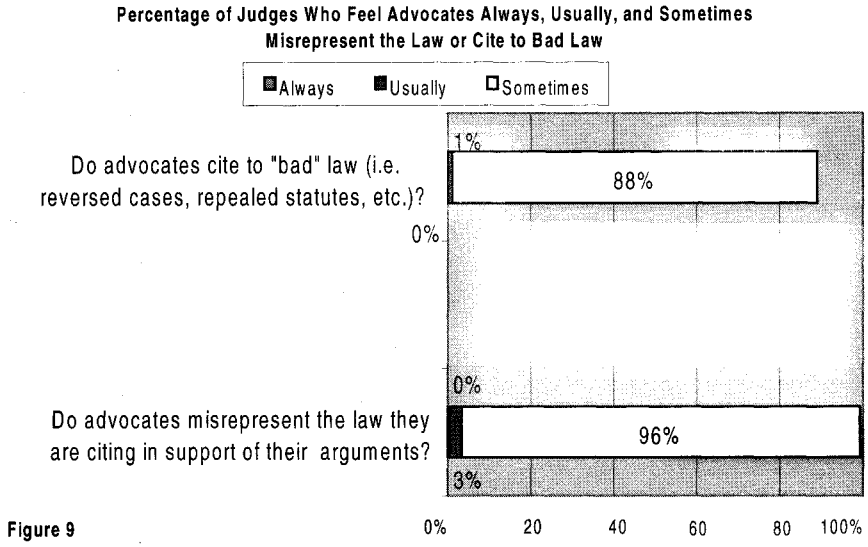

Figure 9

B. A Well-Organized Brief Is Second Only to Good Legal Analysis

Judges were asked to rank the following aspects of persuasive writing in order of their importance: legal analysis, organization, tone,[26] style,[27] mechanics,[28] and citation format. As one might ex-

---

[25] Sample comments include the following:

- They frequently overstate to aid a questionable argument.
- The mistake usually consists of citing a case for a proposition it does not support.
- Tendency to overstate relevance or stretch a holding beyond credibility.
- Represent cases stand for a legal principle when they do not.
- Claim case stands for more than it does (dicta).
- Advocates sometimes cite cases for erroneous propositions.
- Often, case holdings or testimony is taken out of context.
- Sometimes they overstate the support a case gives for their legal arguments.

[26] "Tone" refers to the advocates' ability to strike the right balance between fairness and advocacy.

pect, Figure 10 reflects that the majority of judges consider legal analysis and organization — in that order -- the two most important aspects of persuasive writing; citation format is considered the least important. Although it is difficult to separate written analysis from its organization, judges were more complimentary with respect to lawyers' organizational skills.[29] Seventy-five percent of the judges rated the organization of briefs as "good" or "very good";[30] no judges rated advocates' organization as "excellent." Similarly, ninety-six percent of the judges said that they have difficulty following advocates' arguments only "sometimes."[31]

---

[27] "Style" refers to the writing itself: Are paragraphs and sentences well constructed, do writers use strong topic sentences, do sentences and paragraphs flow together well, are words chosen carefully, etc.?

[28] "Mechanics" refers to editorial concerns: Do advocates use proper punctuation, grammar and spelling, and are there many typographical errors?

[29] Despite the cases cited by Fischer, *supra* n. 23, at 20–22, federal judges seem to think that lawyers, on the whole, do a pretty good job with respect to organizing their arguments.

[30] Judges were asked to rate the quality of organization as excellent, very good, good, fair, or poor.

How would you rate the organization of the briefs (i.e. are arguments presented in a coherent, logical manner)?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	2	.6	.6	.6
	Fair	87	24.5	24.7	25.3
	Good	199	56.1	56.5	81.8
	Very Good	64	18.0	18.2	100.0
	Total	352	99.2	100.0	
Missing	0	3	.8		
Total		355	100.0		

Figure #11

[31] Judges were asked to describe how often they had difficulty following advocates' arguments as always, usually, sometimes, or never.

