THE MIDDLE DISTRICT OF PA. CHAPTER OF
THE FEDERAL BAR ASSOCIATION

presents

ANATOMY OF CIVIL PRETRIAL PROCEEDINGS: HOW TO WIN YOUR CASE BEFORE TRIAL

Wednesday, September 7, 2022
3:30 p.m.–5:00 p.m.

Includes 1.0 hour substantive and 0.50 hour ethics
CLE credits for Pennsylvania attorneys

PANELISTS:	THE HONORABLE WILLIAM I. ARBUCKLE, MAGISTRATE JUDGE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PA.
	CHENA L. GLENN-HART, ESQUIRE, MCQUADE BLASKO
MODERATOR:	SARA MYIRSKI, ESQUIRE OF BUCHANAN, INGERSOLL & ROONEY
COURSE PLANNER:	BRIDGET E. MONTGOMERY, ESQUIRE, ECKERT SEAMANS CHAIR, CONTINUING LEGAL EDUCATION, MIDDLE DISTRICT OF PA CHAPTER OF THE FBA
LOCATION:	DISTANCE LEARNING CLE

ANATOMY OF CIVIL PRETRIAL PROCEEDINGS: HOW TO WIN YOUR CASE BEFORE TRIAL

September 7, 2022

COURSE AGENDA

- Drafting the Complaint
- Drafting the Answer
- Joint Case Management Plan
- Motions to Dismiss
- Motions for Summary Judgment
- Motions in Limine
- Mediation and other ADR
- Final Pre-trial Conference
- Questions from the Audience (as time permits)

Hon. William I. Arbuckle III
United States District Court - Middle District of Pennsylvania

William "Skip" Arbuckle was born and raised in Erie, Pennsylvania. Educated at Grove City College (1971, B.A. with honors), and the University of Akron School of Law (J.D. 1974). While at Akron, he was a twice published member of the Law Review and won the Sixth Circuit Moot Court Competition in 1973.

During his legal career, Attorney Arbuckle was a lawyer for the Pennsylvania Judicial Inquiry and Review Board, and the successor agency, the Judicial Conduct Board, where he was Chief Counsel. He has served as Pennsylvania's Chief Deputy Attorney General for Organized Crime and Public Corruption and before that was the Chief Public Defender of Erie County. He also spent two years as a litigation associate at Knox Graham McLaughlin & Sennett (now Knox McLaughlin Gornall & Sennett). From 1974 to 1979 he was a prosecutor and public defender in Ohio.

In 1988 a group of lawyers and judges, including Mr. Arbuckle, formed Lawyers Concerned for Lawyers of PA, an independent non-profit corporation dedicated to helping lawyers, judges, and law students who are at risk as a result of alcohol and drug use, gambling, depression or other serious mental illness. He has served on the LCL Board of Directors for the past 34 years.

Judge Arbuckle is admitted to practice before the U.S. Supreme Court, The U.S. Court of Appeals for the Third Circuit, The U.S. District Courts for the Western, Middle, and Eastern Districts of Pennsylvania, and the Northern District of Ohio as well as the Supreme Courts of Ohio and Pennsylvania.

In 1994, Attorney Arbuckle entered private law practice in Centre County, where he was a shareholder and managing partner at the Mazza Law Group, P.C.

Judge Arbuckle previously taught Civil Pre-Trial Advocacy at The Pennsylvania State University Dickinson School of Law and Criminal Law; Criminal Procedure; Civil Law; and Judicial Ethics for the Pennsylvania Minor Judiciary Education Board. He frequently lectures for various professional groups including PBI and PBA. Since 1980 he has regularly taught various undergraduate courses at Penn State University and Harrisburg Area Community College and law school courses at Widener Commonwealth, Penn State, and Dickinson Law.

In July 2008 he was appointed to serve as the part-time United States Magistrate Judge for the Middle District of Pennsylvania in Williamsport. In 2014 he was elected to the Board of the Federal Magistrate Judges Association. In 2017 his position as a United States Magistrate Judge became full time.

Judge Arbuckle and his wife Penny, a Registered Nurse, live in Montoursville, PA. They have a combined family of four children and seven grandchildren.

Sara E. Myirski
Associate
sara.myirski@bipc.com
t: 717 237 4860 | Harrisburg, PA

Practices
Labor & Employment

Employment Litigation

Education
J.D., Penn State Dickinson School of Law, 2015

B.A., Gettysburg College, Psychology, 2012

Courts & Admissions
U.S. District Court for the Eastern District of Pennsylvania

U.S. District Court for the Middle District of Pennsylvania

Pennsylvania

How Sara Helps Clients

Sara's practice involves both proactive counseling and defense of employment-related actions in state courts, federal courts and in administrative forums. Sara has experience in various employment matters including wage and hour, discrimination, harassment, hostile work environment and wrongful discharge. Her practice has involved drafting PHRC and EEOC position statements and successfully negotiating settlements on behalf of employers.

In addition, Sara counsels clients regarding enforcement of employer policies, hiring (job applications, job interviewing, background checks), employee discipline, independent contractor status, FLSA exempt/non-exempt classification, ADA reasonable accommodations, absenteeism, wage and hour, non-compete agreements and general best practices. She has also drafted and assisted in drafting employee handbooks, litigation settlement agreements, independent contractor agreements, last chance agreements and confidentiality agreements.

