THE ARCHITECTURE OF ARGUMENT: SEVEN EASY STEPS TO EFFECTIVE ORGANIZATION

I once had the following exchange with a gracious judge who allowed me to review his work in a tutorial session.

"I had trouble figuring out what's going on in this case until I got to page 15," I said. "This is where you get around to mentioning the issues."

"Yes, professor, I can see that."

"And now that I know what the issues are, it seems to me that probably twelve of the first fifteen pages could be omitted, since they have nothing to do with any of this issues."

"Yes, professor, I agree."

"Just out of curiosity, why did you wait until page 15 to enunciate the issues?"

"Well professor, to tell the truth, I didn't know what the issues were myself until I got to page 15."

It was an instructive admission. Writing is often a means of discovering what we think. It is not unusual for judges and lawyers to discover the case as they write it.

They make a mistake, however, when they require their readers to wander through the same process of discovery—to follow them down blind alleys, wrong turns, false starts, and irrelevant facts until the issues finally pop up like mushrooms after rain.

I. THE UNIVERSAL LOGIC OF THE LAW

Every legal argument can be distilled to the same simple structure, a variation of the classic categorical syllogism:

> These facts (*narrate facts*) . . .
> viewed in the context of this law/contract/regulation/
> precedent/section of the Constitution/principal of equity (*choose one*) . . .
> **lead to this conclusion (*relief sought*).**

The logic never varies. At trial the judge's job is to discover this pattern of thought in the morass of facts, distortions, outright lies, genuine issues, and spurious arguments that the contending parties allege. And the attorney's job is to assist the judge in reducing the facts and evidence to this pattern.

In jurisprudence, only three arguments can occur: one about facts, the other two about the law:

1. The litigants may contest factual allegations.
2. Or they may claim that the other side has cited the wrong law.
3. Or they may concede that the other side has cited the right law, but misinterpreted it.

Every case boils down to some combination of these three basic disputes. There are no others. Even when some procedural issue is argued (venue, for example, or timeliness), the argument will always be the same. One side will allege certain facts in the context of a controlling law, or principle, or standard, and the other side will either dispute the facts, or argue that the wrong law has been cited, or that the right law been misinterpreted.

When several issues are involved, each must be resolved with the same logic: certain facts considered in the context of a particular law, lead to an ineluctable conclusion.

The logic of jurisprudence is the same in trial courts and courts of appeal. The only difference is that at trial, litigants are likely to argue about both facts and law, whereas in courts of appeal arguments tend to focus on the law—the appellant arguing that the court below has applied the wrong law or misinterpreted the right one. Appellate courts are not equipped to examine the quality or quantity of the evidence itself. They cannot call in witnesses or examine exhibits or indulge litigants in the lengthy, unpredictable, and often disorderly proceedings that are characteristic of a trial. Courts of appeal may hear arguments about the admissibility or sufficiency of certain evidence, but except in rare circumstances they will not second-guess trial courts on the inferences drawn from whatever evidence they deem admissible.

Because the pattern of legal logic is always the same, the structure of an effective pleading at any level is identical to the structure of a judgment. These genres have different audiences, but the same purpose: to persuade. There is one important difference. A judgment has the advantage of authority. A judge can issue an order instead of merely asking for one.

II. A UNIVERSAL OUTLINE FOR JUDGMENTS, BRIEFS, MOTIONS, AND OTHER SUBMISSIONS

If the logic of the law is so simple and repetitive, why do judges and lawyers have so much trouble organizing what they write?

Because despite the *appearance* of logic, litigation is always messy and uncertain. It relies on "facts" inferred from observations that cannot be replicated, reported by witnesses who may or may not be telling the truth or by experts who are generally contradicted by opposing experts. Inferences made from events described by witnesses are never as reliable as scientific inferences, which are made from replicable observations. Even expert evidence that claims to be "scientific" can be contested by other data or other interpretations of the same data.

Nor do the issues arise from the facts, with a logical inevitability. Good lawyers can find many issues in any set of allegations, some more likely than others to benefit their client's position. Unanticipated issues and surprising facts may arise during the trial, and sometimes on appeal. Even when opposing lawyers agree on the issues, they can frame them differently to gain an advantage.