Do you have difficulty following advocates' arguments?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Never	5	1.4	1.4	1.4
	Sometimes	338	95.2	96.0	97.4
	Usually	8	2.3	2.3	99.7
	Always	1	.3	.3	100.0
	Total	352	99.2	100.0	
Missing	0	3	.8		
Total		355	100.0		

Judges' Ranking of the Relative Importance of Legal Analysis, Organization, and Citation Format in Persuasive Writing

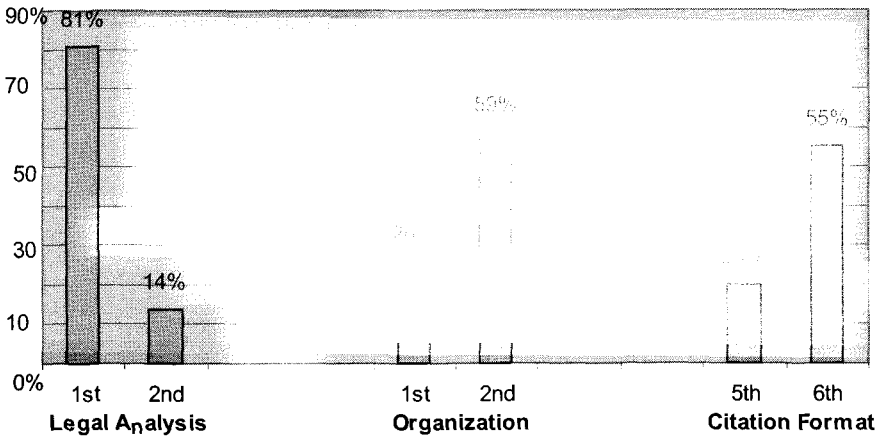

Figure 10

When it comes to the organization of arguments, judges remain fairly traditional in terms of their expectations. Seventy-six percent of the judges said it is essential or very important to include an introductory paragraph that explicitly outlines the arguments to follow. Only twenty percent said it is somewhat important.[32] Nearly the same number of judges — seventy-four percent — said it is essential or very important for advocates to put their strongest arguments first.[33] Although confident legal writers

---

Figure #12

[32] Judges were asked to describe the importance of including an introductory paragraph or section that explicitly outlines the arguments to follow as essential, very important, somewhat important, or not important.

How important is the inclusion of an introductory paragraph or section that explicitly outlines the arguments to follow?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Not Important	14	3.9	4.0	4.0
	Somewhat Important	70	19.7	19.8	23.8
	Very Important	185	52.1	52.4	76.2
	Essential	84	23.7	23.8	100.0
	Total	353	99.4	100.0	
Missing	0	2	.6		
Total		355	100.0		

Figure #13

[33] Judges were asked to describe the importance of advocates putting their strongest arguments first as essential, very important, somewhat important, or not important.

might resist such formulaic convention, this audience seems to like and expect it.[34] In response to the question of what advocates do best in legal writing, several judges indicated that the best briefs "[g]enerally begin with the most important issues," "emphasize the strongest arguments for their side," "[s]et forth early on their strongest arguments both legally and factually," "provid[e] the reader with a road map through the analysis, from strongest to weakest arguments," and "[m]ake an introduction that road maps the rest of the brief."

How important is it that advocates put their strongest arguments first?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Not Important	22	6.2	6.2	6.2
	Somewhat Important	69	19.4	19.5	25.7
	Very Important	177	49.9	50.0	75.7
	Essential	86	24.2	24.3	100.0
	Total	354	99.7	100.0	
Missing	0	1	.3		
Total		355	100.0		

Figure #14

This expectation gibes with the conventional wisdom taught in most legal writing textbooks. *E.g.* Charles R. Calleros, *Legal Method and Writing* 202–203, 299–300 (2d ed., Aspen Publishers, Inc., 1994); John C. Dernbach et al., *Legal Writing and Legal Method* 227–228 (2d ed., William S. Hein & Co. 1994); Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 247–248 (3d ed., Matthew Bender & Co. 1998).

