

“LIVEN THEIR LIFE UP JUST A LITTLE BIT”:^{*}
GOOD PACING PERSUADES JUDGES

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It's a word I've used a lot because I think it's important: good pacing. . . . The pacing—bringing the reader along at the particular speed you want, for the effect you want—is, I think, very important.

*Chief Justice John G. Roberts, Jr.*¹

Introduction

Pacing is a critical component of great fiction writing, but it is rarely mentioned in legal writing. That is a shame. We lawyers should consciously consider how the pacing in our legal briefs can “liven [the judge’s] life up just a little bit.”² Once a lawyer has engaged the judge then the lawyer can persuade the judge.

Pacing is simply the speed at which a writing or a story “unfolds.”³ The word “pace” is originally from the Old French “pas” meaning stride or step.⁴ As used in a legal writing context, pacing refers to the

^{*} *Interview with Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 18 (2010).

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¹ *Roberts Interview, supra* note *, at 40.

² *Id.* at 18.

³ STEPHEN KING, ON WRITING: A MEMOIR OF THE CRAFT 220 (2000). Note that I have no hesitation in citing to King in an academic article even though others have been told that they will not be taken seriously if they study King’s writing. See Sam Jordison, *Which classic is the best page-turner?*, THE GUARDIAN (March 9, 2007),

<https://www.theguardian.com/books/booksblog/2007/mar/09/pageturningclassics> (last visited Oct. 18, 2019). King may be the best living model of a master of pace; ignoring his insights would be ridiculous.

⁴ Online Etymology Dictionary, <https://www.etymonline.com/word/pace> (last visited Oct. 18, 2019). The Old French word “pas” is in turn a derivative of the Latin word “panders” meaning to stretch and “pasus” meaning a

writing techniques that influence the speed at which a reader reads a brief. The speed can be fast, medium, slow, or something in between. Contrary to a commonly held misconception, fast pacing is not always best because some things should unfold slowly. Perhaps the only universal truth about pacing is that balance is the key.

Balanced pacing helps the legal writer control the reader. When I say control, “I don’t mean anything sinister.”⁵ Instead, I simply mean that the legal writer can control, through pacing, how to engage and then persuade the reader. Take a step back and think about the role of the legal brief in helping a judge decide a case.⁶ At its core, a legal brief communicates the strengths of your client’s case and your compelling legal theory to persuade the judge.⁷ A brief with balanced pacing helps draw the reader in by clipping along with speed to create tension and interest, but then slowing down when the reader needs to ponder a complex legal concept.

Pacing is not only a way to make your writing more elegant, even though it does do that. It helps you dictate where and when the reader will read at full tilt and when and where the reader will read steadily and purposefully. Legal writers should aim to make parts of their briefs page-turners.⁸ But after hustling through some parts of the

stretch (of the leg). *Id.* “Pace” is a delightfully flexible word—it can mean walking anxiously across the same space again and again, the strength of the pitch of a thrown cricket ball, the measurement taken when stepping across a distance, or even a group of donkeys. Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/pace>; *What Is a Group of Donkeys Called?*, <https://www.reference.com/pets-animals/group-donkeys-called-999884af97000748> (last visited Oct. 18, 2019).

⁵ IAN GALLACHER, LEGAL COMMUNICATION AND RESEARCH: LAWYERING SKILLS FOR THE TWENTY-FIRST CENTURY 110 (2015). I also agree with Gallacher that, “[t]his doesn’t reflect my desire to brainwash my readers or to take over the world.” *Id.*

⁶ Several judges note that the legal briefs are helpful as they decide cases. *See, e.g., Roberts Interview, supra* note *, at 28 (noting that judges “have a responsibility to try to get the right answer on the law”; they want the briefs to help them); TESSA L. DYSART, LESLIE H. SOUTHWICK & RUGGERO ALDISERT, WINNING ON APPEAL 19 (3d ed. 2017) (“It is easier for a judge to write an opinion than for a lawyer to write a brief from scratch; the judge has the advantage of both parties’ work product.”) [hereinafter ALDISERT].

⁷ Judge Aldisert defines an appellate brief as “a demonstration of written, reflective thinking expressed in a logical argument designed to educate and to persuade.” ALDISERT, *supra* note 6, at 15.

⁸ A “page-turner,” first coined in 1972, refers to an engrossing book or story. Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/page-turner> (last visited Oct. 18, 2019). A page-turner is a “book, story, etc., that is difficult to stop reading because it is so

brief, the legal writer should slow down in other parts to allow a reader to process your well-reasoned legal position, so that a decision in favor of your client is inevitable. Pacing can actually help you persuade. And, in the end, “persuasion is the only test that counts.”⁹

Skeptics may suggest that the reason pacing is not often emphasized in legal writing is that it just isn’t that critical. Sure, a skeptic may concede, pacing may make the brief more enjoyable to read. But, unlike accuracy, brevity, and clarity,¹⁰ it isn’t an essential component of legal writing. The skeptic may say that legal writers, always pressed for time, don’t usually have time to think about pacing.¹¹

Yet, one of the best writers on the Supreme Court,¹² Chief Justice Roberts, told us that good pacing is “very important.”¹³ Plus, he mentioned pacing not just once, but seven more times during a one-hour interview about legal writing.¹⁴ It is fair to take his advice at face value.

interesting.” *Id.* A negative connotation dogs the term “page-turner” because the word can be used to refer to a book that, although it was hard to put down, is easily forgotten and has no literary worth. Collins Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/page-turner> (last visited Oct. 18, 2019).

⁹ ALDISERT, *supra* note 6, at 15.

¹⁰ *See, e.g.* HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 324 (7th ed. 2018)(a lawyer has a duty to be accurate); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 5 (2010) (maintaining that “clear explanation is the first goal of most legal writing”); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 314 (7th ed. 2018) (“Communicating clearly and convincing the judge of your competence are two of an advocate’s most important persuasive techniques.”); ALDISERT, *supra* note 6, at 19 (stating how judges report that some briefs are too long, misrepresent the facts or law, or are disorganized).