In addition, the logic of the law often melts like a pocket watch in a surreal painting. Analogies, which are the basis of common law (the claim that the case at bar is essentially like a precedent), always limp. Precedents are*always* distinguishable.

Furthermore, the language of the law is rotten with ambiguity. Despite the best efforts of legal drafters, a motivated reader can find more than one meaning in any text. A word like "murder" may seem plain enough—until we have to decide how it applies in cases of abortion or assisted suicide. A term like "marriage" may seem plain enough—until we have to decide when cohabitation becomes marriage, or whether one member of a same-sex union can claim spousal benefits on the other's insurance policy. Absolutely no word in the law is immune from the ambiguity it might contract, like a contagious disease, in the context of a novel set of facts. What seems like "plain meaning" when a legal text is drafted disappears in a swirl of indeterminacy when the text is applied to facts the drafters did not anticipate.

Despite these problems, the credibility of common law depends upon the ability of lawyers and judges to control the chaos by conveying their reasoning in a form that reflects the universal logic of jurisprudence. Instead of instead of controlling the chaos, however, they often reproduce it, failing to provide their readers with the issues that form a context in which individual facts have meaning, rambling through facts and allegations without distinguishing the credible from the implausible, switching from one party's version to the other's as if they were court reporters, reproducing the testimony instead of analyzing it. Their arguments meander, just as their own thoughts must have meandered. They produce a stream of consciousness instead of an orderly sequence, a diary of dawning awareness instead of an engine of logic in which a result emerges from an application of law to fact. They forget that the goal of jurisprudence is to pluck the essential issues, the relevant facts, and controlling laws from the maelstrom of arguments, allegations, precedents, principles, and pretensions that rage about during a trial. It is not an easy task. But it would be easier if advocates would remember the simple logical structure that must underlie the resolution of every issue in every case.

Many jurisdictions publish rules to assist lawyers in organizing their submissions. These rules generally make excellent sense. "First, tell us what the issues are," they seem to say, reflecting an awareness that facts have no significance until they are placed in the context of an issue. "Then tell us what the case is about"— reflecting the frustration of judges who have to read dozens of pages before discovering the basic fact situation from which the case arises. And finally, "Organize the rest of the judgment in a logical and predictable order"—a plea from readers who are continually surprised by what pops up next in an argument.

Paradoxically, judges and lawyers sometimes forget that as readers they want precisely what their readers want from them. Rules for pleading or for appellate procedure generally work just as well on either side of the bench, and at every level, all the way up to Supreme Court.

III. A SEVEN-STEP RECIPE FOR ORGANIZATION

Here is a recipe for organizing a pleading or a judgment in even in the most complex case.

1. Identify and partition the issues.
2. Prepare an OPP/FLOPP analysis for each issue.
3. Arrange the analysis of issues like rooms in a shotgun house.
4. Prepare an outline with case-specific headings.
5. Write a beginning.
6. Write an ending.
7. Review your draft with a checklist and a friend.

1. IDENTIFY AND PARTITION THE ISSUES. Plan the body of the pleading or the judgment *before* settling on an introduction.

Use a stack of note cards, or half sheets of paper, or the equivalent space on a computer screen. On each card write the word ISSUE, followed by a *brief* statement of any question the court must decide. If the issues change as the case proceeds, prepare separate cards for the new ones and discard those that become irrelevant.

Determining the issues early is essential to efficiency in the writing process and economy in the result. You cannot distinguish relevant facts and arguments from pointless digressions until you have determined precisely what questions the court is being asked to settle.

Partitioning the issues is essential to the structure of your argument. Unless each issue is clearly separated from the others, your argument will seem like a vast swamp, shapeless, devoid of direction. Dividing your argument into discrete issues enables you to focus you analysis on each one individually. It also enables your reader to move from one issue to the next with a sense of orderly progression.

2. PREPARE AN OPP/FLOPP ANALYSIS FOR EACH ISSUE. The easiest way to organize the analysis of each issue is to follow this pattern:

OPP (Opposing Party's Position)
FLOPP (Flaw in Opposing Party's Position
CONCLUSION

(If you are a judge, change "OPP" to "LOPP," or "Losing Party's Position.")