[34] Many judges indicated that they have little time to wade through long, undifferentiated argument. *See infra* Part D. The judges' preference for straightforward organization makes sense given their desire to read as efficiently as possible.

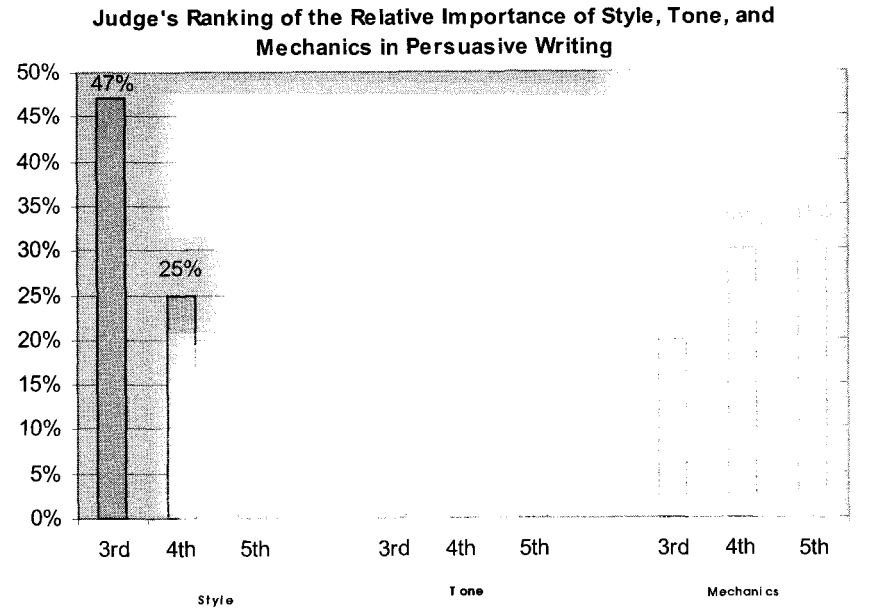

Figure #15

C. Judges Value Style, Tone, and Mechanics Equally

Although the vast majority of judges agrees that analysis and organization are the most important aspects of persuasive writing, there is no clear third, fourth, and fifth place for tone, style, and mechanics. As Figure 15 illustrates, style is perhaps third, but only forty-seven percent of the judges ranked it third; twenty percent selected tone and twenty percent selected mechanics. The numbers for fourth place are very close: twenty-five percent chose style, thirty percent chose mechanics, and twenty-seven percent chose tone. As for fifth place, thirty-one percent chose mechanics and twenty-seven percent chose tone, but only six percent chose style. In other words, they all matter. Because different judges value these aspects of writing somewhat differently, the legal writer must take them all into account.