¹¹ Balance, not just as it relates to pace, is always required in legal writing. Pacing should never come at the expense of accuracy, clarity, brevity, or logic.

¹² Ruth Bader Ginsburg called Roberts “the ‘best’ advocate to come before the Supreme Court.” ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES* 60 (2d ed. 2014) (noting that Ginsburg made the comment when “Roberts was nominated to be Chief”).

¹³ *Roberts Interview*, *supra* note *, at 40.

¹⁴ *See id.* at 11 (asserting that lawyers should add pacing to “take the judge by the hand and lead them along with some degree of drama to get them to . . . the major points”), 16 (explaining how you want the story of the lawsuit to

Chief Justice Roberts highlights both how enjoyable it is to read a brief with good pacing and then he explains what, exactly, happens to the reader when the writer has mastered pacing. He describes the “pleasure”¹⁵ of reading a brief with good pacing with these words: “interesting,”¹⁶ “anticipation,”¹⁷ “page-turner,”¹⁸ and “drama.”¹⁹

But pacing doesn’t just make the brief more enjoyable to read—it can influence persuasion. Pacing has a noticeable effect on the reader. As a reader, Chief Justice Roberts says that pace “draw[s] you in”²⁰ and “carries you on.”²¹ He used the following imagery to further explain that good pacing makes the reader feel “swept along with the argument.”²² This is exactly the reaction a lawyer wants from a reader. A reader who is being swept up and carried on by the legal argument is much more likely to view that argument as correct.²³

I suggest that pacing is a critical tool for legal writing. I explore why pacing has not been emphasized in legal writing; I caution against taking a captive audience for granted. I provide examples of how writers in non-legal disciplines use pacing to make their writing compelling. Legal writers can’t use all the writing techniques available to fiction writers because “the rest of the story”²⁴ is revealed at the

be “a little bit of a page-turner”); 35 (a well-written brief “kind of carries you on”); 38 (“[G]o with the gerund that, again, is better for pacing.”); 38 (“And I’ll spend a lot of time trying to get a sentence to read in a way that seems comfortable and well paced and conveys the meaning and isn’t choppy.”); 40 (acknowledging that he is aware of the pace in a brief).

¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 16.

¹⁹ *Roberts Interview, supra note **, at 11, 16.

²⁰ *Id.* at 40.

²¹ *Id.* at 35.

²² *Id.* at 5.

²³ Stories are persuasive, “even to lawyers and judges.” RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 39 (2013). Justice Antonin Scalia and Bryan Garner pointed out, “[t]o say that your writing must be clear and brief is not to say that it must be dull.” ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 112 (2008).

²⁴ This is a reference to the Paul Harvey radio show. Harvey told a story, took a commercial break, and then told “the rest of the story,” which almost always had an O. Henry surprise ending. Edward Walsh, *This is Paul Harvey*, THE WASHINGTON POST (July 7, 1995), https://www.washingtonpost.com/archive/lifestyle/1995/07/07/this-is-paul-harvey/b0c98823-ce93-4aab-933b-3d93f5c79f82/?utm_term=.65caaac744ef (last visited Oct. 18, 2019).

beginning of legal briefs, but lawyers can still create tension and interest in briefs plus slow down so that the reader can process the legal argument.

Unlike musicians, lawyers cannot annotate their briefs with tempo marks to tell the reader when to speed up and when to slow down. Yet lawyers can accomplish the same effect with a few writing techniques. Don't be discouraged if you have never deliberately thought about pacing when writing legal briefs. Many legal writers unconsciously write with great pacing. Also, many of the legal writing habits legal writers have conscientiously thought about, such as telling the client's story, varying the length of sentences and paragraphs, and carefully choosing punctuation, have also improved pacing. I end with tips which will give you more arrows to fill your quiver as you seek to persuade through pacing. These writing techniques are illustrated with examples from Chief Justice Roberts's writing, long before he was Chief Justice, in the *United States v. Kokinda* Petitioner's brief.²⁵

I. All Readers, Even Captive Judges, Appreciate and Are Influenced by Pacing

Most writers have to “capture the reader immediately and force him to keep reading.”²⁶ Stephen King explains that book buyers “want a good story . . . that will first fascinate them, then pull them in and keep them turning the pages.”²⁷ It's simple economics for almost all professional writers—if readers don't pick up your book or story and then keep reading then you have no book or story to sell. Pacing is the primary tool writers use to get and keep readers. Pacing makes the story a page-turner and allows the writer to make the work irresistible. “Anything will do [to entice a reader], as long as it nudges his curiosity and tugs at his sleeve.”²⁸ The test is not over yet; once the reader picks up the book, the writer must keep the reader

²⁵ Brief for the United States, *United States v. Kokinda*, No. 88-2031 (U.S. Nov. 16, 1989). <C:\Users\asoled\Downloads\9> (last visited Oct. 18, 2019).

²⁶ WILLIAM ZINSSER, *ON WRITING WELL: THE CLASSIC GUIDE TO WRITING NONFICTION* 55 (7th ed. 2016).

²⁷ KING, *supra* note 3, at 160. King suggests that readers are more likely invested in the story if they “recognize the people in a book, their behaviors, their surroundings, and their talk.” *Id.*

²⁸ ZINSSER, *supra* note 26, at 55.

“inquisitive.”²⁹ Pacing helps the writer control the reader’s emotional reaction to the writing. Slowing down signals to the reader that the text should be savored, pondered, and understood at a deep level.