In 2022, Sara was named to the Pennsylvania Rising Stars® list.

What Clients Can Expect

Sara prides herself on her personal approach to client representation. She provides clients with clear, practical guidance to understand their goals and work toward creative solutions. Clients appreciate her commitment to exemplarily counseling and advocacy.

Outside the Office

Originally from Maryland, Sara relocated to Pennsylvania to attend Gettysburg College and Penn State Dickinson Law. Sara enjoys reading, baking and traveling.

Affiliations

Federal Bar Association, Young Lawyers Division, Co-Chair, Middle District of Pennsylvania Chapter, 2017-present

Dauphin County Bar Association, Member, 2016-present

Civic & Charitable

Central Pennsylvania Youth Ballet Gala Committee, 2016

Harrisburg Young Professionals, Member, 2016-present

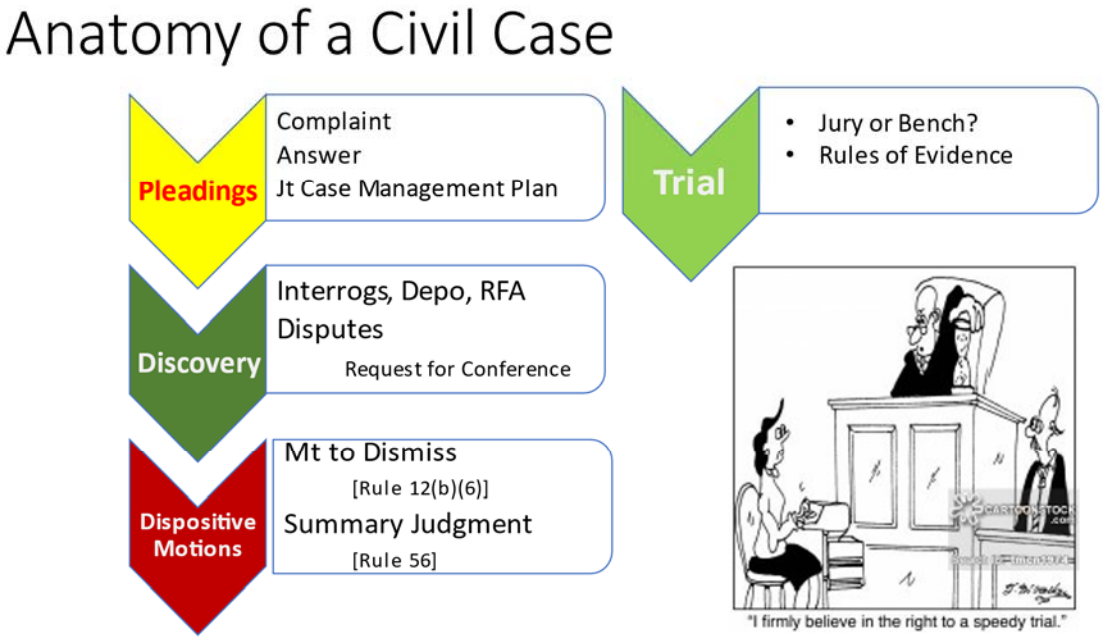
ASPCA, volunteer, 2008-2009, 2011

Humane Society of Harford County, volunteer, 2010

Nico's Outing, volunteer, 2010

Chena L. Glenn-Hart, Esquire
McQuaide Blasko

Chena Glenn-Hart graduated from The Pennsylvania State University and earned her J.D. at The University of New Hampshire School of Law (formerly Franklin Pierce Law Center). After law school, she served as a law clerk for the Pennsylvania Court of Common Pleas for Franklin and Fulton Counties. A shareholder in the State College office, Ms. Glenn-Hart joined McQuaide Blasko in 1999. She is chair of the firm's litigation practice group and focuses her practice on labor and employment law, personal injury and insurance defense and general civil litigation. Ms. Glenn-Hart has over 20 years of experience in the courtroom trying cases before juries and judges to verdict and handling matters on appeal. She represents institutional, business and individual clients throughout central Pennsylvania in federal and state court as well as administrative proceedings. Ms. Glenn-Hart is admitted to practice before the U.S. Court of Appeals for the Third Circuit, The U.S. District Courts for the Western, Middle and Eastern Districts of Pennsylvania and the Supreme Court of Pennsylvania. Ms. Glenn-Hart is a long standing member of the PBA Civil Litigation Section, and is a past Chair of the Section.