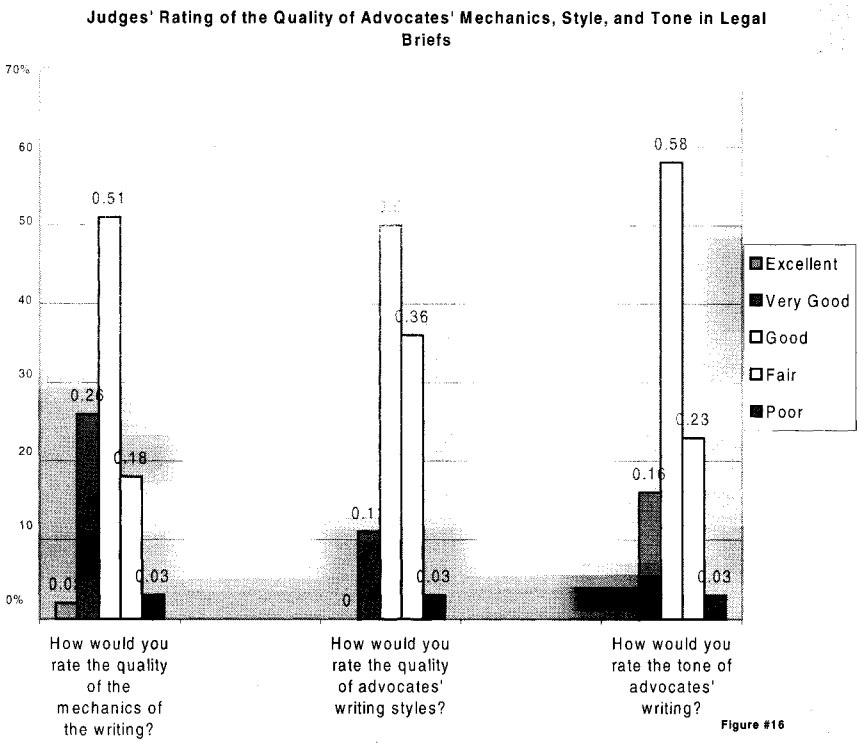

Figure #16

The survey indicates that judges think lawyers are performing only moderately well in these three areas: roughly fifty percent of the judges said that lawyers are doing a "good" job in each of these categories.[35] However, as Figure 16 illustrates, a significant percentage — twenty-one percent, thirty-nine percent, and twenty-six percent — said that lawyers' abilities range from poor to fair in mechanics, style, and tone, respectively. Only two percent rated mechanics as "excellent." Twenty-six percent rated mechanics as "very good," eleven percent rated style as "very good," and sixteen percent rated tone as "very good." Apparently, in addition to working better with the law, lawyers still need to brush up on — or develop — basic writing skills.[36]

---

[35] Judges were asked to rate the advocates' performance as excellent, very good, good, fair, or poor.

[36] For citations to opinions that discuss serious problems with grammar, spelling,

Regrettably, the survey did not elicit much data to explain specifically why advocates did not score better in these areas. However, as far as style is concerned, the judges' opinions do not seem heavily influenced by lawyers' use of arcane language. Ninety-seven percent of the judges said that lawyers "never" or "sometimes" use Latin phrases and/or legal jargon in a way that detracts from the writing's persuasiveness.[37] Either the Plain English movement is succeeding, in part, or more traditional legal writing does not trouble these judges. Second, with respect to "tone" or the lawyers' ability to strike a balance between fairness and advocacy, the majority of judges does not seem to think that lawyers are behaving unprofessionally. Eighty-eight percent of the judges said that advocates "never" or "sometimes" characterize their opponents' arguments unfairly,[38] and ninety-eight percent

typographical errors, and punctuation, see Fischer, *supra* n. 23, at 27–30.

[37] Judges were asked to describe how often advocates use Latin phrases or legal jargon in a detrimental way as always, usually, sometimes, or never.

Do advocates use Latin phrases and/or legal jargon in a way that detracts from the writing's persuasiveness?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Never	72	20.3	20.5	20.5
	Sometimes	268	75.5	76.4	96.9
	Usually	10	2.8	2.8	99.7
	Always	1	.3	.3	100.0
	Total	351	98.9	100.0	
Missing	0	4	1.1		
Total		355	100.0		

Figure #17

[38] Judges were asked to describe how often advocates unfairly characterize their opponents' arguments to the court as always, usually, sometimes, or never.

Do advocates unfairly characterize their opponent's arguments to the court?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Never	3	.8	.9	.9
	Sometimes	306	86.2	86.9	87.8
	Usually	41	11.5	11.6	99.4
	Always	2	.6	.6	100.0
	Total	352	99.2	100.0	
Missing	0	3	.8		
Total		355	100.0		

Figure #18

said that advocates "never" or "sometimes" personally attack their opponents in an unprofessional manner.[39]

As legal writing professors have always suspected, judges base their opinions of a brief's quality to some extent on its appearance. One judge stated:

> Whether we mean to or not, we judges tend to become suspect of any argument advanced by an advocate who produced shoddy work. . . . I have little trust in an advocate who files a document that contains misspellings, poor grammar, or citation to "bad law."