Maybe pacing isn’t emphasized in legal writing because lawyers think they have a captive audience. Lawyers may think they don’t have to convince judges to read briefs because judges’ jobs require them to read what lawyers write. I’m not so sure. I’ve never seen a rule that requires this. All can agree that judges are required to reach a decision and announce that decision,³⁰ but they could use a variety of methods to reach that end. Sure, it is customary for judges to either read, or at a minimum pretend to read, all the submitted briefs. Many judges have gone on record saying that the briefs are an essential part of their decision making.³¹ Yet I’ve heard judges admit that they skim some briefs. Others say that they closely read only the reply brief because presumably it will provide the most efficient way to see the main arguments and counterarguments. Others start by reading all the binding cases cited in the briefs and then turning to the briefs only to supplement their understanding of the law. Still others rely on their law clerks to thoroughly read the briefs and prepare bench memos summarizing the relevant law.³²

But that isn’t really the point. The point is that we legal writers should stop taking our audience for granted.³³ Instead, lawyers should adopt the attitude of fiction writers: I need to entice this reader into both starting and then continuing to read my brief. Judge

²⁹ *Id.*

³⁰ One appellate judge noted that a published opinion “may not truly be revealing of what influenced the court.” Randall Tietjen, *An Inarticulate Premise Intuitively Felt*, 39 Wm. Mitchell L. Rev. 784, 790 (2013). “In their written opinions,” the judge continued, “judges are not necessarily expected to state the reasons for deciding as they did, but only to justify their decision with reasoning that is respectable and authorities that are appropriate.” *Id.*

³¹ See *Roberts Interview*, *supra* note *, at 6 (“We depend heavily on the lawyers.”).

³² I really don’t have any idea what percentage of judges thoroughly read every single brief submitted. And I’m not sure how anyone would ever be able to find the answer to that question because it is unlikely that many would admit to anything less than a complete reading of all briefs.

³³ Lawyers aren’t the only ones who take advantage of their audience. Some criticize history writers for failing to capture and engage their captive audiences—dissertation supervisors and students. See Gordon Wood, *In Defense of Academic History Writing* (April 1, 2010) (citing Barbara Tuckman), <https://www.historians.org/publications-and-directories/perspectives-on-history/april-2010/in-defense-of-academic-history-writing> (last visited Oct. 18, 2019).

Aldisert recognized this when he noted that “[a]ttention is a necessary condition for persuasion.”³⁴ A judge will only act if the writer gains and then maintains the judge’s attention.³⁵

Also, lawyers should acknowledge one obvious downside about a judge’s job: reading briefs can be boring. Pacing engages a reader, making the entire reading experience a pleasure instead of a pain. Chief Justice Roberts hints at this:

I think pacing is so important, whether you’re a lawyer writing a brief or a judge reading it. You want to take the judge by the hand and lead them along with some degree of drama to get them to—when you’re going to be making the major points—have some degree of anticipation. And if they’re slogging through each sentence because it’s just not very clear, you’re going to lose that, and then it becomes a real chore, as opposed to a pleasure.³⁶

Even Chief Justice Roberts felt a little sheepish admitting that reading briefs isn’t always scintillating. He laughed when he said, “Think of the poor judge who is reading, again, hundreds and hundreds of these briefs. Liven their life up just a little bit in some cases [laughter] with something interesting.”³⁷

Maybe lawyers have somehow equated difficult or boring to read with intelligence. Any hesitations about writing to engage the reader strike me as snobbish and wrong. Literary critics have considered the same dilemma by asking whether a page-turner can ever be considered a literary classic.³⁸ One literary critic wondered,

Is there something inherently less valuable about compelling easy reads? Is there some kind of equation where the amount of effort you put in to [reading] a book is [equaled] and compensated by intellectual reward? Will *Ulysses* therefore always be worth more

³⁴ ALDISERT, *supra* note 6, at 16.

³⁵ *Id.*

³⁶ *Roberts Interview, supra* note *, at 11.

³⁷ *Id.* at 18. Chief Justice Roberts also laughed when he explained that he was well aware of Bryan Garner’s “crusade” to move citations to footnotes. *Id.* at 38-39. Chief Justice Roberts doesn’t view the placement of citations in the text as disruptive. *Id.* at 39.

³⁸ Jordison, *supra* note 3.

to the serious reader than *Right Ho, Jeeves*, no matter how beautiful Wodehouse's style?³⁹

Lawyers should not hesitate to make legal briefs engaging. One appellate judge noted that “the human mind . . . tends to hover, until finally, it alights on a conclusion.”⁴⁰ The good use of pace will not make a judge assume the legal analysis is simplistic or incorrect; balanced pacing will instead persuade the human mind that the conclusion proposed in the brief is correct.

A well-written and engaging brief really has only one risk—the good writing can mask incorrect legal analysis. Chief Justice Roberts noted that good writing can cover up some weaknesses, which may be fine, but that judges need to be “on guard” when reading good writing that the legal analysis is “not right.”⁴¹ A lawyer has an ethical obligation to be honest about the law and facts, and to be an officer of the court, so this should not stop any lawyer from using all the techniques of good writing, including pacing.

Although pacing is often ignored in legal writing, a related concept called “flow” is emphasized. Flow in legal writing means that the brief is easy to follow.⁴² The writer guides the reader by using a familiar logical structure and providing transitions and logical links.⁴³ Thus, writers are advised to pay attention to flow at the sentence, paragraph, and section level.⁴⁴ Sometimes words like “choppy” or “wordy” are used to suggest that a brief lacks flow; these criticisms suggest that the rhythm of the brief was off. So, when flow is used to suggest this lack of rhythm then flow and pace overlap. But they are two different qualities. A brief could have perfect flow with well-explained logical

³⁹ *Id.*

⁴⁰ Tietjen, *supra* note 30, at 790.

⁴¹ *Roberts Interview*, *supra* note *, at 23.

