

DRI Writer's Corner:

By Don Willenburg

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# Making The Most Of Your Table Of Contents, Introduction And Conclusion

This article is not about key issues like proper grammar, or avoiding the legal logorrhea of excessive wordiness, or active vs. passive voice, or the order of your arguments, or alternatives to common phrases and locutions in legal writing that get in the way more than they guide the reader to the correct result. Those are all important parts of legal writing, and they are covered in many seminars and articles.

This article will instead focus on some aspects of legal writing that are under-covered:

- Table of Contents
- Introduction
- Conclusion

The Rodney Dangerfields of legal writing. They don't get no respect.

Each of these is or can be very important. Yet each is sometimes considered an afterthought, something to throw together at the end if the drafting process. That is wrong. More attention to these parts of the brief will make the whole brief better.

### Table of Contents

This is the first substantive thing your reader sees. Why would you put off doing it, and giving yourself as much opportunity as possible to make it sing?

A TOC is an aid to the reader. I find it indispensable to the writer. If for some reason you do not start writing by having an outline, which naturally translates into headings for use in a table of contents, then add a TOC by your second draft.

A California appellate justice has been quoted as saying: "A good table of contents, and the rest of the brief is filler." Aspire to this goal.

Another way of stating this: "A good table of contents, and the reader is convinced." Or at least strongly inclined to your position.

How do you achieve that? When your TOC describes the facts and law necessary for you to win.

Every heading should be more than a mere mile-marker. (Except the Level 1 headings like "INTRODUCTION," "FACTS," "ANALYSIS" aka "ARGUMENT," "CONCLUSION".) It should be a zinger advancing your argument.

For example, I received a brief with this table of contents:

- NRAP 26.1 DISCLOSURE .....
- I. JURISDICTIONAL STATEMENT .....
- II. ROUTING STATEMENT .....
- III. ISSUES ON APPEAL .....
- IV. STATEMENT OF THE CASE .....
- V. FACTUAL BACKGROUND .....
- VI. LEGAL ARGUMENT .....
- VII. CONCLUSION .....
- CERTIFICATE OF SERVICE .....

All that told the court was that my opponent had read the Nevada appellate rules about the required elements of a brief and their required order. You should expect that your court expects you to get that part down. This TOC told the court nothing about the merits of my opponent's case. So, it is wasted space.



**Don Willenburg** chairs the national Appellate Practice Group at Gordon Rees Scully Mansukhani from the firm's Oakland office. Described as an "appellate luminary" by the journal *California Litigation*, he is past chair of the Appellate Practice Section of the Bar Association of San Francisco, and for the last decade-plus has chaired the amicus briefs committee of the Association of Defense Counsel of Northern California and Nevada working to advance causes important to the defense community. Mr. Willenburg has won appeals and writes in cases involving product liability, employment (discrimination, harassment, wrongful termination), construction defects and disputes, the "going and coming" rule, and other areas. He is editor of the firm's blog *Environmental and Toxic Tort Defense Insight*.



*In the Facts section, this is common and sub-optimal:*

1. Plaintiff is hired.
2. Plaintiff undergoes performance reviews.
3. Plaintiff is terminated and sues.

*Better something like:*

1. Plaintiff is hired to \_\_, an at-will position requiring careful attention to \_\_\_\_.
2. Plaintiff's performance reviews consistently show poor performance at \_\_\_\_.
3. Even after counseling and discussions, Plaintiff's performance does not improve, and in some ways gets worse.

4. After careful consideration by HR and his superiors, Plaintiff is let go for performance reasons.

This way your table of contents tells a story. You have already framed matters and preconditioned the reader toward your position, before the first word of your (I'm sure brilliant) text.

Give just enough detail but not too much. Like dates. They usually should not be in the headings unless the specific date is significant (e.g., timeliness of service).

Attorneys are usually better about descriptive headings in the argument section, but not always.

*Common but sub-optimal:*

1. The first cause of action should be summarily adjudicated in Client's favor because it has no merit.

Well, that doesn't tell us anything about the cause of action other than that the author concludes it is meritless. Your reader already suspects that is your position, and you haven't given the reader any reason to come to the same conclusion.

*Better:*

1. The Court should grant partial summary judgment for Client on Plaintiff's breach of contract cause of action because there was no contract.
- or
1. The Court should grant partial summary judgment for Client on



Plaintiff's breach of contract cause of action because Client paid everything required under the contract.

or

1. The Court should grant partial summary judgment for Client on Plaintiff's breach of contract cause of action because Plaintiff repudiated the contract by taking another job.

What are the reasons to include a TOC starting your first draft?

- To ensure you are covering all the arguments you want to cover.
- To edit and change as your arguments and text is modified.
- To achieve parallelism among headings where appropriate.
- To make sure your headings are all in the same case.

E.g., Many (like me, Garner and Scalia) believe that all headings should be in sentence case.

Others Believe that All Headings Should be in Title Case.

Many Believe That All Headings Should Be In Title Case.

"Oh, it's just the headings. I'll be editing them as I revise the document, I do not need to see them in table form." Nonsense. You do not know what the table of contents looks like until you have a table of contents to look at.

Again, this is the first thing your reader sees that describes the substance of your case. You don't get a second chance to make a first impression.

### Introduction

This should explain why we win, starting with the first sentence. E.g., "The Court

should grant summary judgment in this asbestos personal injury case, because there is no evidence that Mr. \_\_\_\_\_ was ever exposed to asbestos on any MyClient product." Exceptions to this first-sentence rule are rare.

The introduction should not be a mini-fact section. Too many first sentences put right up front facts to which the brief never refers again (like the date plaintiff was hired, or the date of the complaint, or work history details), and does not tell the reader why we win.

The phrase "elevator speech" may get overused, but it explains what to look for in an introduction. What would you say if you only had 15-30 seconds to convince someone? What are the most important, attention-getting reasons why you win? Why wouldn't you start your brief with those?

The introduction should summarize your best and most persuasive arguments. You started framing the issues for the reader with your great table of contents entries, and now in the Introduction you add flesh and blood to those bones.

As in the TOC headings, give just enough detail but not too much. What is it you want the reader to have in mind when reading the rest of the brief? Juicy quotes from testimony, or sometimes a controlling decision, can be powerful when used here. You do want the reader to have them in mind. Extra benefit: you will be repeating and therefore reinforcing those later in the brief. In contrast, specific dates and numbers are rarely balls you need your reader to keep mentally juggling.

I took a great MCLE once called "Introductions: Winning in Three Pages." Great, but for all page-limited trial court

motions and most briefs, even better is "Introductions: Winning in Three Paragraphs." You can do it.

Some people put off writing the introduction until late in the briefing process on the understandable rationale "how can I know what my best points are to summarize until I've written them out?" The answer is you do have ideas early in the process, and you can always change and edit as the brief develops. Like the TOC, there is considerable benefit to starting this early and giving yourself maximum time to edit and refine.

### Conclusion

"For all the foregoing reasons, this Court should rule in our favor." Common, nearly omnipresent. Also cheap, and sub-optimal. It sounds like you are tired of writing the brief, and you expect your reader to be tired of reading it.

True, if you have not convinced your reader by this point, you are unlikely to do so in the conclusion. That result is all but guaranteed if you rely on "all the foregoing reasons" that the reader has already not accepted.

You may, however, still persuade someone "on the fence" if instead your conclusion re-states and perhaps re-frames your best points once again. And you'll have more pride as a writer and advocate.

The introduction and the conclusion are the parts of the brief where you can most get away with summary, argumentative, conclusory statements; where you can be creative and, if appropriate, rhetorical. Use, don't squander, these opportunities!