Another judge wrote, "The care with which an advocate proofreads a brief is usually indicative of the care with which he has made his argument." It is no wonder, then, that these judges place as much significance on mechanics — grammar, punctuation, spelling — as they do on style and tone.

D. Judges Want Conciseness and Clarity in Legal Reasoning

The survey included four open-ended questions that asked judges what advocates do best and worst in persuasive writing, what additional comments they have with respect to the quality of advocates' writing, and what law school writing courses should emphasize to improve persuasive writing in practice.[40] Although the judges' responses to each question vary widely, there is a

---

[39] Judges were asked to describe how often advocates attack their opponents unprofessionally as always, usually, sometimes, or never.

Do advocates personally attack their opponents (parties or counsel) in an unprofessional manner?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Never	36	10.1	10.2	10.2
	Sometimes	311	87.6	88.1	98.3
	Usually	6	1.7	1.7	100.0
	Total	353	99.4	100.0	
Missing	0	2	.6		
Total		355	100.0		

Figure #19

[40] Judges interpreted Question 26, regarding what advocates do best in persuasive writing, differently. Some answered in terms of what the best briefs should do, while others answered in terms of what advocates generally do best. These multiple interpretations make it difficult to conclude what judges think with regard to the latter and intended interpretation.

strong, recurring, and unmistakable cry for conciseness and clarity.

Judges seem most interested in an advocate's ability to be brief. From the judges' perspective, conciseness is not aspirational, it is essential. Seventy-three of the 355 judges volunteered that the best briefs are concise; 70 said that the worst briefs fail to be concise; and 118 said that conciseness should be taught in law school writing courses.

When asked how important conciseness is to legal writing's persuasiveness, ninety percent of the judges said that conciseness is "essential" or "very important."[41] However, none of the judges said that advocates are "always" concise, and only nineteen percent said that advocates are "usually" concise. In fact, seventy-five percent of the judges said that advocates are only "sometimes" concise.[42]

---

[41] Judges were asked to rate the importance of conciseness in persuasive writing as essential, very important, somewhat important, or not important.

How important is conciseness to the writing's persuasiveness?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Not Important	2	.3	.6	.6
	Somewhat Important	33	4.3	9.3	9.9
	Very Important	216	28.3	61.0	70.9
	Essential	103	13.5	29.1	100.0
	Total	354	46.5	100.0	
Missing	0	1	.1		
	System	407	53.4		
	Total	408	53.5		
Total		762	100.0		

Figure #20

[42] Judges were asked to describe how often advocates write concisely as always, usually, sometimes, or never.

Do advocates write concisely?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Never	22	2.9	6.2	6.2
	Sometimes	264	34.6	74.8	81.0
	Usually	67	8.8	19.0	100.0
	Total	353	46.3	100.0	
Missing	0	2	.3		
	System	407	53.4		
	Total	409	53.7		
Total		762	100.0		

Figure #21

Fischer cites several cases in which courts sanctioned or rebuked advocates for excessive

The frustration felt by judges is apparent in their handwritten comments. In response to Question 27, on what advocates do worst, some of the judges said:

- Ramble on.
- Their briefs are almost invariably *too long* and frequently repetitious.
- Write for the sake of writing. They do not edit and boil matters down to their essentials.
- Lengthy, rambling briefing in which it is difficult to discern the point.
- Too long, too repetitious and meandering.
- Making the briefs excessively long and incomprehensible.
- Verbosity and over citation.
- Often important and concise points are lost in a sea of irrelevant points.
- Length of virtually all briefs, excessive. Briefs far too long.
- Unfocused, imprecise and verbose writing.
- They write too much and dilute their arguments.
- Repeat arguments ad infinitum.
- Is verbosity a synonym for attorney?
- Write too much.
- Too lengthy and not really doing a good job of addressing the issues.
- Fail to write short, clear, "to the point" briefs.
- Unnecessary volume.
- In sum, the briefs — usually a misnomer — are too long and do not focus on the critical issues in the case.

