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Effective Legal Brief Writing

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Speaker Bios

Lori A. Colbert is an owner in the firm of Mendel & Associates, Inc. in Anchorage, Alaska. She is a graduate of Claremont McKenna College (Claremont, California) and Willamette University College of Law (Salem, Oregon). Her practice focuses on family law to include divorce, child custody and support, wills and adoption. Ms. Colbert is a member of the Alaska and American Bar Associations. She served for eight years as the co-chair of the Family Law Section of the Alaska Bar Association. She has been active in the American Bar Association Family Law Section as a member of the CLE committee, as a member, co-chair and current vice-chair of the Diversity Committee, as a member and co-chair of the Member Benefit Committee and is currently an at-large member of Council. Lori has served as the vice-president for the M. Ashley Dickerson Chapter of the National Bar Association. She is a lifelong Alaskan and the mother of two daughters.

Greg Johnson is a Professor of Law and Director of the Legal Writing Program at Vermont Law School, where he has taught since 1997. Greg also taught legal writing at Oregon Law School and St. Louis University School of Law. He clerked for the Alaska Supreme Court and the Palau Supreme Court and practiced law with a firm in Anchorage, Alaska. Greg has spoken at many legal writing conferences and has published several articles on legal writing. His latest, Spiralling Into Control: Appreciating the Groundbreaking Legal Writing Pedagogy of Professor Mary S. Lawrence, was published last year by the Oregon Law Review. Greg is a graduate of Cornell University and Notre Dame Law School.

Brian L. Porto is Professor of Law at Vermont Law School. He holds a J.D. from Indiana University-Bloomington and a Ph.D. in Political Science from Miami University (Ohio). He has worked as an attorney in both state government and private practice, and continues to practice law by writing appellate briefs for Vermont attorneys. He teaches courses in legal writing, appellate advocacy, election law, and sports law. He has published several articles about appellate brief writing in the Vermont Bar Journal and has written two books about legal issues in college sports. His latest book is titled The Supreme Court and the NCAA: The Case for Less Commercialism and More Due Process in College Sports (University of Michigan Press 2012).
PRACTICAL TIPS FOR EFFECTIVE BRIEF WRITING

Aristotle wrote: “It is not enough to know what to say—one must also know how to say it.”¹ That sentiment is the underlying premise of our presentation this morning. Based on that premise, we will share with you some tips that we think will help you “say it” effectively in appellate briefs. And “saying it” effectively could well make the difference between winning and losing on appeal. If you doubt that, consider the words of Judge Murray Cohen of the Texas Court of Appeals, who has observed:

Is good writing rewarded? I used to think it doesn’t matter much, in comparison with legal authority, justice, and the like. Now I know better: Good writing is rewarded so automatically that you don’t even think about it.²

Perhaps we can help you earn your fair share of subconscious judicial rewards for effective brief writing. Our tips follow:

1. **Use The Madman-Architect-Carpenter-Judge Writing Process.**

   Naturally, you will want your writing to be as clear, concise, precise, and logically organized as you can make it. You know the judge is not reading it by choice, but instead, as a job requirement, so you will try to make the judge’s reading experience as easy and pleasurable as possible. Toward that end, we recommend using a writing process called the Madman-Architect-Carpenter-Judge, which an English professor at the University of Texas developed some years ago.³

   The first role to be played in the writing process is the Madman. In this role, you should brainstorm ideas regarding the components of your brief, especially the Statement

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¹ ARISTOTLE, THE RHETORIC OF ARISTOTLE 182 (1932).
² BRYAN A. GARNER, GARNER ON LANGUAGE AND WRITING 62 (2009).
of the Case and the Argument. Scribble notes on these subjects as they occur to you; they need not be arranged in any particular order. The important thing is to identify the key facts and issues in the case. A good rule of thumb is that if you have an hour to devote to a writing project, you should spend ten minutes brainstorming ideas. For a brief, then, estimate the total number of hours the project will require and allot one-sixth of the total to the Madman role. Otherwise, you are liable to waste time staring at a blank computer screen or to produce an incomplete first draft.

   Every Madman needs an Architect to bring coherence to his random thoughts. So after jotting down all your ideas for the brief, switch to the Architect role and start building a structure from the pieces the Madman identified. For a brief writer, that structure is an outline, and constructing it should consume approximately five minutes per one-hour writing project. Consider first the Questions Presented, which you may have composed hurriedly and imprecisely for your docketing statement, but which you should now make clear and concise. They set the tone for the entire brief; hence can make both writing the document and reading it either a pleasure or a chore. Precise, concise Questions Presented will offer you a conceptual road map for writing the brief and they will give the reader a similarly handy tool for understanding it.