Important Steps in a Civil Case

Pick a client with a good case! 😊

Drafting the Complaint (Rule 5, 7, 10, 11)

Joint Case Management Plan (L.R. 16.3 & Appendix A)

Motion to Dismiss (Rule 12)

Summary Judgment (Rule 56, L.R. 7.4 & 56.1)

Motions in Limine (Fed. R. Evid. 103, 104, 403)

Mediation (L.R. 16.7 – 16.9.5)

Final Pre-trial Conference (L.R. Appendix B)

HOW TO WIN A MOTION FOR SUMMARY JUDGMENT

A Motion for Summary Judgment is a three headed beast:

1. A one- or two-page motion describing the counts or issues for which summary judgment is sought (with the motion being filed on or before the dispositive motions deadline). The Motion must include a Proposed Order, *see* L.R. 7.1, and a Certificate of Concurrence/Nonconcurrence, *see* L.R. 7.1);
2. A separate, short and concise statement of the material facts, in numbered paragraphs: (filed with the motion, *see* L.R. 56.1, with supporting exhibits, *see* L.R. 7.3, and a table of contents for exhibits, *see* L.R. 5.1(f));
3. A Brief in Support of the Motion (filed w/in 14 days of motion, *see* L.R. 7.5).

Practitioner's Tip: *File all three on the same day as three separate docket entries, showing the judge that you (and your paralegal) are in top form and know the rules!*

The Opposition to a Motion for Summary Judgment is a two headed beast. An answer to the Motion is not required. The required response includes:

1. A Brief in Opposition (*See* L.R. 7.6);
2. A Responsive Statement to moving party's Statement of the Material Facts, responding to each numbered paragraph of the moving party's Statement (*See* L.R. 56.1). Attached to the Responsive Statement are any transcripts, affidavits or other relevant documentation, *see* L.R. 7.6, to show that there are disputed issues of material fact preventing summary judgment. *See* L.R. 56.1. Don't forget the table of contents for the exhibits if there are more than one. *See* L.R. 5.1(f).

Practitioner's Tip: *A judge should be able to compare the Statement of Material Facts and the Responsive Statement of Material Facts side by side and quickly determine which facts are disputed and why. Rambling paragraphs with multiple facts and lots of adjectives prevent a yes or no response. The arguments should be in the briefs, not in the Statement of Material Facts.*

Here are the Local Rules that apply:

LR 5.1 Size and Other Physical Characteristics of Papers and Other Documents.

(f) Exhibits to a brief or motion shall accompany the brief or motion, but shall not be attached to or bound with the brief or motion. Exhibits shall be secured separately, using either lettered or numbered separator pages to separate and identify each exhibit. Each exhibit also shall be identified by letter or number on the top right hand corner of the first page of the exhibit. Exhibits in support of a pleading or other paper shall accompany the pleading or other paper but shall not be physically bound thereto. In all instances where more than one exhibit is part of the same filing, there shall be a table of contents for the exhibits. (emphasis added)

LR 7.1 Motions to be Written.

A motion must be written, and shall contain a certification by counsel for the movant that he or she has sought concurrence in the motion from each party, and that it has been either given or denied. No concurrence need be sought in pro se prisoner cases. A certificate of nonconcurrence does not eliminate the need for counsel to comply with Local Rule 26.3 relating to conferences between counsel in all discovery motions directed toward a resolution of the motion. Every motion shall be accompanied by a form of order which, if entered by the court, would grant the relief sought in the motion.

LR 7.3 Exhibits and Other Documents Substantiating Motions.

When allegations of fact are relied upon in support of a motion, all pertinent affidavits, transcripts, and other documents must be filed simultaneously with the motion and shall comply with Local Rule 5.1 (f).

LR 7.4 Motions for Summary Judgment.

For local rule regarding the filing of a motion for summary judgment, see LR 56.1. Briefing schedules under Local Rules 7.5, 7.6 and 7.7 are applicable to any brief filed in connection with a motion for summary judgment.

LR 7.5 Submission of Briefs Supporting Motions.

Within fourteen (14) days after the filing of any motion, the party filing the motion shall file a brief in support of the motion. …

LR 7.6 Submission of Briefs Opposing Motions

… A brief in opposition to a motion for summary judgment and LR 56.1 responsive statement, together with any transcripts, affidavits or other relevant

documentation, shall be filed within twenty-one (21) days after service of the movant's brief.

LR 7.7 Reply Briefs.
A brief in reply to matters argued in a brief in opposition may be filed by the moving party within fourteen (14) days after service of the brief in opposition. No further briefs may be filed without leave of court.

LR 7.8 Contents and Length of Briefs.
(a) Contents of Briefs.
…The brief of the moving party shall contain a procedural history of the case, a statement of facts, a statement of questions involved, and argument. The brief of the opposing party may contain a counter statement of the facts and of the questions involved and a counter history of the case.
(b) Length of Briefs.
(15 pages or 5,000 words, more requires prior leave of court. Briefs longer than 15 pages require certificate of word count)

LR 56.1 Motions for Summary Judgment.
A motion for summary judgment filed pursuant to Fed.R.Civ.P.56, shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.