OPP: Respondent contends that he had not been informed of the penalty clause in the contract.
FLOPP: The evidence shows that both the respondent and his attorney received the contract thirty days before signing it.
CONCLUSION: Therefore respondent's contention that he was unaware of the penalty clause has no merit.

The first sentence in this pattern would be followed by supporting details, perhaps by quoting the respondent's contention verbatim; the second sentence would be followed by citing evidence indicating that respondent had received the contract in plenty enough time to examine it.

When the conclusion is obvious, it may be effective to leave it unstated and allow your readers to complete the syllogism on their own. Judges, of course, have to make their conclusions explicit in the form of findings or orders, usually at the end of the ruling as a whole. Sometimes it is effective to refer to an unstated conclusion as if it were so obvious that it can be safely tucked away in a subordinate clause (e.g., "Because respondent had ample time to examine the contract before signing it . . ."). Understatement of this sort can be more powerful than rhetorical excess. It implies that any reasonable reader would agree with you.

Be careful about using highly charged language to characterize the opposing party's position. Charged language is a rhetorical weapon that often backfires. It pleases readers who agree with you in advance, but it alienates impartial readers and infuriates the opposition and anyone who may be sympathetic to the opposition's point of view. Charged language is often a sign that an argument is based on passion rather than law. Normally, judges try to rise above emotion. They want you to give them reasons, not feelings nor even ideals, that will survive scrutiny on appeal. If you are a judge, you should be able to express the losing party's position as effectively as you can—as if you were representing that party yourself—and then identify the flaw in that position with surgical detachment. If you cannot find the flaw in your best statement of the losing party's position, you may need to reconsider your conclusion.

The OPP/FLOPP pattern can be effective even when the writer is the moving party and the opposing party has not yet expressed a position. The OPP in this situation is whatever the opposing party has done or said (or failed to

do or say) that motivates you to file this particular motion or application. The FLOPP explains why opponent's words or actions are factually inaccurate or incompatible some law or legal principle.

One exception to the LOPP/FLOPP patter occurs when the controlling law is not so much a law as a principle of equity or a matter of judicial discretion. In determining custody, for example, or visitation rights, family court judges can help calm raging emotions by downplaying the notion of a "losing" party. An adverse ruling in family court is never easy to accept; but disappointed parents will find it easier to respect a decision that focuses on the child's best interest rather than on a finding that either party has been found a less competent parent. Even when the decision is actually based on the unsuitability of one parent, it does no harm to acknowledge whatever parental strengths the judge can attribute to that parent, even if, for the record, it also mentions the weaknesses that are critical to the decision.

Bankruptcy cases and contract disputes—where assets have to be divided equitably in the absence of clear language or mathematical formulae—are often best resolved by downplaying the notion of a winner and a loser. In cases like these, judges sometimes have little to rely on other than a subjective sense of fair play. Whenever possible, the tone of the judgment can ease the disappointment of the litigants, even though both parties are likely to be dissatisfied with the result.

Another exception to the LOPP/FLOPP pattern occurs when judges are finding facts. It generally makes sense to begin with the position of the party with the burden of proof, whether that party loses or wins.

> Plaintiff argues that the value of the condominium at the time of the divorce was $150,000.
> Respondent, however, presented evidence that the value was roughly half that amount.
> After carefully weighing the evidence presented by each side, I find that . . . because . . . .

Again, in an actual judgment each of the first two sentences would be followed by a summary of the evidence presented, and the third sentence would be followed by an indication of why the judge found one party's evidence more persuasive than the other's.

This is tricky business. Many trial judges believe, with good reason, that by expressing reasons for findings based on credibility of experts or other witnesses, they invite the court of appeal to second guess them and to reach different conclusions. On the other hand, failure to give reasons can tempt the court of appeal to remand on grounds that the findings were not supported by sufficient evidence. Balance is the key. Support your findings with sufficient reasons to show that they are not arbitrary and capricious, but do not provide so much detail that your readers will be tempted to draw inferences of their own. You, after all, were present to observe nuances in the testimony that will not be available to the Court of Appeal.