   2. Limit Your Brief To No More Than Three Questions Presented.

   Try to limit your brief to three issues or less. Additional ones may occur to you, but usually, they can be presented more effectively as subparts of the three main issues. If the various issues cannot be presented well as single-sentence questions, use the “deep-issue format,” which is “a multi-sentence syllogism incorporating a statement of the law,
relevant facts, and a question.” It is especially helpful in fact-heavy or legally complex cases. An example appears below:

The Appellant, Mr. Jones, who is estranged from the Appellee, Mrs. Jones, has harassed her verbally, entered her residence without her permission, intimidated her physically, and threatened to retaliate against her if she filed for divorce. Under these circumstances, did the Family Court act within its discretion when it granted Mrs. Jones’s complaint for relief from abuse?

Whichever method of identifying the Questions Presented you use, though, expect to redraft them several times before the brief is finished so that they reflect the arguments you have actually written. They may differ somewhat from the ones you anticipated writing when you began the project.


Your Statement of the Case will be most persuasive if it begins with a coherent and compelling theme that holds the brief together and summarizes the story about to be told. Just as good literature grabs the reader’s attention with an opening sentence that orients the reader to the forthcoming story, such as “It was the best of times, it was the worst of times,” or simply, “I had a farm in Africa,” so should your SOC begin with a theme sentence. You can be sure to do this by employing a mantra opening, such as, “This case is about…” or “This case presents….” Depending on the nature of the case, your theme can be as simple as, “This case is about statutory construction” or it can be more creative, such as the example below.

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Comedian and filmmaker Woody Allen has said, “Ninety percent of life is showing up.” Judging by this case, the Appellants, [names omitted], failed to learn this lesson. Had they learned it, they may have spared themselves the effort and the expense of this appeal along with the sting of a large default judgment.

Whether you use a simple, straightforward theme or a more creative one, try to include facts and law in it if possible. In other words, try to include the rhetorical elements of *logos* (logic), *pathos* (emotion), and *ethos* (ethics) in your theme. For instance, the above example includes an appeal to logic, namely, the default judgment resulting from the failure to pursue one’s case, but it also includes appeals to emotion and ethics, suggesting that one should not be permitted to seek relief from judgment after having sat on his rights by refusing to respond to a legitimate lawsuit.

4. **Tell A Compelling Story In Your Statement of the Case.**

Follow your theme with a sentence informing the court who is appealing from what decision. Then the court will be acquainted not only with the equities of the case (from your theme), but also its procedural posture. After identifying the procedural posture of the case, proceed to let the facts tell your client’s story. Think of your client as the protagonist in a drama and of the opposing party as the antagonist. The antagonist is trying to prevent the protagonist from solving a problem and reaching a happy resolution. Make the court want to resolve the problem in your client’s favor. If you represent the protagonist, identify your client’s honest behavior and the troubles that befell your client when she came in contact with the protagonist.

This is more easily done, of course, if your client is the elderly widow who purchased a defective modular home from the sketchy contractor who later ignored her
complaints, failed to make repairs and tried to ignore her lawsuit, too. But if you represent the contractor, you still must tell the best story you can, even if it is simply that under the facts and the pertinent law, the trial court acted within the bounds of its discretion in reaching its decision. Whichever party you represent, your Statement of the Case must be “neutral in form, but persuasive in effect.” To achieve that delicate balance, limit adjectives and avoid intensifiers (e.g. clearly, very, etc.), but explain, using descriptive nouns and verbs, that, for example, the contractors sold the widow a home riddled with defects, ignored her requests for repairs, neglected to make repairs, and failed to answer her lawsuit in a timely way.

5. Use Rhetorical Techniques To Aid Storytelling.

When editing your brief, insert vivid imagery to enhance the persuasive effect of your words. Suppose, for example, your first draft states: “On his way out the door, Smith staggered against a serving table, knocking a bowl to the floor.” In a later draft, consider writing: “On his way out the door, Smith staggered against a serving table, knocking a bowl of guacamole dip to the floor and splattering guacamole on the white shag carpet.” Use alliteration (e.g., the corporate conspirators) and assonance (e.g., the omnipresent officer) to spice up your writing, along with figures of speech, such as isocolon (clauses of equal length—e.g., “The patent system rewards those who can and do, not those who can but don’t) and tricolon (ideas and actions presented in groups of three, such as “life, liberty, and the pursuit of happiness” and “our lives, our fortunes, and our sacred honor”). An occasional metaphor (e.g., “He was a pit bull in the courtroom”) or simile (e.g., “Her writing was as smooth as silk”) can also aid persuasion.