⁴² Gallacher defines flow as “the unbroken movement of a reader’s eyes from left to right across a page, from the top of the page to the bottom, and from one page to the next” GALLACHER, *supra* note 5, at 109. The use of the word “flow” in writing stems from its definition as “moving in one direction,” thus describing how a reader can easily move in one direction, without rereading, through the writing. See Oxford Dictionary, <https://en.oxforddictionaries.com/definition/flow> (last visited Oct. 18, 2019).

⁴³ See CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 11 (2d ed. 2013) (suggesting that editing should include “tweak[ing] transition sentences and topic sentences so that your discussion flows well”).

⁴⁴ GALLACHER, *supra* note 5, at 108-09, 116 (explaining that sentences “should flow from one to the next”; paragraphs should also “flow on from each other”).

connections and stellar transitions, but no pace. A brief could have perfect and varied pace, but no flow. Think about the difference between flow and pace in running. A runner could have perfect flow with just the right stride length and an economy of motion, but that perfect flow is separate from how fast or slow the runner runs. In the same way, the flow of a brief is distinct from its pace.

II. What Musicians, Athletes, and Other Writers Can Teach Lawyers about the Value of Pacing

Musicians know that pacing is critical to create interest, excitement, relaxation, and tension.⁴⁵ Tempo, the Italian word for “time,” is “the speed at which music unfurls through time.”⁴⁶ In short, it is the speedometer of the music.⁴⁷ Measured in beats per minute, tempo markings indicate variations from 20 to 208 beats per minute.⁴⁸ Musicians manipulate the tempo in a piece, from very slow (*largo*), to slow (*adagio*) to walking speed (*andante*) to moderate pace (*moderato*) to fast (*allegro*) to very fast (*presto*).⁴⁹ Tempo may change frequently in one musical piece “to generate interest or certain feelings for the listener.”⁵⁰ And musicians have a way to indicate that the music is slowing down (*ritardando*) or speeding up (*accelerando*). Beethoven believed that a proper tempo could determine the success

⁴⁵ Lawyers often reference music when discussing good and bad writing. Chief Justice Roberts explained what it is like to hear a lawyer use “a wrong bit of grammar” during an oral argument: “[I]t’s like music. If you’re listening to music and somebody hits the wrong note, it kind of detracts from it, and you hear it. It’s the same way there . . . you’re noticing the [incorrect] words. And that’s unfortunate.” *Roberts Interview, supra note **, at 12. Gallacher advises that one paragraph should move “irresistibly” to the next through “an almost musical sense of balance and forward movement.” GALLACHER, *supra* note 5, at 116. Zinsser “loved” to rewrite, “I like to rephrase a drab sentence to give it a more pleasing rhythm or a more graceful musical line.” ZINSSER, *supra* note 26, at 87.

⁴⁶ LEO SAMAMA, *THE MEANING OF MUSIC* 29 (2014).

⁴⁷ *Tempo: Definition and Uses in Musical Forms*, <https://study.com/academy/lesson/tempo-definition-and-uses-in-musical-forms.html> (last visited Oct. 18, 2019).

⁴⁸ *Id.*

⁴⁹ Jordan Drum, *Tempo in Music*, <https://www.phoenixsymphony.org/uploads/Tempo.pdf>. Note that this is only a partial list of the most common tempo markings.

⁵⁰ *Id.*

of a new piece.⁵¹ Indeed, he considered tempo an integral part of “character”—“the most essential” element of his music.⁵²

Athletes also know the value of pacing. Runners have even borrowed musical terminology to incorporate “tempo runs” into training.⁵³ Tempo runs are run at speeds just below an all-out effort that hone physical and mental toughness.⁵⁴ Distance runners tirelessly train to pace themselves during a race, so that they can run the race at the fastest speed without tiring before the finish line.⁵⁵ Swimmers also know that pacing is critical.⁵⁶ Swimming coaches advise competitive swimmers to “hold back” and keep emotions and excitement under control to prevail.⁵⁷

Our closest kin in the use of pace are other writers. Mystery, thriller, and suspense writers leap to mind, but the subjects of their books offer an advantage that we lawyers do not have. We cannot make up facts to make the story a thriller. We cannot make up the law to create an unexpected twist. And lawyers know that legal briefs are not mystery novels because we give away the conclusion—what the case is about and why your client should win—on the very first page of the brief.⁵⁸

⁵¹ Rudolph Kolisch, *Tempo and Character in Beethoven’s Music*, THE MUSICAL QUARTERLY, Vol. 77, No. 1, 95 (1993).

⁵² *Id.* at 98.

⁵³ Kevin Beck, *What exactly is a Tempo Run*, Runner’s World (Aug. 22, 2018), <https://www.runnersworld.com/advanced/a20827239/what-is-a-tempo-run/> (last visited Oct. 18, 2019).

⁵⁴ *Id.*

⁵⁵ Coach Jeff, *The 5 Most Common Marathon Training Mistakes*, <https://runnersconnect.net/coach-corner/training-for-a-marathon-common-mistakes/> (last visited Oct. 18, 2019).

⁵⁶ Gary Hall, Sr., *How to Pace Your Race* (Jan. 8, 2018), <https://swimswam.com/how-to-pace-your-race/> (last visited Oct. 18, 2019).

⁵⁷ *Id.*

⁵⁸ Judge Aldisert was direct about the need to immediately state the conclusion:

[Judges] need and expect to know what a given case is about, and the opening . . . should tell them immediately. Detective mysteries and narratives with surprise endings have their place—in fiction. But apply these techniques to brief writing and you risk losing your audience. . . . [I]t is important that the brief writer give an early signal to the reader. That signal is the opening or orientation paragraph of the summary of the argument.

ALDISERT, *supra* note 6, at 208.