The gravity of this problem from the judges' perspective is even more apparent in their responses to Question 29, on what law schools can do to improve persuasive writing in practice. As these

---

wordiness. Fischer, *supra* n. 23, at 22–27.

comments illustrate, the time pressure felt by these judges greatly influences their recommendations:

- You need to stress the need to write clearly and concisely. We are *drowning* in 50 page briefs that are poorly written when the case should have been presented in a 20 page brief.
- A brief can be brief. Please tell your students that I have a lot to do and little time to do it. Write a brief that I can adopt as my opinion with a straight face and you will please me.
- How to say something concisely and once!
- Shorter, but harder hitting briefs.
- We read about 1000 pages a day and don't have time for rambling briefs that are poorly organized.
- Brevity, brevity, brevity.
- Legal research and writing courses should continue to stress well-organized, clear and concise writing. Judges' time is limited and cannot be wasted on bombast and personal attacks.
- Judges and their clerks have limited time and *hate* long briefs and rambling arguments.
- We don't have time for unnecessary arguments.
- Remind the students that as they learned in English 101, clarity and brevity are virtues.
- It's not "good" because it's long, exhaustive and complex.
- Conciseness! Remember the burden of paperwork the courts face.
- Excessive length may hurt your case.
- Encourage brevity and precision.
- Students should be made to understand that, in today's world of crowded dockets, a judge has only a limited amount of time to devote to each case and that the good advocate must be sure that none of that time is wasted. If briefs are too long, the judge's attention will often stray and the good arguments will be lost in the sea of irrelevance.

As the judges' comments indicate, conciseness means presenting fewer arguments[43] as well as writing shorter sentences.[44]

Many judges also indicated that "clear" language contributes to good writing and should be taught in law schools. The judges did not mention "clarity" nearly as often as they mentioned "conciseness," but its recurrence in the judges' comments is noteworthy. For example, in response to Question 26, on what advocates do best, several judges said they "state clearly . . . what the case is about and why the court should affirm or reverse," "[m]ake things clear and interesting," "clearly and concisely identify and analyze the issues presented," and "state their positions clearly." Conversely, the worst briefs "read like a Joycean stream-of-consciousness and seem to have no theme or clear purpose," "are anything but" clear, "muddy up the water," "cloud the main issues with trivia," or contain "fuzzy, imprecise thinking and writing, leaving the reader to guess or assume as to the meaning."

"Clarity" is as elusive and opaque a concept as "audience." Of all the terms associated with good writing and the teaching of writing, it is perhaps the most difficult to define. What does it mean to write clearly?[45] If something is clear, it is transparent, invisible. Surely, to write clearly does not mean to write something that cannot be seen. What, then, is it possible to see when the words themselves become see-through?

"Clarity" is often used to describe writing when the reader's — or the judge's — primary concern is with the text itself, in this case, the brief. The emphasis on the need for "clear" language may reflect the judges' implicit belief that language does not create

---

[43] Several judges said:

- Most brief writers tend toward redundancy and over argument. They also tend to raise more issues than are necessary to present the case.
- "[A]void the "everything but the kitchen sink" — in no particular order syndrome.
- Teach students not to throw in the kitchen sink. Shorter, sharper arguments are more likely to be winners.
- Avoid the shotgun approach to advocacy.

[44] In this regard, some judges advised:

- Keep the sentences short. Use action verbs.
- Shorter, more pithy sentences.
- Shorten the sentences.