In general, though, litigants benefit from a judgment that is as definitive as an umpire's call at home plate or a line judge's verdict in a tennis match. Even if we know they are occasionally wrong, we do not want referees to have doubts. We want them to be decisive so we can get on with the game—or with our lives. Perhaps more importantly, the OPP/FLOPP pattern helps judges and lawyers think clearly about the application of fact to law. It helps lawyers determine whether they have a case or not, and whether they should advise their clients to settle rather than enter into litigation they are likely to lose. It also keeps judges honest, protecting them from their own biases. Nothing is more frustrating to the bar and to the public than a high profile decision that is not supported by a clear and logical application of law to facts. And nothing can be more damaging to public trust in the integrity of the judiciary.

3. ARRANGE THE ANALYSIS OF ISSUES LIKE ROOMS IN A SHOTGUN HOUSE. The most frequent cause of obscurity in jurisprudence on both sides of the bench is not technical language or complex issues or arcane subjects. It is haphazard organization compounded by facts and allegations that have no bearing on any of the issues.

The easiest way to organize a judgment or a pleading is to imitate the structure of what in some parts of the United States is called a shotgun house—a house in which each room follows the other in a straight line: front porch, back porch, and a series of perfectly parallel rooms between (see figure below).

The front porch is the introduction, the back porch the conclusion. Each room between contains the analysis of a particular issue. This pattern can be effective whether there is one issue or fifty.

Once you have determined the issues, arrange them in a sequence that makes sense. If you have written each issue on a separate card, you can spread the cards across a table and select the sequence that works best.

Sometimes there will be threshold issues (standing, for example); normally these are dealt with first. Sometimes issues can be grouped in categories (e.g., three dealing with the admissibility of evidence, two dealing with jury instructions, five dealing with sentencing). Sometimes the issues can be arranged in a logical chain, each issue dependent on the other for its viability. Sometimes each issue is completely independent of the others. In this situation, consider

arranging the issues chronologically, if the material allows it. Or consider arranging them for their rhetorical effect, perhaps beginning with those for which you have your best analysis, with the alternative arguments trailing behind.

The analysis of each issue should be self-contained, like a stanza in a poem or a room in a shotgun house (*stanza* actually means "room"). You should have as many rooms as you have issues.

In some cases, another section needs to be added to the structure: the rhetorical equivalent of a foyer, an antechamber just after the introduction and just before the analysis of the first issue. This section is necessary in cases that cannot be understood without a detailed narration of facts.

Although a "foyer" for an extended facts, background, or procedural history may be necessary at times, more often than not it can be avoided by writing a beginning that provides an essential overview (see step 5, below) and mentioning necessary details in the analysis of the issue to which they are most relevant. Narrating the detailed facts twice—in the beginning and in the analysis of the issues—creates unnecessary work for your readers.

4. PREPARE AN OUTLINE WITH GENERIC AND CASE-SPECIFIC HEADINGS. If a pleading or judgment is very short—two or three pages—it may need no headings. In longer texts, headings are essential.

At the beginning of a document, in the table of contents, headings provide a roadmap, foreshadowing the journey you want your reader to take. Within the document, headings serve as signposts marking the boundaries between various stages of the journey. They show where each argument ends and another begins. To serve these functions effectively, headings must be as brief as possible. They should not be entire arguments (though it is often effective to put a brief summary of an argument immediately *after* a heading).

There are two kinds of headings: generic and case specific. Words and phrases like "Introduction," "Background," "Order," "Relief Sought," "Cases Cited," "Issues," "Findings of Fact" are generic headings. Generic headings can be transferred from case to case, regardless of the facts and issues. They can be very useful. Sometimes they are required.

In addition to generic headings, however, are case-specific headings, like "Was the Warrant Valid," or "What is the meaning of 'obscenity' in Section 905?" Case-specific headings are extremely useful when they mark boundaries between the analysis of separate issues.

There are three ways to phrase a case-specific heading. You can phrase it as an argument:

The University of Montevallo is not an Agency of the State.

You can phrase it as a question:

Is the University of Montevallo an Agency of the State?

Or you can phrase it as a topic:

State Agency.

Some lawyers prefer argumentative headings, never wanting to pass up an opportunity to press their point of view. Others think topics or questions are more effective as headings because they convey a sense of detached objectivity, which is in itself a persuasive stratagem. It's a matter of personal preference, based upon the authorial persona you want to create and on the way you think a particular reader or set readers is likely to react.