Instead, writers who have incorporated pace even though the genre they write is not, on its face, suspenseful, are better examples for lawyers. Authors lauded for their pace when pace is not expected can motivate us to do the same in our legal briefs. Charles Dickens used pace even when it was not essential to his narrative. One reviewer noted, “Nobody could board a stagecoach like Charles Dickens: he could make its headlong progress menacing, doom-laden or deliriously happy.”⁵⁹ Nonfiction books also benefit from pacing, “[Steve] Bender has done the almost impossible: He has written a garden guide that is a real page-turner.”⁶⁰

Authors who slow the reader down are equally inspiring. Here is what a book critic at *The Guardian* said when describing the first story in Donal Ryan’s novel *From a Low and Quiet Sea*:

Ryan keeps the pace deliberately slow, with long, dense paragraphs that are as absorbing as they are convincing. An educated man and a doctor, Farouk’s story develops in a manner that I suspect is painfully familiar to anyone who has been forced to flee the country of their birth under cover of night.⁶¹

As in music, the pace in writing controls both speed and emotional impact.

Good lawyers persuasively state why they should win at the beginning of the brief. But that is no excuse to write a tiresome legal brief. Many, many other authors have revealed the climax of their

⁵⁹ *Weatherwatch: Dickens Piles on the Pace and Atmosphere*, <https://www.theguardian.com/news/2011/sep/23/weatherwatch-dickens-fog-trees> (last visited Oct. 18, 2019).

⁶⁰ S. LIVING 50, July 2018 (advertisement quoting Mother Nature Network for STEVE BENDER, THE GRUMPY GARDENER: AN A TO Z GUIDE FROM THE GALAXY’S MOST IRRITABLE GREEN THUMB (2018)). The advertisement also includes Bender’s Rule #19: “Forecasting the day of your last spring frost is easy. It always comes right after you set out your impatiens.” *Id.* The Columbus Dispatch called Bender’s book, “Irreverent, opinionated and so much fun to read.” *Id.*

⁶¹ Donal Ryan, *From a Low and Quiet Sea*, <https://www.theguardian.com/books/2018/mar/30/from-a-low-and-quiet-sea-by-donal-ryan-review> (last visited Oct. 18, 2019). Critic John Boyne noted that Farouk, a Syrian refugee, “escapes his homeland with his wife and daughter for what he hopes will be a brighter future in western Europe. Readers of the novel instantly realize that this hope is dashed in a painful, but predictable, tragedy.” *Id.*

stories on the first page while still creating works with great pacing. Here are a few examples of revealing first sentences:

At the outset Verna had not intended to kill anyone.⁶²

All happy families are alike; each unhappy family is unhappy in its own way.⁶³

It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.⁶⁴

When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow.⁶⁵

Readers know from the outset that Joe Rantz will win an Olympic gold medal in rowing at the 1936 Olympic Games in Berlin, but that doesn't stop anyone from compulsively reading the compelling story of how he became one of the "boys in the boat."⁶⁶ And we know from the very first song in *Hamilton: The Musical* how Alexander Hamilton's life will end because Aaron Burr sings that he is "the damn fool that shot him."⁶⁷

Even when the ending of a story is very well-known, like it is in a legal brief, a talented writer knows the value of pacing. A book critic made this precise point when reviewing Erik Larson's *Dead Wake: The Last Crossing of the Lusitania*, "Expertly ratcheting up the tension (note how, as the disaster draws closer, the chapters become shorter), Larson puts us on board with these people; it's page-turning history, breathing with life."⁶⁸

⁶² Margaret Atwood, *Stone Mattress*, THE NEW YORKER (Dec. 11, 2011), <https://www.newyorker.com/magazine/2011/12/19/stone-mattress/> (last visited Oct. 18, 2019).

⁶³ LEO TOLSTOY, ANNA KARENINA 3 (Modern Library Paperback ed. 2000) (1877).

⁶⁴ JANE AUSTEN, PRIDE AND PREJUDICE, in THREE COMPLETE NOVELS: SENSE AND SENSIBILITY; PRIDE AND PREJUDICE; EMMA 267 (Barnes & Noble, Inc. 1997).

⁶⁵ HARPER LEE, TO KILL A MOCKINGBIRD 3 (Warner Books ed. 1960).

⁶⁶ DANIEL JAMES BROWN, THE BOYS IN THE BOAT (2013).

⁶⁷ Lin-Manuel Miranda, *Hamilton* lyrics available at *Alexander Hamilton Original Broadway Case of Hamilton*, GENIUS, <https://genius.com/Original-broadway-cast-of-hamilton-alexander-hamilton-lyrics> (last visited Oct. 18, 2019).

⁶⁸ Moira McDonald, *Dead-Wake: Page-turning tale of the Lusitania's last days*, SEATTLE TIMES (March 1, 2015), <https://www.seattletimes.com/entertainment/books/dead-wake-page-turning-tale-of-the-lusitanias-last-days-book-review/> (last visited Nov. 3, 2019).

Many of the tools available to other writers are simply not options for lawyers. But that only increases the importance of pacing because it may be the only tool lawyers have to make legal briefs page-turners. Plus, it is a proven way to slow down reading speed when a reader needs to process information.

III. Balanced Pacing Is Key

Two great writers in dramatically different disciplines—Stephen King in suspense and Chief Justice Roberts in law—both suggest a mixture of pacing to achieve balance. Writers often assume that a fast pace is preferable.⁶⁹ Not always. King, a master at pacing, suggests “a happy medium.”⁷⁰ King says writers can “overdo the speed thing” and he likes “a slower pace and a bigger, higher build.”⁷¹ Chief Justice Roberts says, “But you’re certainly aware of [pacing]—whether it’s the shorter sentences that give you a quicker pace as you’re reading through it to get to a particular point as the drama’s building up, or a sentence that’s going to cause you to pause a little bit more, to slow down.”⁷²

Variety in pacing maintains reader interest while also recognizing that some things are harder to understand, so a reader needs some comprehension time. As readers, we easily relate to the advantages of fast pacing. We have all read page-turners that pulled us along, so that we could not resist reading one more page, paragraph, or word. We are interested, but we are not as focused in our haste to find out exactly what happened.