Statements of material facts in support of, or in opposition to, a motion shall include references to the parts of the record that support the statements.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

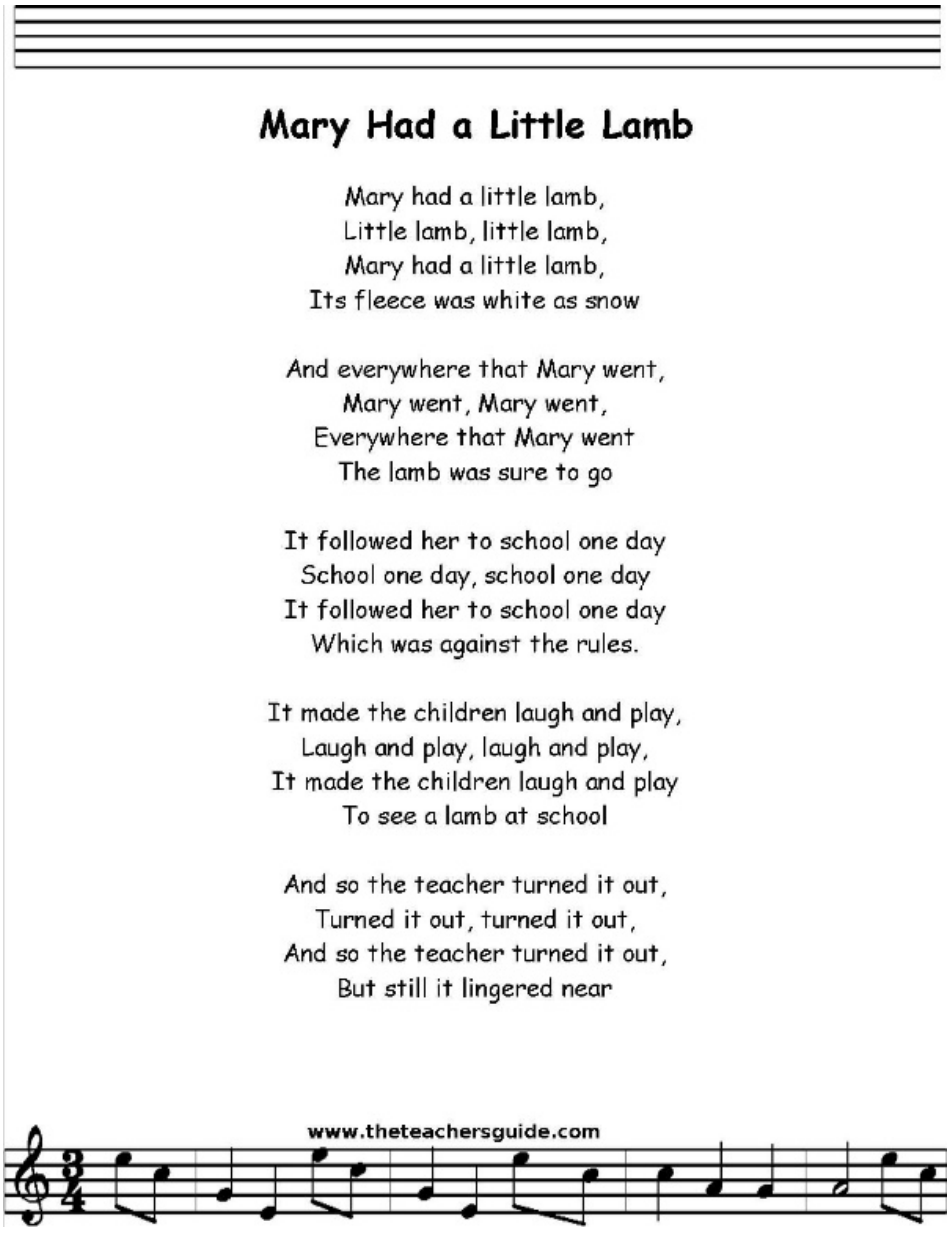
Practitioners' Tip: *Motions targeted to specific claims are more likely to succeed. Consider a separate motion, brief (and if S.J - a statement of undisputed material facts) for each count in the complaint.*

One Judge's Pet Peeve: Motions filed as "Motion to Dismiss or in the Alternative for Summary Judgment." If you must file this weasel, at least identify in the motion the specific claims that are deficient and specify: 1) which claim(s) fail to state a claim (motion to dismiss) and, 2) which claim(s) are subject to summary judgment (no disputed issue of material fact and your client wins on the undisputed facts).

Another Judge's Pet Peeve: Don't' waste space in your brief with a detailed legal standard for the motion. Our judges know the legal standards for motions to dismiss and summary judgment.

SUMMARY JUDGMENT SAMPLE PROBLEM

In this case Mary, a student at "The School," is being sued by The School in trespass for bringing a lamb onto school property. The record consists solely of the nursery rhyme which is Exhibit 1.



Mary Had a Little Lamb

Mary had a little lamb,
Little lamb, little lamb,
Mary had a little lamb,
Its fleece was white as snow

And everywhere that Mary went,
Mary went, Mary went,
Everywhere that Mary went
The lamb was sure to go

It followed her to school one day
School one day, school one day
It followed her to school one day
Which was against the rules.

It made the children laugh and play,
Laugh and play, laugh and play,
It made the children laugh and play
To see a lamb at school

And so the teacher turned it out,
Turned it out, turned it out,
And so the teacher turned it out,
But still it lingered near

Exhibit 1

Example of a proper Statement of Material Facts Supporting Summary Judgement:

The School (Plaintiff) contends that the following material facts demonstrate that there is no genuine issue of fact to be tried.