Even though you should write every pleading and judgment *as if* you expected your readers to follow it from beginning to end, chances are they won't. Effective headings will aid those readers who raid your text like marauding pirates, looking for what interests them and ignoring the rest. The safest policy is to let them know where they can find whatever they are looking for—those issues in which they are most interested in your argument.

No matter how you phrase them, however, they should be clearly foreshadowed by the end of the introductory section (see step 5 below).

5. WRITE A BEGINNING. It may seem odd to suggest writing an introduction at this stage, after you have already developed the heart of your argument. But you are not in a position to write an introduction until you know what you are going to introduce. Sometimes you have no idea what the issues are, or how many, or how they should be resolved, until you have drafted an OPP/FLOPP analysis for each issue.

Avoid beginning with technical, dry, or uncontested assertions. Imagine, for example, the reaction of a weary judge with a busy schedule and other things to do when she or he reads an opening paragraph like this:

1 **Pursuant to this Court's Rule 25.5, appellees City of New York, et al., respectfully submit this Supplemental Brief responding to an argument made by the Solicitor General for the first time in his Reply Brief on the merits. Appellants have claimed that appellees' invocation of jurisdiction under 28 U.S.C. § 1331 in the district court failed because that statute "does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity." Reply Brief for the Appellants ("Reply Br.") at 3 n. 1. Appellants failed to raise these arguments below, in their Jurisdictional Statement to his Court, or in their opening brief on the merits.**

If you are a typical reader, you probably did not read this example in its entirety. You skipped over it as soon as you eyes glazed over. Yet some lawyers are convinced that they are bound by tradition, rules, or logic to begin their pleadings in this way. A judge is likely to react to a beginning like this in very much the same way you reacted to it when you read it—or failed to read it.

Similarly, judges should try to imagine the reaction of their readers when they encounter opening lines like these:

> **<u>DECLARATORY JUDGMENT (Article 453 C.P.C.)</u>**
>
> **This Court, having examined the proceedings and the exhibits, considered the arguments of counsel, and duly deliberated, doth now render the following Declaratory judgment:**

This self-congratulatory gambit serves no purpose. It is a sort of judicial throat clearing. It enables the judge to put *something* on paper before getting around to the case at hand. Why not just get around to it? Skip the throat clearing.

A perfect introduction provides two things: a synopsis of the facts and a brief statement of the issues. Imagine how you would begin if you were telling a neighbor about the case. Start with the issue, if the issue has far-reaching implications. Otherwise, start with a thumbnail sketch of the facts, a *brief* story indicating of the human conflict, "who did what to whom," followed immediately by a concise statement of the questions (the issues) that the court needs to decide.

This combination of facts and issues in a nutshell provides the context your arguments will make sense and be worth reading. In addition, by delineating the issues in a few lines, you can foreshadow the structure of the argument to follow. Here is an example:

> **Harry Saunders was convicted of assault, battery, rape, and murder, each in the first degree. According to the evidence, Saunders wore gloves and a mask when he committed these crimes, concealing his identity from his victim and from witnesses on the scene.**
>
> **In this appeal, Saunders argues that the lineup in which he was identified was suggestive, that articles of clothing used in his identification were illegally seized from his apartment, and that he had no access to counsel at key points during the investigation.**

This beginning is exceptional not only for what it does, but perhaps more importantly for what it does *not* do. It does not establish standing or jurisdiction with the ubiquitous phrase, "Pursuant to Rule 123 appellant asks. . . ." It has no legal jargon or long, tangled sentences. In fact, there is nothing in this opening that would seem odd or technical in a good newspaper. And *that*, despite whatever misgivings you might have about the media, is an excellent standard for legal writing.

The writer (a judge in Idaho) also avoided citing specific sections of the code and specific references to precedent. He did not feel obliged to tell us that assault, battery, rape, and murder are illegal activities (e.g., "contrary to sections w, x, y, and z of the Criminal Code"). Nor did he feel obliged, at this stage, to tell use what statutes, precedents, or standards the appellant had invoked in support of his claims. This may be essential information at some point—the precedents will have to be cited and distinguished, the statutes and standards may have to be quoted if there is any dispute about their meaning or the application to this particular set of facts. But details of this sort should be saved for the sections in which issues are analyzed. No need cluttering the opening paragraph with more information than the reader needs at this point.

