



Litigation Practice Tip - May 2023

How to Redline Friends and Influence People

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Good briefing can make the difference in a close case. And good briefing most often requires conscientious editing. As nearly all legal aid litigation is done in partnership, we edit as much, if not more, than we draft.

Good editing balances constructive criticism with diplomacy. Legal services attorneys have a culture of niceness, and the last thing we want to do is criticize each other, particularly in writing. So when called upon to edit a brief, we might think, “I don’t really understand most of this, and it does seem to repeat itself a lot, but the cause is righteous and the judge will probably sort it out.” The resulting editing is either nonexistent or superficial.

That’s not actually being nice, either to the author—whose writing is unlikely to improve—or, more importantly, to the client.

Conscientious editing, like good writing, takes time, and covers several areas. But it’s well worth it, even, or especially, for the editor. Looking critically at another’s draft (“what do I like (or not like) about this?” “How can it be strengthened?”) is a great way to improve your own writing.

Here are some tips for when you are the editor:

Editing for clarity

If you don’t understand something, neither will the judge. And if you had to read it three times before getting it, that’s two more readings than the judge will make. This applies to a sentence, a paragraph, or the entire argument. If anything, you probably are more familiar with the subject matter than the judge, so don’t give the author the benefit of the doubt on an argument you don’t understand. Explain your confusion to the author.

Editing for substance

Read with healthy skepticism. This is probably the most difficult advice to follow. Given the likely importance of the issue and our ongoing relationships, we—myself included—have a tendency to overlook potential flaws in the argument. Unfortunately, opposing counsel and the judge will not. Try to spot weaknesses in the argument and anticipate opposing arguments to give the author an opportunity to counter them.

Read the major authority relied upon. If the draft relies heavily on a particular opinion, read the opinion to make sure the author is accurately and fairly citing it, and is deriving the maximum benefit from the citation. This advice goes double if the author exclusively paraphrases the opinion without any quotation. As I discussed in a previous Tip, judges are likely to view paraphrases with more skepticism than they exercise with quotations.^[1] And if you find a short quote from the opinion that bolsters the author’s argument, suggest that the author use the quote. The

same advice applies to statutes or other authority relied upon.

Editing for organization

Start with the headings. You probably won't get a draft with a Table of Contents. But even without a Table, review the argument headings—which should all be sentences—to see that the order of arguments is logical and effective. And don't stop there; also review to make sure that the text under the heading matches what the heading promises; and that each argument follows some variation of IRAC (stating the issue, the rule governing the issue, then applying the facts of the case to the rule and reaching a conclusion). [2]

Editing for citation form.[3] *Review for acceptability and consistency.* Even if you are not the person responsible for cite-checking, make sure the author is accurately using an acceptable citation form (in state court Bluebook or California Style Manual; in federal court Bluebook) and is doing so consistently. And stay on the lookout for obvious errors (e.g., a 2022 opinion cited as Cal. App. rather than Cal. App. 5th).

Make sure each statement in the brief is sufficiently supported with readily available citations. For factual statements, this means consistently citing to a readily available record or other source. For published opinions, this means always providing pin cites when needed.

Editing for “style.” *Review for readability.* What is sometimes called “style” really means readability. Does the brief read well, and if not, where could it be improved? This involves checking for things that apply to all forms of persuasive writing. Among them: grammar, syntax, tone, conciseness, use of active voice and verbs, and good use of transitional sentences.

Don't over-edit, or under-edit. Admittedly, this is a hard balance to strike. Avoid rewriting perfectly good sentences or paragraphs to make them more like you would have written them, even if you think your version would be “better.” It's the author's brief in the author's voice, not yours. On the other hand, if, for example, you can delete several unnecessary words from a sentence without changing the meaning of the sentence, don't hesitate to do so.

Keeping it nice(er). Niceness does have a role in editing. If you need to make extensive edits, there are different ways to deliver them. Here are some considerations.

To sandwich or not to sandwich, that is the question. Some experts suggest that editors say something nice and encouraging at the outset, then make the suggested edits, and wrap matters up with more encouraging words. Though authors will often see through this, most everybody likes an encouraging word.[4] A more believable and refined version would be to praise a particularly good turn of phrase or insight.

Aim for a good mix of redlining and comments. Generally, explaining in a Comment bubble why certain changes should be made is preferable to merely redlining, though you will not often have time for too many explanations. Sometimes you can avoid excessive redlining by changing one sentence with a Comment explanation such as, “numerous sentences in this draft are phrased in the passive voice. You might want to change as many as you can.”

Phrase Comments carefully. As they teach in elementary school, use “I” phrases. Instead of saying, “this is not a sentence” or “this sentence is incomprehensible,” try “I didn't understand this sentence.”

Conscientious editing can make a mediocre brief good, and a good brief excellent. That's a truly nice result.

[1] See my [Litigation Practice Tip on the use of quotations](#) (Nov. 2020).

[2] See my [Litigation Practice Tip on organizing your brief](#) (Feb. 2022), which encourages writing strong headings and sub-headings as argumentative sentences and using subheadings liberally.

[3] See my [Litigation Practice Tip on citations](#) (Dec. 2021).

[4] Not everybody. One of my former colleagues reacted to my edits by saying, “don't ever give me that ‘good work’ crap again!” You have to know your audience.



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