Consciously speed up the pace when you want to draw the legal reader into the controversy. A fast pace could be used in the beginning of a legal brief to catch the reader’s attention. The Statement of Facts in a brief can be another appropriate place to sprinkle in fast pacing.⁷³ Linda Edwards urges readers, “Aim for a beginning that sparks the

⁶⁹ King notes that it is “largely bullshit” to say fast-paced stories and novels are more commercially successful. KING, *supra* note 3, at 220-21.

⁷⁰ *Id.* at 221. King also recommends a “happy medium” for description because “[t]hin description leaves the reader feeling bewildered and nearsighted,” but “[o]ver description buries him in details and images.” *Id.* at 174.

⁷¹ *Id.* at 221.

⁷² *Roberts Interview, supra* note *, at 40.

⁷³ EDWARDS, *supra* note 10, at 284-90. Linda Edwards includes 30 tips for writing persuasive facts in her book.

judge' interest . . . do try to draw the judge into the story.”⁷⁴ But readers may not remember the details of fast-paced sections, so if those details are important then the pace should slow down.⁷⁵

Slow the pace when a reader needs time to think. Justice John Simonett, a gifted writer on the Minnesota Supreme Court, said that in his early years as a lawyer he often took his glasses off and carefully cleaned them after clients asked him a question.⁷⁶ “This gave him time to think, he said, without looking like he didn't know the answer.”⁷⁷

Consciously slow the pace in a brief when the judge needs time to take off and clean her glasses. When might you need that slow pace for a “higher, slower build” or to allow time for comprehension? A good rule may be to remember where and when you struggled and had to slow down to understand the law or how it applied in this case. Those places will likely be the places where your reader also needs time.

A medium pace, charmingly called a “walking speed” in music, is appropriate in other places. Briefs often include rules about the cause of action, such as the elements for a tort. In many cases, these sections can be written with medium pacing.⁷⁸

IV. Tips for Adding Pace to Your Briefs

Unlike musical scores, our briefs do not have tempo designations. We have no shorthand way to tell the reader that this section of the brief should be read quickly, but please slow down for this section. But we can incorporate several writing techniques to help us speed up or slow down the reader. This section offers several tips. It uses examples from Chief Justice Roberts's writing when he was a lawyer. Roberts⁷⁹ is not the only listed author on the *United States v. Kokinda*

⁷⁴ *Id.* at 285.

⁷⁵ “Occasionally, when you want the reader to slow down and take in the significance of the material in all parts of the sentence, place a phrase or dependent clause in the middle of the sentence, interrupting the reader's direct path from the subject directly to the verb.” *Id.* at 287-88.

⁷⁶ Tietjen, *supra* note 30, at 793.

⁷⁷ *Id.* Simonett wryly noted that he would not have been able to get through his first years of practice if he had worn contact lenses. *Id.*

⁷⁸ This is not always true. Sometimes the appropriate standard of review is hotly contested or a lawyer's entire theory of the case may depend on whether the opponent has met the legal standard for a motion to dismiss. In those situations, the lawyer should thoughtfully reveal the appropriate legal standard with a pace that highlights the issue.

⁷⁹ Note that I refer to Chief Justice Roberts as “Roberts” to indicate when he was writing as a lawyer.

brief, but the brief is packed with his unique style, such as use of the phrase “so too here.”⁸⁰ It is fair to assume that he was the principal author of the brief; even if he wasn’t, the brief still provides examples of great pacing. Also, the brief must have been persuasive because the United States Supreme Court ruled in favor of the United States.⁸¹

1. Tell a page-turning story—yes, even in a legal brief.

All lawsuits are stories; lawyers must tell a good story to persuade. Chief Justice Roberts highlighted the reality that lawyers are storytellers, “It’s got to be a good story. Every lawsuit is a story. I don’t care if it is about a dry contract interpretation; you’ve got two people who want to accomplish something, and they’re coming together—that’s a story.”⁸²

Just telling the story is not enough. It should be told so effectively that it is a page-turner. Chief Justice Roberts explained, “And you’ve got to tell a good story. Believe it or not, no matter how dry it is, something’s going on that got you to this point, and you want it to be a little bit of a page-turner, to have some sense of drama, some building up to the legal arguments.”⁸³

Chief Justice Roberts pointed out that even mini-stories, like the story he told about how the Red Dog Mine was named in the *Alaska v. EPA* case, can motivate the reader.⁸⁴ He highlighted this slice from his own lawyer days:

⁸⁰ Brief of Petitioner at 47, *Alaska, Dep’t of Envtl. Conserv. v. EPA*, 540 U.S. 461 (2004). Ross Guberman pointed out that Justice Elena Kagan used the phrase “so too here” in her opinion in *Fry v. Napoleon Community Schools*. Ross Guberman, *Legal Writing Pro, Five Ways to Write Like Justice Kagan*, LEGAL WRITING PRO (MARCH 20, 2018), <https://www.legalwritingpro.com/blog/five-ways-write-like-justice-kagan/> (last visited Nov. 22, 2019). He recognized this as one of Chief Justice Roberts’s unique phrases and asked, “Was she trying to get Chief Justice Roberts’s vote with that phrase?” *Id.*

⁸¹ *United States v. Kokinda*, 497 U.S. 720 (1990).

⁸² *Roberts Interview*, *supra* note *, at 16.

Characterizing every lawsuit as a story has advantages; there can be no debate about whether lawyers should tell a good story. *Cf.* Wood, *supra* note 33 (noting all history is narrative; some history is, instead, analytical).

⁸³ *Id.* Ian Gallacher suggests that, “[Y]our entire document—facts and legal analysis—should be one coherent story that draws the reader in and carries the reader through the entire document.” GALLACHER, *supra* note 5, at 253.