1. Mary had a little lamb. (Nursery Rhyme, sentence 1, Exhibit 1).
2. Its fleece was white as snow. (Nursery Rhyme, sentence 4, Exhibit 1).
3. Everywhere that Mary went the lamb was sure to go. (Nursery Rhyme, sentences 7-8, Exhibit 1).
4. It followed her to school one day. (Nursery Rhyme, sentence 9, Exhibit 1).
5. Following her to school was against the rules. (Nursery Rhyme, sentences 11-12, Exhibit 1).

Example of a proper Statement of Material Facts Opposing Summary Judgement.

Mary, (the Defendant) contends that there are disputed issues of material fact which prevent summary judgment. In response to the Plaintiff's Statement of Material Facts (Doc. __) Defendant replies as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Denied. It is denied that a rule exists preventing a lamb from following Mary to school. "Which was against the rules" is a legal conclusion, not a fact.

Defendant contends these additional Material Facts are not in dispute:

6. There is no rule prohibiting a lamb from following a student to school.
7. There is nothing in the record to show that Mary was personally responsible for the lamb coming to the school.

ELEMENTS & DAMAGES ANALYSIS FORM

Caption; _____

Case #: _____

Count ___

Cause of Action: _____

Elements: Source: _____

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

Statutory Basis: _____

S/L: _____

Attorney Fees Authorized: _____

Damages authorized: _____

Punitive Damages Requested: _____

Count ___

Cause of Action: _____

Elements: Source: _____

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

Statutory Basis: _____

S/L: _____

Attorney Fees Authorized: _____

Damages authorized: _____

Punitive Damages Requested: _____

Damages authorized: _____

Punitive Damages Requested: _____

TIPS FOR YOU OR YOUR PARALEGAL

Convert to .pdf

Use your word processing program to convert to .pdf rather than scanning the finished document. Scanned documents are often crooked and loose many of their embedded links.

Create accessible PDFs.

Add accessibility tags to PDF files to make sure that people who use screen readers and other assistive technologies can read and navigate a document with Tables of Contents, hyperlinks, bookmarks, alt text, and so on. Accessibility tags also make it possible to read the information on different devices, such as large type displays, personal digital assistants (PDAs), and mobile phones. In Office for Windows, Office for Mac, and Office for the web, you can add tags automatically when you save a file in PDF format.

Try these samples of live links:

Our court's public web site: www.pamd.uscourts.gov

Our court's local rules and standing orders:

https://www.pamd.uscourts.gov/court-info/local-rules-and-orders

Citing to a case:

Miranda v. Arizona, 384 U.S. 436 (U.S. 1966).

Numbering AND Naming Exhibits

When you file a document in ECF with exhibits you have a chance to name the attachments. Instead of just "Exhibit A" try "Exhibit A – Smith Affidavit" or better yet "Exhibit A - Supervisor Smith Affidavit."

Four Mortal Sins in Summary Judgement Practice: (from Judge Carlson)

1. Statement of facts that are too verbose or contentious (can it really be that there are 200-or 2,000-completely undisputed facts in your case?)
2. Statement of facts without clearly identified record support (judges are not pigs sent out to search for factual truffles).
3. Failures to directly respond to the opposing party's statement of facts (do you agree or don't you?)

4. Summary judgment motions that tread into what counsel know to be completely contested, fact bound and factually disputed areas, such as: Negligence; Causation; and, Subjective motivations.

The Poison Ivy Rule: (from Judge Arbuckle)

As kids we all learned: "leaves of three, let them be." Use this old memory device to prompt you to separate out any list longer than three items.

Here is an example as written in Habeas Petition seeking to overturn a state court conviction, this paragraph appears in the fact section of the brief.

> "The trial court denied the motions on January 9, 2014. The motions presented seven claims for relief. (1) the evidence was insufficient to sustain the verdict (2) the trial court erred when it denied a *motion in limine* challenging the Petitioner's circumstances of arrest as consciousness of guilt, (3) the trial court erred when it denied the *motion in limine* on the grounds of unfair prejudice (4) the trial court erred when it instructed the jury that evidence of flight was evidence of consciousness of guilt (5) the trial court erred when he stated that Petitioner could not draw a link between the fact that another guy at the scene had been convicted of aggravated assault involving a handgun and that other guy might have been the shooter (6) whether the jury placed too much weight on the testimony of Larry Graves and Magdelina Cruz, and (7) whether the sentence was excessive."

Same example but using the "Poison Ivy" Rule:

"The trial court denied the motions on January 9, 2014. The motions presented seven claims for relief:

> (1) the evidence was insufficient to sustain the verdict;
> (2) the trial court erred when it denied a *motion in limine* challenging the Petitioner's circumstances of arrest as consciousness of guilt;
> (3) the trial court erred when it denied the *motion in limine* on the grounds of unfair prejudice;
> (4) the trial court erred when it instructed the jury that evidence of flight was evidence of consciousness of guilt;
> (5) the trial court erred when he stated that Petitioner could not draw a link between the fact that another guy at the scene had been convicted of aggravated assault involving a handgun and that the other guy might have been the shooter;
> (6) whether the jury placed too much weight on the testimony of Larry Graves and Magdelina Cruz; and,
> (7) whether the sentence was excessive. "

Ask yourself: which choice will be easier to go back and review?