[45] As indicated earlier, the briefs' lack of clarity does not appear due to a failure to use plain English. *Supra* n. 38.

meaning; it is a transparent medium for meaning.[46] In some sense, the content of the writing — the advocate's arguments — is assumed to exist apart from the writing itself, and the advocate's brief simply articulates those arguments. This traditional view of writing dominated writing pedagogy until the 1970s and 1980s, when the expressivists and cognitivists began to challenge and supplement this formalistic approach. At that time, the importance of the writing process emerged, including an interest in the way individual writers actually compose.[47] Later, the context in which writing functions — the social construct — became important in thinking about ways to write and teach writing.[48]

Although legal writing instruction has incorporated, in part, these newer writing pedagogies, a traditional approach to writing prevails both in the classroom and the courtroom. The survey responses that praise briefs for their "clarity" are perhaps good reminders of the judges' educational background and perspective. Most, if not nearly all, federal judges were trained to write — both in undergraduate and law school — in the formalist tradition, well before the process and social constructionist approaches found their way into law school writing curricula in the late 1980s and early 1990s. As a result, judges predictably use words like "clear" to describe good writing. They sense that the advocate has a decent argument to make, but he has failed to express it well in writing. To the contrary, it may be that the advocate has not formed a well-reasoned argument, and the writing reflects that weakness.[49]

---

[46] *E.g.* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 49 (1994).

[47] *E.g.* Peter Elbow, *Writing without Teachers* (Oxford U. Press 1973); Janet Emig, *Writing as a Mode of Learning*, 28 College Comp. & Commun. 122 (1977); Linda Flower, *Writer-Based Prose: A Cognitive Basis for Problems in Writing*, 41 College English 19 (1979); Linda Flower & John R. Hayes, *The Cognition of Discovery: Defining a Rhetorical Problem*, 31 College Comp. & Commun. 21 (1980).

[48] *E.g.* Kenneth A. Bruffee, *Thinking and Writing as Social Acts*, in *Thinking, Reasoning and Writing* 213 (Elaine P. Maimon et al. eds., Longman Group 1989). For a more complete discussion of the evolution of writing pedagogy and its parallel in legal writing education, see Rideout & Ramsfield, *supra* n. 47, at 49–60.

[49] The next logical question, of course, is how to produce "clearer" writing for the audience that demands it. That is, in part, the subject of my next article, in which I plan to develop the idea that "clarity" in writing really means reasoned thinking and better use of case law. "Unclear" writing is not simply a failure in translation from the mind to the written word, but the manifestation of unformed or weak argument. To improve the quality of legal analysis is to improve the clarity of the writing. Legal writing professors, in particular, need to find better ways to describe and teach persuasive argument. My next article

IV. CONCLUSION AND RECOMMENDATIONS

So, what do judges really think about the way lawyers write? On the whole, advocates are doing a "good" job but not much better than that. Advocates identify well the relevant, legal issues and cite the appropriate, controlling law, but they need to engage in hard-hitting, intelligent, and honest legal analysis. Citing the law is inadequate; advocates need to tell judges explicitly how the law supports their position, instead of hoping the judge will figure that out for them. Furthermore, when advocates analogize to or distinguish case law, they need to look beyond the facts, to the issues, themes and policies involved in those cases.

As the judges' handwritten comments make clear, judges feel tremendous time pressure when called upon to read briefs. Perhaps as a result of this pressure, judges seem to prefer "tried and true" organizational forms, including summaries of or "roadmaps" to arguments and the selection of fewer, strong arguments arranged in their order of importance. In addition, good briefs still have to look good, and judges seem to value equally excellence in style, tone and mechanics. Although some lawyers still need to brush up on their basic writing skills, judges are more concerned about pithy legal analysis than good grammar. Judges don't care much about citation format, but they will fault advocates for sloppy work.

The overwhelming message from judges is that they want briefs that are concise and clear. Again, because they are so busy, judges do not seem to have enough time or energy to figure out what an advocate is trying to say; he must argue "clearly." Moreover, if an advocate takes ten pages to say what the judge perceives could have been argued in four, he runs the risk of annoying the judge or worse. Judges seem to want more legal analysis in less space. Although these demands seem to be inconsistent, they do not need to be. Judges do not necessarily want more, but better analysis.

---

will focus on the rhetorical underpinnings of legal argument with which students need to be explicitly acquainted and illustrate typical flaws in legal reasoning that students can easily identify and eradicate.