⁸⁴ Roberts wrote:

You've got to find some way of trying to bond your reader with the brief. He can pick it up later on and say, "Oh, this is the case about" And it can be something silly. I remember I had a cert petition once with a mine in rural Alaska. It was called the Red Dog Mine. Well, I didn't know why it was called the Red Dog Mine, so you do some research. It's a fascinating story about a guy with his plane and his faithful red dog delivering emergency medicine in a blizzard, and the plane crashes, and the dog dies. You waste a couple of sentences in a brief, but you put that in there, and it's kind of interesting. Then everybody remembers that. Oh, that's the case about the Red Dog Mine. And they're kind of invested in it, and they want to see how the story ends up, and it gives a little texture to the brief.⁸⁵

Roberts did not "waste a couple of sentences" in that brief. Instead, those few sentences were the essence of how Roberts built empathy for his client when a reader's normal inclination may be to dislike the company accused of polluting the pristine Alaska wilderness. This storytelling, if done with the correct pacing, makes the lawyer "invested in it" which can then lead to being persuaded by the story.

For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek.

Brief for the Petitioner at 7-8, *Alaska v. EPA*, 540 U.S. 461. In his book, *Point Made: How to Write Like the Nation's Top Advocates*, Ross Guberman uses this brief to make several points about good writing. See GUBERMAN, *supra* note 12, at 59-60, 212, 223, 227, 239, 260, 263, 266, 273, 282, 304-05, 345-53.

⁸⁵ *Roberts Interview*, *supra* note *, at 17-18.

In *United States v. Kokinda*, the Supreme Court faced the question of “whether a United States Postal Service regulation that prohibits ‘soliciting alms and contributions’ on postal premises violated the First Amendment.”⁸⁶In just two paragraphs written with a quick pace, Roberts told the story of how the conflict arose:

Respondents are members of the Democratic Policy Committee, a political advocacy group. On August 6, 1986, they set up a card table near the entrance to a post office in Bowie, Maryland, located on a major suburban thoroughfare. The table was located approximately five or six feet from one of two entrances to the post office. The table stood on, and partially blocked, a seven-foot wide concrete walkway that runs along the entire length of the post office and separates the building from the surrounding parking lot. The walkway, which provided the sole route from the parking lot to the building entrance, was entirely on Postal Service property, and was at all points more than 75 feet from the street and the public sidewalk abutting the street.

For several hours, respondents attempted to “[get] the . . . attention” of postal patrons as they passed between the parking lot and the post office building. Respondents called out questions about the problem of illegal drug use and drew patrons’ attention to publications they were offering for sale. They requested contributions for their organization, sold subscriptions to the organizations’ newspaper, and distributed literature and pamphlets. During the several hours that respondents were soliciting, postal employees received between 40 and 50 complaints about the respondents’ activities. Eventually, the Bowie postmaster approached respondents and requested that they leave. When they refused, Postal Inspectors were called to the scene. After observing respondents’ activities, the Postal Inspectors supplied respondents with a copy of the pertinent postal regulations and asked them to remove their table and

⁸⁶ *Kokinda*, 497 U.S. at 722-23.

leave the premises. When respondents again refused they were arrested.⁸⁷

Roberts turned the facts into a page-turner because he drew the reader into the story. The reader is interested in knowing the rest of the story—not what happened on the day in question, but in whether the postal regulation will be found Constitutional.

But that wasn't the only story Roberts told in the brief. He drew the reader in with other mini-stories. He noted, “[C]ustomers may steal precious time from the workday or the weekend to make a trip to the post office Whatever may have been the case in times past, few people nowadays go to the post office simply to pass the time—and certainly not to the Bowie post office off busy Route 197.”⁸⁸ These details help any reader, including Supreme Court Justices, relate to the everyday activity of stopping at the post office. And the busy Route 197 is likely a familiar highway to the Justices who work in nearby Washington, D.C.

One final example demonstrates that Roberts knows what he is talking about when he says lawyers can “liven up” the lives of judges. After pointing out that the Postal Service faces competition from the private sector, Roberts wrote:

The Postal Service's competitors are not constrained by rules that require them to share their facilities with public advocacy groups. Customers visiting a Federal Express or DHL outlet, for example, are not required to run a gauntlet of hawkers bombarding them with questions about social issues and importuning them to donate money or subscribe to a particular journal of opinion. Like those private delivery services, the Postal Service should be able to shield its customers from unreasonable interference and annoyance, and to provide a businesslike setting in which patrons can purchase services undisturbed by unwelcome confrontations.⁸⁹

⁸⁷ Brief for the Petitioner at 4-5, *United States v. Kokinda*, 497 U.S. 720 (1990).

⁸⁸ *Id.* at 33-34.

⁸⁹ *Id.* at 35-36.

2. Write with enthusiasm.

All of us can relate to the common human experience of being roped into listening to someone talk about something you have absolutely no interest in. It happens at dinner parties and near the workplace cooler as often as during formal presentations. Once in a while, you are shocked to discover that you are suddenly interested. The change from boredom to engagement happens when the speaker is enthusiastic.

Enthusiasm is just as useful to engage judges. Most lawyers can vaguely remember when they felt enthusiastic about the case—probably when they first met the client or when they learned more about what exactly happened that led to the lawsuit. It can be hard to keep that same level of enthusiasm after hours of discovery, months of motions, and multiple meetings with stressed clients. To write with good pace, lawyers must dig deep to rekindle that spark of enthusiasm.

Roberts showed that enthusiasm by interweaving his legal theory of the case that not all sidewalks are public forums with the practical result of a ruling against the Postal Service:

The fact that the post office access walkway lies out of doors and contains sections of pavement resembling an ordinary municipal sidewalk does not transform it into a public forum. . . . It is the *use* to which government property is put or for which it is designated, not its physical characteristics, that determines whether it is a public forum. Otherwise, every strip of pavement located on private property would qualify as a public forum, and every patch of grass would qualify as a public park.⁹⁰

Roberts connected to the Post Office,⁹¹ in part, through empathy for its plight in facing throngs of solicitors on their property. In the next pages of his brief, he came back to his theme that it simply is not practical for a Court to hold that “any horizontal strip of concrete located on publicly owned property would have to be considered a

⁹⁰ *Id.* at 13.

