SUMMER 2025 ◊ ISSUE 51

AttPro Ally

Make Your Brief POP!

Writing Tips to Take Your Briefs to New Heights

IN THIS ISSUE:

Making the Most of Your TABLE OF CONTENTS, INTRODUCTION AND CONCLUSION

By: Don Willenburg, Esq.

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:

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. This TOC told the court nothing about the merits of my opponent's case. So, it is wasted space.

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 ___.

*This article was originally published in the November & December 2022 issue of DRI's For The Defense.

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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.

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:

> *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:

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

"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 from 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. 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.

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.

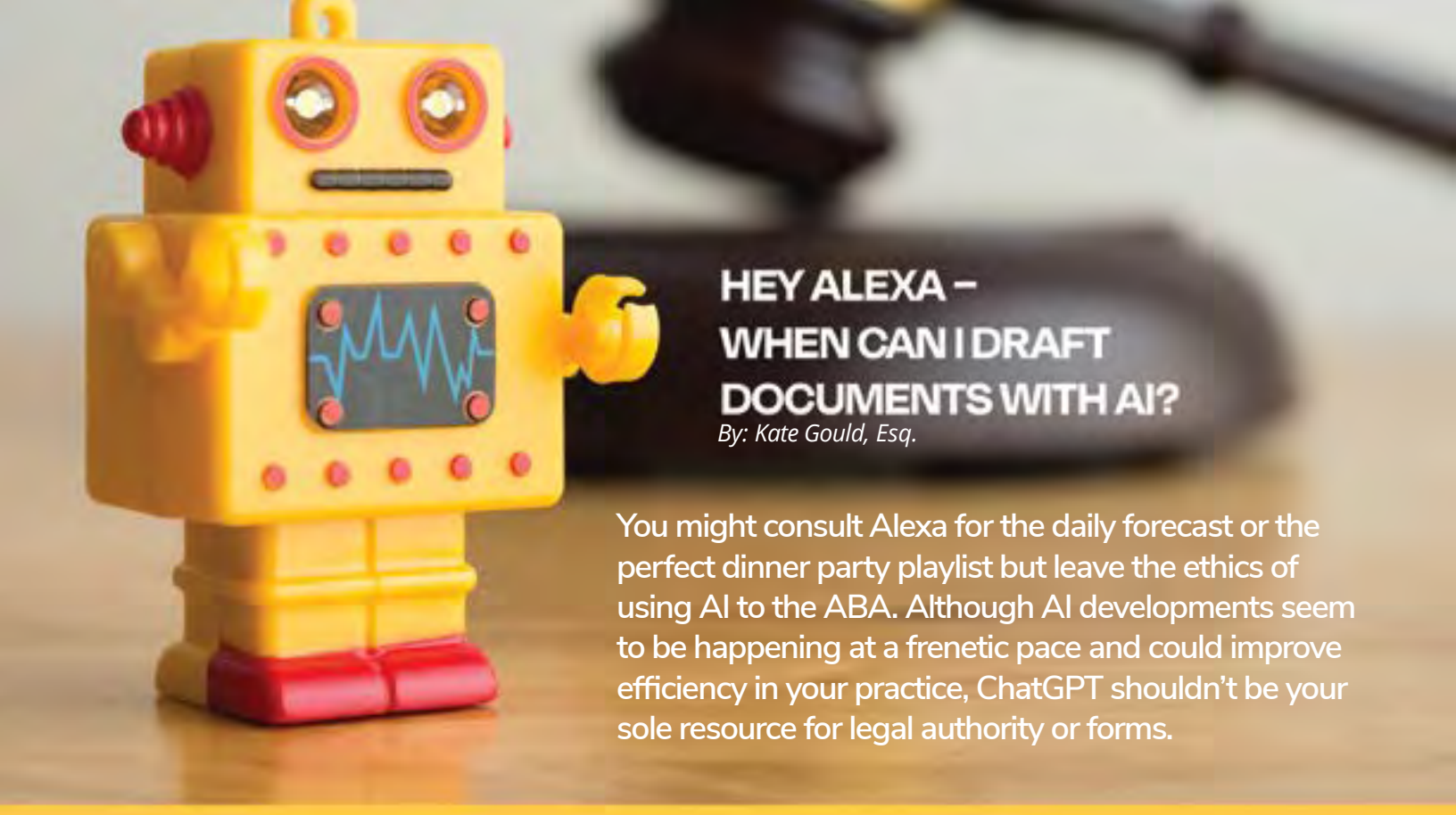
Conclusion

"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!



HEY ALEXA – WHEN CAN I DRAFT DOCUMENTS WITH AI?

By: Kate Gould, Esq.

You might consult Alexa for the daily forecast or the perfect dinner party playlist but leave the ethics of using AI to the ABA. Although AI developments seem to be happening at a frenetic pace and could improve efficiency in your practice, ChatGPT shouldn't be your sole resource for legal authority or forms.