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7 Jennifer S. Carroll, Appellate Specialization and the Art of Appellate Advocacy, 74 Fla. B.J. 107, 107 (June 2000).
6. Use Your Point Headings To Persuade.

A judge should be able to glean the import of your brief from reading only your point headings. That will be possible if you (1) include facts, law, and a conclusion in each point heading and (2) make them adversarial, not just topical or even assertive. The examples below illustrate this point.

**Topical:** The Statute of Limitations Question

**Assertive:** The Statute of Limitations Bars This Lawsuit

**Adversarial:** The Statute of Limitations Bars This Lawsuit

Because It Was Filed Three Months After The Limitations Period Expired.

Use the same technique to create subheadings, preferably one every 4-5 pages so as to hold the reader’s attention throughout the brief.

7. Remember the Principles of **Unity** and **Coherence** for Good Paragraphing.

At this point, you are ready to begin drafting your argument. When you begin drafting the argument, forget about perfection and lose any sense of pride in your writing. Bad writers are oblivious to the challenges of persuasive writing, but good writers—those who know how hard it is—can get stalled in the initial drafting process by spending too much time trying to get it “just right” and not enough time thinking creatively about persuasive arguments. A sense of pride in your writing is essential, but that comes later. In the initial drafting stage, value quantity over quality. Lay it all out and only later separate the wheat from the chaff. Or, as I once heard it put, embrace the sh—ty draft!

Once the unedited draft is complete, you will need to employ the Carpenter to make real the Architect’s vision. Here is where you take the random thoughts of the first
draft and put them in a logical and persuasive order. Garner notes that for many people the Carpenter stage is the “most unpleasant part” of writing because this is where “you begin writing in earnest.” Garner asserts, and we agree, that the problem stems in part from skipping the Madman and Architect stages. Skipping the brainstorming and outlining stages requires the writer to “think of ideas, sequence them, and verbalize them all at once.” Better to spend 15 minutes of every writing hour on the essential but often overlooked process of creatively thinking of ideas in an uninhibited fashion, and then imposing some order on them in outline form.

Even so, the Carpenter stage will take up at least 30 minutes of every hour of writing, or the bulk of the time it takes to write an effective brief. This is the hard stuff of legal writing—imposing order on information, putting thoughts in logical order, connecting thoughts in clear yet varied ways to keep the reader’s attention and interest. Remembering two key principles of paragraphing will help you manage the challenge of this demanding stage. These principles are profound—and never vary, no matter the paragraph—yet they can be expressed simply in two words: **Unity** and **Coherence**.

The unity principle of paragraphing holds that each paragraph can relate to one topic only. A paragraph is a collection of sentences grouped together to explain or defend a single idea. A paragraph discussing or defending two or more topics violates the unity rule. Adding a new topic distracts the reader and undermines the logical flow of

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9 *Id.*
10 The unity rule of paragraphing in legal writing is universal and longstanding. The great Henry Weihofen explained the principle succinctly in his influential *Legal Writing Style* (1961) (“Each paragraph should be not merely a series of sentences, but an orderly series, with unity of purpose. It should have one point to make, and only one.”).
an argument. Announce the topic of every paragraph in the first sentence and then stick to that topic throughout the paragraph.

Coherence is the paragraphing principle dictating how you establish flow and logical progression within and between paragraphs. You have a number of tools at your disposal to create coherence in your paragraphs. All of them are effective, yet none should be used to the exclusion of others. The best approach is to vary these techniques to keep your writing lively and fresh. The most common way to establish coherence is to use logical connectors, or transition words. You likely have seen lists of transition words and their causal connections. We will distribute such a list, drawn from Deborah Schmedemann’s book, *Synthesis: Legal Reading, Reasoning, and Writing* (2007), at the CLE. You should keep this list handy for every writing assignment. Even experienced writers can benefit from a reminder of the many effective ways to transition from one thought to the next.

Yet using transition words is only one way to establish coherence. Another effective strategy is to use “pointing words” and “echo links.” Pointing words, like *this*, *that*, *those*, refer back to something you have already said. “Echo links,” according to Brian Garner, are “words or phrases in which a previously mentioned idea reverberates.” The echo links strategy is akin to the “Given/New” technique of establishing coherence and logical progression between sentences. Using this technique, the writer artfully begins a sentence with a word(s), idea, or concept from the preceding sentence, and then adds some new information. With this technique, you can re-enforce a point while allowing the reader to digest and understand it, before moving on to a new thought. I say artfully because you risk making your sentences cumbersome and lengthy if start every
sentence with a long clause just to achieve flow. The challenge is to choose the right word—or even a concept evident but not expressed in so many words—to help the reader along and get him/her ready for the new thought.