This beginning provides the necessary context for understanding the analysis that follows. You can even predict the headings: "Lineup Identification"; "Search and Seizure"; "Access to Counsel." And in predicting the headings, you are predicting the structure of the rest of the document. You are, in effect, promised an easy and interesting read. Although lawyers are not obliged to make their writing interesting, doing so does have the effect of helping the reader pay attention to the argument.

In this case, the writer felt the need to interpolate a detailed narration (foyer) between the opening paragraphs (the front porch) and the analysis of first issue (the first in a series of rooms). He did this by telling the story of the lineup in which Mr. Saunders was identified, beginning with "There were three lineups. The first occurred. . . . The second occurred. . . . The third occurred. . . ."

In most cases, however, a simple story-plus-issue is the best way to gain the reader's interest and attention. But the temptation to write abstractly is hard to resist. Here is the opening paragraph in a case about unlawful detention:

> **[1] This is an application supported by an affidavit in which the applicant is seeking to be admitted to bail pending her trial. The affidavit discloses that the applicant who has been in custody since October, 1985 was on 3rd December, 1985 committed to the High Court for trial for the offence of Infanticide. On 18th December, 1985 she applied to the High Court at Kitwe to be admitted to bail pending her trial.**

This is an adequate beginning, but it reads like an abstract problem in the law instead of what it really is, a case about a young woman who has been improperly held in jail without bail. Starting with the story would have given the case the sense of urgency and human significance it deserved:

> **[1] Rosemary Chilufya has been in jail for nearly five months, awaiting trial on a charge of infanticide. The High Court has refused to set bail, on the ground that infanticide is a form of murder, and murder is not a bailable offense. A threshold issue in this case, however, is whether the Supreme Court has the authority to . . .**

Stating the issues effectively requires steering a course midway between too much detail and too little. The example below provides too much detail—too much because it overwhelms the reader and predicts what follows in bewildering specificity:

> **1. The issues in this appeal in respect of the Appellant's 1994 taxation year are:**
>
> a) Whether the Appellant, in determining LCT liability under Part I.3 of the Act, is entitled to deduct the amounts of the Estimates from its "capital", or whether such amounts are to be included in its "capital":
>
> i) as "reserves" pursuant to ss. 181(1) and 181.2(3)(b), or
>
> ii) as "other surpluses" pursuant to s. 181.2(3)(a);
>
> b) Alternatively, if the Estimates are "reserves" or "other surpluses", whether the Appellant, in computing its income under Part I of the Act, is entitled to deduct the amounts of the Estimates from its revenue;
>
> c) Whether the Appellant, in determining LCT liability under Part I.3 of the Act, is entitled to deduct the $37,481,776 amount" as a "deferred tax debit balance" within the meaning of s.181.2(3)(h).

The other extreme is to provide too little detail::

> **The issue is whether the appellant is entitled to deductions he claimed on his tax returns for 1994.**

This version does not predict the structure of what follows, nor does it give the reader a glimpse of the grounds on which each side bases its argument.

It is also possible to provide too much and too little at the same time—too much by including information the reader does not need at the outset; too little by not explaining what is at stake and by presuming a reader who knows the code by heart:

> **The issue is whether the appellant is entitled to deductions pursuant to ss. 181(1), 181.2(3)(a), 181.2(3)(b), and 181.2(3)(h) of Part I.3 of the Income Tax Act.**

A good statement of issues foreshadows the structure of what follows, provides the reader with a glimpse of the grounds of the argument. It does not cite laws, precedents, or records that can be more usefully cited in the analysis section. In this particular case, after a brief description of what the appellant claimed in his tax returns, the issues might might have been effectively stated like this:

> **The issues are:**
>
> - **Whether the Appellant is entitled to deduct the amounts of the estimates from its "capital."**
> - **Whether the Appellant is entitled to deduct the amounts of the Estimates from its revenue**
> - **Whether the Appellant is entitled to deduct the $37,481,776 as a "deferred tax debit balance."**

Some pleadings (for example, an appellant's opening brief filed in a United States Court of Appeals) are required by rule to begin with a statement of jurisdiction, even if jurisdiction is not contested. If you are writing such a pleading, minimize the distraction by making it seem like the boiler plate it is. Give it a heading ("Jurisdiction") and a single sentence citing the applicable rule. If possible, set it off in a box in a corner of the page—a ritual recognition that you would not be in court if you had no right to be there.