As lawyers, we spend a significant amount of time drafting documents, including client correspondence, pleadings, and memos. While using AI to prepare these documents may save time, its use can result in the unauthorized disclosure of confidential client information. This article will address some of the ethical considerations related to a lawyer's decision to use generative AI to assist with everyday tasks. No need to ask your Echo.

The ABA Model Rules

Multiple Rules of Professional Conduct come into play when using AI in your legal practice. As detailed below, consider how these Model Rules may be implicated:

Competency (Rule 1.1)

ABA Model Rule 1.1 requires that a lawyer provide competent representation to a client. What does this mean? You must possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. If you are going to use generative AI in your practice, you must understand how it works and what its limitations are to avoid any potential harm to your client's interests. And as further discussed below, you must verify the authenticity of any purportedly valid legal information or case citations generated by an AI model like ChatGPT. False or incomplete information, known as "hallucinations," can be produced by AI and appear to be legitimate.

Client Communications (Rule 1.4)

This Rule requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." If you intend to use AI as one means to accomplish your client's objectives, you should "promptly inform" the client of that intention in order to obtain the client's informed consent. According to ABA Resolution 112, a lawyer should obtain approval from the client before using AI, and this consent must be informed. You might use your initial fee agreement to ensure you have client consent from the outset of the case. Interestingly, the Resolution also states that if you decide not to use AI, you must communicate that to the client if using it would benefit them.

Confidentiality (Rule 1.6)

ABA Model Rule 1.6(a) provides that "[A] lawyer shall not reveal information relating to the representation of a

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continued from previous page

client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." As such, disclosing any confidential client information to an AI tool without the client's informed consent would constitute a violation of the Rule. Even with their consent, the use of an outside AI model is problematic. For example, if you used it to draft an email in reply to opposing counsel, you would be disclosing your strategy by asking the model to craft a response based on your legal position – even if you somehow avoided plugging in confidential client information. Quite frankly, the risks of using outside generative AI when it comes to the question of confidentiality may be the biggest hurdle to its use.

Candor to the Tribunal (Rule 3.3)

You've probably heard (or maybe Siri mentioned it) that lawyers are routinely being reprimanded for using ChatGPT or another AI model for legal research and then citing fake cases in their briefs. Model Rule 3.3(a)(1) prohibits a lawyer from knowingly making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Lawyers simply cannot rely on AI models alone for the case law they need given the risk of hallucinations. Instead, as with any case you might include in a brief, you must Shepardize the case to ensure it is still valid precedent – not to mention a legitimate case. So, whether you find your case "in the books," on Westlaw or Lexis, or via an AI generative model, fulfill your ethical responsibility to confirm the validity of the case law you present to the court.

When Can You Use Generative AI to Draft Documents?
If you know you can comply with the above Rules – and your client has given you the requisite informed consent – there are some circumstances were you can use generative AI to draft documents.

Examples of potentially ethical uses of AI include the following:

- **The first draft of a litigation hold letter** – As long as you do not input any client or matter information and tailor the letter to your needs, you could use AI for the initial draft of your letter.
- **The first draft of a contract** – Sometimes, working from a form is easier than starting from scratch. After ChatGPT generates a draft contract, you can add the necessary client information and revise it to fit your needs and comply with the laws of your state.
- **Initial template creation** – Whether you are developing an internal memo form or client intake questionnaire, you could ask AI to get you started.
- **Initial drafts of discovery requests** – Preparing discovery requests can be tedious work. Having AI produce an initial draft will leave more time for you to develop case-specific Interrogatories and Requests for Production. Be sure to check your local rules to ensure you comply with all form requirements and do not exceed to maximum number of questions or requests.
- **Marketing materials** – It is difficult to find the time to generate timely blog posts or client newsletters while managing a heavy caseload. If you use an AI model to produce these materials, be sure to check the case citations!

The potential benefits of using AI will likely eventually outweigh the risks as it continues to develop. Further, as it becomes more commonplace to have captive AI tools where client confidentiality can be sufficiently guaranteed within the firm, we will likely see the use of AI further grow into our day-to-day practices. However, lawyers will always have the responsibility to protect their client's interests, whether our work product is aided by AI-generated content or not. And, now that you know the ethical considerations to incorporating AI into your practice, your virtual assistant can get back to setting alarms and finding recipes.

Out of Office: The Ethics of Leaving Your Practice

August 20, 2025 | 1:00pm ET

If you are planning a vacation or thinking about closing your practice, don't miss this webinar. Before catching a plane or winding down your legal career for good, ensure that you comply with your ethical obligations when you temporarily or permanently leave your practice. This webinar will cover the applicable Model Rules of Professional Conduct related to planning for a temporary absence from office and considerations when planning your retirement. Join Attorney Protective as we discuss best practices to avoid ethics violations when you are out of office.

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