Here are a couple of paragraphs from the United States Supreme Court’s recent decision in *United States v. Windsor*\(^{11}\) to illustrate the unity and coherence principles.

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” *Ibid.* “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906); see also *In re Burrus*, 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”).

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956), for example, the Court held that, “[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,” under the Copyright Act “requires a reference to the law of the State which created those legal relationships” because “there is no federal law of domestic relations.” *Id.* at 580, 76 S.Ct. 974. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of “the virtually exclusive primacy ... of the States in the regulation of domestic relations.” *Id.* at 714, 112 S.Ct. 2206 (Blackmun, J., concurring in judgment).

Notice how both paragraphs state clearly the topic of the paragraph in the opening sentence. Study the paragraphs to appreciate how the writer (in this case Justice Kennedy) sticks to that single topic and defends the point of each paragraph (State control of marriage/federal deference) through varied uses of authority (parenthetical quotations appended to citations, in-text quotations, and paraphrases). Justice Kennedy establishes coherence in the opening paragraph with a sophisticated use of the Given/New technique in the form of an isocolon (“The recognition of civil marriages is central to state domestic relations law . . . .”; “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations. . . .”) before adding new information—i.e., just how that authority plays out in the particulars.

The second paragraph begins with a pointing word as a paragraph transition (“this authority”) and then shifts to a related but new topic—federal deference to State domestic relations law. Here Justice Kennedy uses a traditional transition/logical connector (“for example”) and another pointing word (“this principle”). The final sentence of the paragraph includes a subtle form of the Given/New technique (“the federal courts . . . do not adjudicate issues of marital status” of the previous sentence becomes “Federal courts will not hear divorce and custody cases . . . .”) and a case quote (albeit from a concurrence) with a ringing endorsement of the topic of the paragraph.

You can see that building paragraphs is an incremental process. Keep in mind that everything is new to your reader. He/she is not inside your head and so has no idea what the next sentence/thought will be. Guide the reader carefully through your
argument with frequent (yet subtle) repetition. Your point is never as clear to your reader as it is to you, so be kind and explain each step of your logical progression.

Finally, as the quoted paragraphs and my description make clear, develop your paragraphs using the C-R-A-C format (Conclusion/Rule/Application/Conclusion). That is, start each paragraph with a persuasive statement of your position on the topic of the paragraph in the form of a Conclusion (“The trial court properly dismissed the motion for a directed verdict because . . .”). Follow this with an explanation of the relevant Rule drawn from authority. Then Apply this rule to your facts. Complete the paragraph with another Conclusion, this time phrased differently to incorporate a summation of the rule you have just applied. The C-R-A-C format is taught in legal writing programs across the country, but it is not just for law students! It works every time and is an essential element of effective brief writing.


Lawyers receive more criticism for writing too much than too little, but many lawyers write less than they should in the conclusion to a brief. A one-sentence, “For all the foregoing reasons . . .” conclusion has zero persuasion value. You should consider the conclusion as more than just a pro forma appendage to a brief. See it as your final opportunity to persuade the court. Keep it short, but give it meaning and impact. Here, for example, is the conclusion to an amicus brief filed by Outserve, an advocacy group supporting LGBT servicemembers, in the recent Tenth Circuit marriage equality case:

The military values the service of gay and lesbian service members, and is actively working to recruit and retain them. But so long as married gay and lesbian couples confront the prospect of being moved to a state that will refuse to recognize their marriages, a powerful disincentive to recruitment and retention will remain. The lack of marriage recognition is a strain on these military families, and an unnecessary distraction for
service members who all too often find themselves in harm's way while trying to protect this country. Ending this discrimination by requiring states to recognize the right of same-sex couples to marry would protect these families, and best serve the needs of the modern military.

A conclusion like this is worth reading, and can linger in the court’s mind as it deliberates (just remember to add the prayer for relief at the end).


We spoke of the Carpenter stage as the most “unpleasant” stage of writing. If you take this stage seriously, and draft (or redraft) a brief with coherent arguments arranged in a logical order, then the next and final stage of writing can actually be fun. Reserve the final 15 minutes of every hour of writing for line editing. Once you become familiar with key principles of line editing, it will be fun to apply them to your draft. You will see your draft turn from acceptable to effective and even eloquent. For all the struggle that good legal writing is, in the line-editing stage you come to the gratifying feeling that your brief is pretty good, and you are making it better with each edit.