Then use another heading ("Background," or "Introduction" "Summary of the Case") to direct your reader's attention to your brief narrative and statement of the issues. If jurisdiction is actually contested, list it as your first issue, but save your argument for the analysis section. Avoid getting bogged down in a jurisdiction issue before telling your version of the essential facts. A strategic narrative of the facts may dispose your reader to rule in your favor on jurisdiction when there ruling could reasonably go in either direction.

When jurisdiction and standing are uncontested, starting with "Pursuant to" to answer a non-argument is like putting a hotdog stand on prime real estate. The first paragraph and the last are possibly the only places where you can count on the reader's attention. Why waste this space by filling it with information the reader can be presumed to know?

A good beginning makes the reader *want* to read more. A notable example is this introduction in a *per curiam* by the Ontario Court of Appeals:

> **[1] Professor Starson is an exceptionally intelligent man. His field of expertise is physics. Although he has no formal qualifications in that field, he is in regular contact with some of the leading physicists in the world. In 1991 he co-authored an article entitled "Discrete Anti-Gravity" with Professor H. Pierre Noyes, who teaches physics at Stanford University and is the Director of the Stanford Linear Accelerator Center. Professor Noyes has described Professor Starson's thinking in the field of physics as being ten years ahead of its time.**
>
> **[2] Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. He has been diagnosed as suffering from a bipolar affective disorder. On several occasions during the last 15 years he has spent time in mental institutions. In November 1998 Professor Starson was found not criminally responsible on account of mental disorder on two counts of uttering death threats. In January 1999 the Ontario Review Board ordered that he be detained at the Centre of Addiction and Mental Health (the Centre).**

Notice that this passage does not call attention to itself *as writing*. The words are transparent, invisible, like lenses through which we see characters and events. The writer doesn't seem to be *trying* to write. The art conceals the artifice. It's *as if* the story wrote itself. But of course it did not. A story is almost always an argument—all the more effective because it does not *seem* like an argument.

In this case, the plot thickens when we find out that the unusual Professor Starson "has a history of mental illness." And it thickens further when we discover a few sentences later that he does not want the medication the Ontario Review Board wants to give him, because it would cloud his mind and hinder his ability to conduct his theoretical research.

A beginning like this entices the reader to continue reading. Who would not be curious to know how the case was resolved?

6. WRITE AN ENDING. If you are a lawyer, do not pass up an opportunity to recapitulate the essence of your argument at the end. Briefly summarize what you want the court to decide, what remedy you want the court to grant and what grounds the court has for granting it. Write you conclusion as if you suspected that a busy judge might read your ending before reading anything else, hoping to find there your argument in a nutshell.

If you are a judge, your concluding section may include only an order. However, if you think the court above yours, or the press, or the losing party might miss the essence of your analysis, use your conclusion as a summation. Repeat your analysis, but in different words, and succinctly. Brevity is essential. A conclusion that exceeds one page is likely to seem like a new argument instead of a conclusion.

The concluding section also provides an opportunity for *obiter dicta*—instructions to the bar on related matters that are not logically essential to the case you are deciding. And when your decision is based on common sense our pure equity, the concluding section can include what I like to call the "To-rule-otherwise" trope. Judges rely on this device when they have little or no law to justify their decisions. "To rule otherwise would be to invite . . ." they say, and then list the horrible, unjust, and illogical things that would follow from a different decision.

The concluding section of a brief or motion provides a similar opportunity for lawyers when justice, equity, or common sense is on their side, but the law is not particularly helpful. Pointing out unjust consequences can be persuasive when the law is a feeble ally.