Five Techniques to Strengthen Your Persuasive Legal Writing

By Philip J. Seaver-Hall

I'll say it: Most legal writing stinks. We lawyers just can't seem to wrap our big heads around the idea that good writing means easy reading.

Proffered explanations abound. Some have observed that lawyers, being cautious creatures, think that 10 words must surely be safer than four. Others have noted that law firm culture often ensures that senior partners' habits — both good and bad — are passed down to junior associates. Likewise, many lawyers say that they're just too busy to focus on well-crafted writing.

At the end of the day, however, I think that most lawyers simply haven't acquired the tools required to write at their full potential. So here are five tools that I hope you'll find useful in your writing practice.

1. Think, Plan, Draft, Scrutinize.

Too often, writers dive headfirst into their first draft, neglecting prewriting. This is a critical mistake.

Professor Betty Flowers offers a brilliant encapsulation of the writing process. She says that the best writers take turns playing four roles — madman, architect, carpenter and judge.

The madman is full of ideas, Flowers explains. He writes crazily and sloppily and if he really lets loose, he could churn out 10 pages in an hour.

The architect helps organize the madman's ravings. She picks out maybe one tenth of the madman's brain dump that is relevant or viable. She then arranges the plausible ideas in an outline that might later form the basis for an argument. The architect thinks in broad, organizational, 30,000-foot terms. She doesn't worry about details like word choice or sentence structure.

Once the architect's work is done, the carpenter takes over. He follows the architect's blueprints, nailing the ideas together in a logical sequence. This is the first draft.

Finally, the architect presents the draft to the judge. The judge is highly educated and highly critical. (Her voice even sounds a little like your ninth-grade English teacher.) She knows when writing is garbage and she's quick to say so. To turn garbage into gold, she focuses on things like grammar, punctuation and tone, poring over each word, phrase, sentence and paragraph to ask honestly whether it's as good as it could be.

Flowers explains that writer's block happens when one of these four characters jumps ahead in line. For example, when the judge realizes how awfully imperfect the madman's ravings are, she interrupts, encouraging us to tear the page in two. If we give in to her, we get stuck. To combat this, Flowers encourages us to tell the judge that we'll get to her opinion later.

Good writing only comes from good prewriting. Good prewriting, in turn, requires us to be patient and let each character take its turn.

The best writers take turns playing four roles: madman, architect, carpenter and judge.

Comprehension is a prerequisite of agreement.

2. Start With a Strong Topic or Transition Sentence.

It may be basic, but it's a worthwhile reminder: To express your ideas clearly, each and every paragraph needs a strong topic or transition sentence. Topic and transition sentences tell the reader the focus of a paragraph in simple and direct terms. Without these, you risk confusing and boring your reader.

Consider the following paragraph, which lacks topic and transition sentences:

> In *Kisela v. Hughes*, the U.S. Supreme Court noted that for qualified-immunity purposes, the factual proximity of a precedent case is "especially important in the Fourth Amendment context, where ... it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." For a statutory or constitutional right to be "clearly established," the *Kisela* court said, existing precedent must "squarely govern" the specific facts of the plaintiff's case. Too often, the upshot of this rule is that victims of excessive police violence have no legal recourse. This is a wrongheaded rule that the Supreme Court should revisit.

Until the last two sentences, did you have any idea why I launched into a discussion of *Kisela v. Hughes*? And when you got there, did you remember much about what you had just read? I doubt it. Now consider this revision, in which topic and transition sentences are italicized:

> *The U.S. Supreme Court gives extraordinary deference to police officers accused of excessive force.* Indeed, when a prior excessive-force case does not "squarely govern" the precise facts of the pending case, the court almost always says that the constitutional right invoked by the plaintiff was not "clearly established" and dismisses the case on qualified-immunity grounds. Too often, the upshot is that victims of excessive police violence have no legal recourse.
>
> *How, then, does the court justify this wrongheaded rule?* By reasoning that police officers frequently confront fast-moving situations where it is "difficult for [the] officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts."

By starting with strong topic and transition sentences, you increase comprehension. And comprehension is a prerequisite of agreement.

3. Ditch The Legalese. (I Beg You.)

"Heretofore."

"Pursuant to."

"Wherefore."

"Plaintiff alleges, inter alia ..."

"COMES NOW the Plaintiff, John D. Smith (hereinafter referred to as 'the Plaintiff' or 'Mr. Smith'), by and through counsel undersigned, in the above-captioned cause, and files this his Opposition to Defendant's Brief in Support of Motion for Summary Judgment, stating in support thereof the following ..."

Is any of this cholesterol really necessary? Does anybody honestly think that these words have ever won a case or helped persuade a judge? And was it really necessary to clarify that "the Plaintiff," "Mr. Smith" means the Plaintiff, Mr. Smith?