The list of effective line-editing rules is long, and our time is short, so I will highlight just a few of the most important ones. First, write short sentences. Lawyers can be forgiven for writing long sentences because the law is complex, and even simple issues have provisos and conditions. Yet the longer your sentences, the greater the chance that your reader will get lost. Short sentences have impact. In my 23 years teaching legal writing, I have noted with interest that the recommended sentence length has shortened considerably. When I started, the standard advice was to limit sentence length to 20-25 words. Today, most commentators suggest sentences no longer than 15-
I enjoy challenging myself to make sentences that seem short even shorter. Eliminate surplus words; distill the sentence so that your point is clear to see. If you really want to have some fun line editing, take Ross Guberman’s challenge. He recommends the occasional super-short sentence. He proposes a goal that is “fun to strive for: on every page of your brief, include at least one sentence that starts and stops on the same line of text.” As an example, he uses this sentence couplet:

“Substituting one decision maker for another may yield a different result, but not in any sense a more ‘correct’ one. The aforementioned principle is applicable to the present issue in the instant case before this Court.”

Then he offers Chief Justice John Robert’s version in *Alaska v. EPA*:

“Substituting one decision maker for another may yield a different result, but not in any sense a more ‘correct’ one. So too here.”

Next tip: **Put the subject and verb at or near the start of the sentence.** Tell the reader right at the start what the action is and who is doing the acting. Starting sentences with a long clause risks confusion because the reader does not know the meaning or context of the clause until you provide the subject and verb. Better to let the reader know at the start of the sentence, and then add supplementary material at the end. Many legal writing experts consider starting with the subject and verb the single most important tool to improve your writing. Of course, experts also point out that writers should vary their form so that some sentences start with short, introductory clauses. A writer might also start certain sentences with long clauses to build tension. But in the default mode, the essential and basic strategy is start a sentence with the subject and verb.

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13 Ross Guberman, *Point Made: How to Write Like the Nation’s Top Advocates* 177 (2011).
Here is Judge Cardozo’s famous fact statement from Palsgraf. It is proof positive that starting sentences with the subject and verb creates clear and even eloquent legal writing.

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

A perfect paragraph! Use it as your polestar for every paragraph you write.

I have time for only one more principle: Avoid Nominalizations. A nominalization is a base verb that has been turned into a noun. The most important word in any legal writing sentence is the verb, yet using nominalizations, and thereby obliterating a good verb, is a common practice in legal writing. Here is a typical example, drawn from Richard Wydick’s, book Plain English for Lawyers 25 (5th ed. 2005): “Fulfillment of the duty of good faith by the insurance company has as one of its requirements an obligation to provide a coherent response to a facially valid claim.” This sentence is poorly written because the lively verb “requires” is buried in the bulky nominalization “requirements.” It also has too many surplus words, a common and unfortunate by-product of nominalizations.15 Rewritten as, “The duty of good faith

15 See Richard C. Wydick, Plain English for Lawyers 23 (5th ed. 2005) (“If you use nominalizations instead of base verbs, surplus words begin to swarm like gnats.”).
requires an insurance company to respond coherently to a facially valid claim.”\textsuperscript{16}, the sentence springs to life and is easier to understand. When you use vivid verbs instead of nominalizations your sentences will be clearer and more lively.

How do you know you are using nominalizations? Wydick says you can spot nominalizations by looking for these common word endings: -al; -ence; -ance; -ity; -ment; -ion; -ency; -ant; -ent; -ance. When you edit your draft, circle these word endings. See if you can spot the vivid verb hiding in the cumbersome nominalization. Once you do, with a little effort the sentence will magically transform into a tighter, more readable, and therefore more persuasive one.

CONCLUSION

We would be remiss if we concluded without mentioning the final actor in our writing metaphor—the Judge. After all the hard work it takes to get to a polished draft, the final step is to eliminate all but the most persuasive arguments. The real judge should not have to decide which of your arguments are critical to your claim and which are not. It is hard to cleave off paragraphs and even whole arguments that took so long to compose. But lose any claims of ownership over arguments and be merciless in your cutting. Because this is Vermont, we will close with an apt simile to make this point. Effective legal writing is like making good maple syrup. You start with a huge vat of sap and then you boil it down, down, down, until you have sweet nectar. The volume of the finished product is just a small fraction of what you started with. Think of this as you edit down, down, down. What will emerge are your most persuasive points, tasting as sweet as the finest Vermont maple syrup.

\textsuperscript{16} Id. at 114.