In a very short pleading, where repeating the reasons would be tedious, a conclusion that specifies the relief sought without repeating the reasons may be adequate:

> **CONCLUSION**
>
> **For the reasons above, plaintiff's Motion to Remand is due to be granted. Plaintiff asks this Court to issue an order remanding this action to the Circuit Court for Barbour County, Alabama, Clayton Division. In addition, plaintiff requests that this Court order defendants to pay all just costs and expenses, including attorney's fees, incurred as a result of the improper and groundless removal of this case.**

It would take only minor editing to make this conclusion appropriate for a judgment:

> **For the reasons above, plaintiff's Motion to Remand is granted. This action is remanded to the Circuit Court for Barbour County, Alabama, Clayton Division. In addition, defendants will pay all just costs and expenses, including attorney's fees, incurred as a result of the improper and groundless removal of this case.**

In a pleading of any complexity, however, an ending of this sort misses an opportunity to revisit the argument. A *brief* review of the argument, like the one below, can assist the reader.

CONCLUSION

> **Defendant, Tarwater Tobacco Co., has succeeded in having this case removed from state to federal court on ground that Tarwater's local agents were named as co-defendants by plaintiff as a ruse ("fraudulent joinder") to obtain a favorable local venue.**
>
> **The standards for removal on the basis fraudulent of joinder are quite high. In this case, Tarwater would have had to prove either that there is no possibility of a verdict against the local defendants, or that the complaint against them was based on false information.**
>
> **Tarwater has met neither standard. There is no evidence of fraudulent information in the joinder. Nor is there any question that a jury would find against Tarwater's local agents if the facts alleged are proved at trial.**
>
> **For these reasons, we respectfully request the court to remand the case to the Circuit Court for Barbour County, Alabama, Clayton Division, from which it was removed.**
>
> We also request the court to order that costs and attorney's fees be assigned to Tarwater. Their failure to provide credible evidence for their claim amounts to a frivolous delaying tactic, taxing the plaintiff with unnecessary costs and taxing the resources of this court.

It may seem paradoxical that a good ending resembles a good beginning (which, in turn, often resembles a good head note). The resemblance is not accidental. Judges and lawyers are busy people. They do not necessarily read from top to bottom. If they get lost in an argument, they may flip to the end, hoping to find a synopsis there. They will not be helped by a conclusion that says merely "For the foregoing reasons . . . ," sending them right back to the thicket they had just abandoned. An effective conclusion summarizes those foregoing reasons in a nutshell, in plain English, without repeating citations and references that are already included in the body. Here is how the Ontario court concluded the case about Professor Starson:

> **[14] Putting aside any paternalistic instincts – and we think that neither the Board nor the appellants have done so – we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore it is a decision that the statute and s. 7 of the *Canadian Charter of Rights and Freedoms* permit him to make.**
>
> **[15] The appeal is dismissed.**

Enough said.

7. REVIEW YOUR DRAFT WITH A CHECKLIST AND A FRIEND. Persuade a friend, preferably a non-lawyer with no knowledge of the case, to help you review your draft with the following checklist:

- Ask your friend to tell you, after reading only the first page, who did what to whom and what issues need to be settled.
- Test the overall structure by asking your friend, after reading only the introduction, to guess what headings will follow. If there is a good match between the introduction and the structure that follows, your friend should be able to guess, in substance, the case-specific headings that separate the analysis of each issue from the others.
- Ask your friend to tell you, after reading the last full page, what you decided (or what you want the court to decide) and what grounds you give for the decision.
- Ask you friend to locate the beginning and the end of the analysis of each issue and to tell you the losing (or opposing) party's argument and the flaw you found in it.
- Check for economy and consistency. If you announced five issues at the outset, be sure that you have analyzed five issues. Delete any information that is irrelevant to the issues. Look for repeated information; see if it can be mentioned in one place and omitted in the other.

If your friend doesn't answer any of these questions to your satisfaction, don't explain. Revise.

A well-written pleading or judgment is as smooth as a grape. There is nothing extra. Once you reduce it to essentials and organize it coherently, you are ready to read it again, this time in search of the stylistic problems discussed in the following chapter.

IV. RECOMMENDED READING

Garner, Bryan A. The Winning Brief : 100 Tips for Persuasive Briefing in Trial and Appellate Court. New York: Oxford UP, 1999.
Stark, Steven D. *Writing to Win*. New York: Doubleday, 1995.