I am hardly the only one with a hot-blooded impatience for this medieval discourse. In *The Winning Brief* — which, for litigators, should be canon — Bryan Garner notes that in every state in which judges have been polled, the judges have overwhelmingly said

that they wish lawyers would stop using legalese. Yet, in the majority of briefs I read, authors still cling to this bloated jargon. To paraphrase high-profile lawyer and writer Gerry Spence, those briefs make me want to throw the brief out the window and jump after it. Do you really want to make the judge — the captive audience member in whose hands your case rests — feel the same way?

You may be asking, "But isn't legalese necessary for legal precision?" I think not — especially not in brief writing. Indeed, legalese often creates ambiguity by relying on archaic words, poor grammar and sentence structure, repetition and surplus language. As *The Oxford Guide to Plain English* says, "Fog in the law and legal writing is often blamed on the complex topics being tackled. Yet when legal texts are closely examined, their complexity seems to arise far less from this than from unusual language, tortuous sentence construction, and disorder[.]" In almost all cases, we can nix the nonsense.

(One caveat to this section: If you know for a fact that your judge is one of those rare few who loves legalese, then go ahead and commit the lesser evil, anything hereinbefore to the contrary notwithstanding.)

4. Short, Active Sentences. Plain Words.

What makes for readability? Clarity and simplicity. Their recipe? Short, active sentences and plain words.

Understand: My point is not that you should omit every possible word. As Professor Joseph Regalia noted in a 2019 post on the Appellate Advocacy Blog, "That is just choppy. Real choppy. Like this. It starts. To get. Annoying." Instead, take the advice of Strunk and White and "omit *needless* words." When you omit needless words, you add by subtracting and your writing becomes more readable.

Microsoft Word has a great tool to assess the readability of your writing. Here's how to turn it on: Go to **File** > **Options**. Select **Proofing**. Under **When correcting spelling and grammar in Word**, select **Show readability statistics**. Return to your document and then select **Spelling & Grammar**. Finally, correct or ignore any spelling or grammar errors, and then Word will open a **Readability Statistics** window with information about the readability of your document. That window will show the average number of words per sentence, the average number of sentences per paragraph, the percentage of passive-voice sentences, the document's Flesch Reading Ease score and the document's Flesch-Kincaid grade level.

Let's go through those and give you some goal metrics for each.

First, word count. Legal writing guru Ross Guberman recommends aiming for an average of fewer than 27 words per sentence. Garner, meanwhile, recommends cutting it down to 20. On this point, I'm with Garner.

People to People

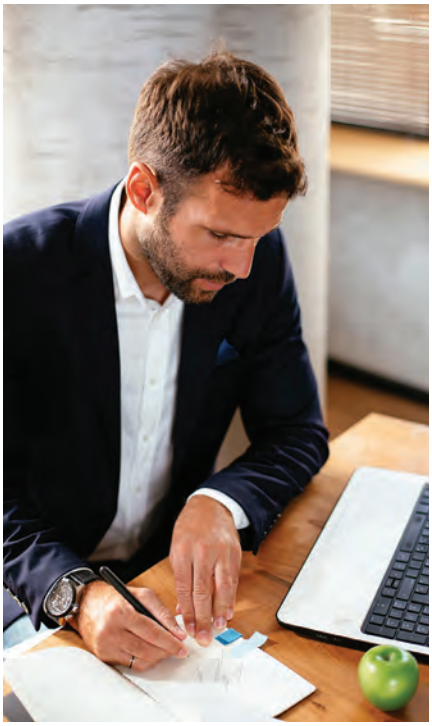
If you're a PBA member and you want the legal community to know about your appointment, promotion, recent speaking event or other law-related news, why not submit your announcement to run as a "People" item?

The most frequent types of "People" announcements we run are for appointments/elections, awards/honors, being published, firm moves and speaking engagements. We run items on recipients of county bar awards, but we do not list county bar committee and section appointments. We do not run prospective notices, particularly for speaking or meeting events, as these are subject to change, and we do not include lawyer and law-firm "best of" announcements. Given the PBA's large member base, we also monitor for how frequently individuals are listed in the column. Photos are welcome. If provided electronically, photos should be high resolution. Most electronic photos we receive are as JPEG files.

The editors reserve the right to reject "People" submissions and to edit for style and length of announcement. Accepted announcements will appear in either the PBA's Pennsylvania Lawyer magazine or *Pennsylvania Bar News* tabloid, depending on when notices are received in the editorial cycle.

Email "People" column notices to editor@pabar.org or mail to the Pennsylvania Bar Association, Attn. People Column, 100 South St., P.O. Box 186, Harrisburg, Pa. 17108-0186.

One way to frame facts persuasively is to be strategic about point of view.



Your statement of facts should make the judge want to rule in your favor, and then your argument should give her the legal tools to do so.

Remember, though, that this is an average measurement. An elegant, long sentence now and then can vary the flow of your writing nicely; it just needs to be punctuated correctly so that your reader doesn't get lost.

Next, passive voice. Many lawyers talk about it; fewer know what it is. In passive voice, the subject of the clause doesn't perform the action of the verb. Instead, the sentence has a be-verb (or get) plus a past participle. To catch most passive sentences, just ask yourself whether you could add the phrase "by zombies" to the sentence, like this:

> Passive: The motion was filed. [Read: The motion was filed *by zombies*.]
>
> Active: Defense counsel filed the motion.
>
> Passive: A sandwich was eaten. [Read: A sandwich was eaten *by zombies*.]
>
> Active: Sam ate a sandwich.

Guberman says to aim for less than 20% of sentences with passive structure. I generally like to aim even lower. That being said, passive voice has its uses — especially, for example, where you want to depersonalize your client's bad act.

Third, the Flesch Reading Ease test. The test uses two variables — the average length of your sentences and the average number of syllables per word — to assign a readability metric between 1 and 100. The higher the better. Aim for a score above 50.

Finally, the Flesch-Kincaid Grade Level test. This test uses the same variables as the Flesch Reading Ease test, but it spits out a number showing the difficulty of a piece of text in the form of a U.S. grade level. The *New York Times* usually clocks in at about an eighth-grade reading level, and Supreme Court opinions usually run in the low teens. In client communications, aim for the former; in court filings, aim for the latter.

Hit these metrics, and your writing will greatly improve.

5. When Reciting Facts, Aim to Create the Right Feeling, Not Just the Right Meaning.

The judge will have reached a preliminary decision about your case by the time she finishes reading your statement of facts. So don't wait until the argument section to persuade; frame the facts persuasively, too. Your statement of facts should make the judge want to rule in your favor, and then your argument should give her the legal tools to do so.

One way to frame facts persuasively is to be strategic about point of view. Justice Clarence Thomas' majority opinion in *District of Columbia v. Wesby* provides a great example. The issue in ***Wesby*** was whether five police officers had probable cause to arrest 21 partygoers and, if not, whether the officers were nevertheless entitled to qualified immunity. Watch how Thomas frames the facts:

> Around 1 a.m. on March 16, 2008, the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D.C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside.
>
> After the officers knocked on the front door, they saw a man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house "was in disarray" and looked like "a vacant property." The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the

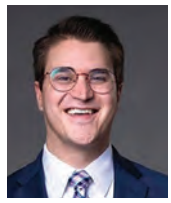
> partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs.

Note how Thomas keeps the focus on what the police officers saw, heard, smelled and observed. Thomas could have just as easily written the second paragraph like this:

> After the officers knocked on the front door, a man looked out the window and ran upstairs. Another partygoer then opened the door and let the police inside. The house had working electricity and plumbing. It was dirty and mostly unfurnished. The air smelled of marijuana, and there were beer bottles and cups of liquor on the floor.

While just as accurate as Justice Thomas', the latter version fails to create the right feeling. Justice Thomas puts us in the officers' shoes, subtly priming us to accept what he later says outright — that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." When the reader steps into the officers' shoes, it's hard not to understand why they were suspicious of the partygoers. By being purposeful about point of view, Thomas has primed us to accept his argument before he has even made it. That's effective persuasion.

As lawyers, we are professional writers. I encourage you to give these techniques a try and see how your writing improves. Best of luck! ⚖



Philip Seaver-Hall is a civil litigation attorney at Knox McLaughlin Gornall & Sennett PC in Erie. He also serves as a contributing editor of the Appellate Advocacy Blog. He can be reached at pseaver-hall@kmgslaw.com.

If you would like to comment on this article for publication in our next issue, please email us at editor@pabar.org.

REGISTRATION CONFIRMATION - PA CLE CREDIT REQUEST

To receive PA CLE Credit for this program, return this form to the course sponsor upon departure.
(Do not file this form with PA CLE)

PROGRAM INFORMATION:

Sponsor: Middle District of Pennsylvania Chapter of the Federal Bar Association

Course Title:
Anatomy of Civil Pretrial Proceedings: How to Win Your Case Before Trial

Date: 09/07/2022

Location: VIRTUAL (DL)

CLE Credits:

is an Accredited Provider of CLE in **Pennsylvania**. This program has been approved for a total of:

1.50 credit hours based on a sixty minute hour.

Of this total:

1.0 credit hours are substantive,

and:

0.5 credit hours are designated as ethics.

Reminders:
Introductory remarks, keynote addresses, business meetings, breaks and receptions are not included in the computation of PA CLE credit.

CLE rules & regulations may vary from state to state. You may wish to check with your state regulator to confirm accreditation and credit hours.

LAWYER INFORMATION:

Name: _____

PA ID#: _____

COURSE EVALUATION

Please check one for each category:

Overall Quality:
Excellent _____
Exceeded Expectations _____
Met Expectations _____
Needs Improvement _____
Failed to Meet Expectations _____

Written Materials:
Excellent _____
Exceeded Expectations _____
Met Expectations _____
Needs Improvement _____
Failed to Meet Expectations _____

Instructors:
Excellent _____
Exceeded Expectations _____
Met Expectations _____
Needs Improvement _____
Failed to Meet Expectations _____

Ease of Use:
Excellent _____
Exceeded Expectations _____
Met Expectations _____
Needs Improvement _____
Failed to Meet Expectations _____

Lawyer Information:

Attorney Signature: _____

Late Arrival ☐ _____ (Time In) **Early Departure** ☐ _____ (Time Out)

Please put the Attendance Verification Codes provided throughout the seminar here:

1._____ 2._____
3._____