⁹¹ Note that Roberts technically represented the United States. The Defendants were convicted of soliciting contributions in front of the Post Office, thus violating a Postal Service regulation. *Kokinda*, 497 U.S. at 737.

public forum.”⁹² Roberts was enthusiastic about the striking position he was taking on behalf of the Post Office; he used two similar phrases “every strip of pavement” and “any horizontal strip of concrete” to make his point.

3. Shorter sentences “give you a quicker pace as you’re reading through it to get to a particular point as the drama’s building up”; longer sentences “cause you to pause a little bit more, to slow down.”⁹³

Advice about sentence length abounds. Suggestions include, “Never write a sentence with more than 12 words” or “Never use more than two forms of punctuation in any sentence.” A computer program can tell you the average length of your sentences, presumably so that you have a quick and reliable way to test whether your sentences are too long.⁹⁴

But writers who are aware of the power of pacing know that general rules about sentence length are not helpful. The artful writer controls and varies the length of sentences,⁹⁵ knowing that sentence length affects pace. A sequence of several short sentences can create “urgency,” “terse certainty,” or “passion.”⁹⁶ Yet all writers know that this technique can be overdone. Writing too many short sentences in a row can be choppy; an even greater risk is that a reader will find the prose “simplistic.”⁹⁷ Roberts used the power of the short sentence when he wrote, “Congress created the Postal Service for one purpose only: to deliver the mail.”⁹⁸

⁹² Brief for the Petitioner at 14, *United States v. Kokinda*, 497 U.S. 720 (1990).

⁹³ *Roberts Interview*, *supra* note *, at 40.

⁹⁴ WORD COUNT TOOL – WORD COUNTER, <https://wordcounttools.com/> (last visited Oct. 18, 2019) (the average sentence length is calculated as follows, “The number of words divided by the number of sentences”).

⁹⁵ JOSEPH M. WILLIAMS, *STYLE: TEN LESSONS IN CLARITY AND GRACE* 206 (6th ed. 2000).

⁹⁶ *Id.* at 206-07.

⁹⁷ *Id.* at 256.

⁹⁸ Brief for Petitioner at 11, *United States v. Kokinda*, 497 U.S. 720 (1990). Sentence fragments can change cadence. JILL BARTON, *SO ORDERED: THE WRITER’S GUIDE FOR ASPIRING JUDGES, JUDICIAL CLERKS, AND INTERNS* ch. 9 (2017). United States Supreme Court Justices “today regularly drop them into their opinions.” *Id.* at 148. When used appropriately, sentence fragments draw attention. *Id.* at 149. Roberts uses “so too here” as both a sentence fragment and a phrase. *See supra* note 80 and GUBERMAN, *POINT MADE*, *supra* note 12, at 352.

Long sentences are often necessary to express complex ideas; these long sentences should still be clear and easy to read.⁹⁹ Law is rife with complex ideas, so explaining those ideas is a time when a writer should choose a longer sentence length. Here is an example from Roberts: “The past practice of conferring broad discretionary authority on local administrators to deny permission to all but a few organizations seeking occasional access, and the longstanding requirement that prior approval from Postal Service administrators be obtained for solicitation, are incompatible with any intent to create a public forum.”¹⁰⁰

Short paragraphs, just like short sentences, quicken pace.¹⁰¹

Roberts used a short paragraph here to speed up the pace, but also reiterate his point that not all sidewalks are public forums:

Although “most sidewalks” serve as general public thoroughfares, a great many public buildings throughout the country contain access walkways that do not function in this manner. Rather, these walkways are designed to funnel employees and patrons to and from the buildings they serve. The walkway at issue in this case serves just such a purpose. It is not a general thoroughfare providing access to a variety of locations.¹⁰²

Here is another short paragraph that speeds along, but also adds weight to Roberts’s point that solicitation impedes postal business:

The Postal Service’s decision to ban all solicitation, in light of its previous experience with rules permitting selective fundraising by charitable organizations, was based on similar considerations. As the Postal Service explained: The Solicitation of alms and contributions is an inherently more aggressive form of conduct, and

⁹⁹ WILLIAMS, *supra* note 95, at 166. Williams suggests several principles to help writers maintain clarity when writing long sentences: start with subjects, get to the verb quickly, get to the object, and control sprawl. *Id.* at 168-75.

¹⁰⁰ Brief for Petitioner at 31, *United States v. Kokinda*, 497 U.S. 720 (1990).

¹⁰¹ One sentence paragraphs allow readers to “catch their breaths.” Gerald Lebovitz, *Do’s, Don’ts, and Maybes: Usage Controversies—Part II*, N.Y. ST. B. ASS’N. J. 50 (July/Aug. 2008). He recommends using one-sentence paragraphs sparingly for dramatic effect. *Id.*

¹⁰² Brief for Petitioner at 25, *United States v. Kokinda*, 497 U.S. 720 (1990).

more likely to hinder the orderly transaction of postal business, than is the expression of ideas.¹⁰³

Long paragraphs cause the reader to slow down. Roberts also wrote long, detailed paragraphs in the brief. Those paragraphs were designed to help the reader steadily and deliberately read the Circuit Court judge's dissent,¹⁰⁴ the explanation of "areas not traditionally dedicated to public expression but intentionally opened by the government for that purpose,"¹⁰⁵ and the history of postal service regulations showing that the government "ha[d] not intentionally created a forum for speech."¹⁰⁶

As just one example, Roberts wrote this long paragraph:

Under this standard, the Postal Service's prohibition on solicitation is clearly valid. First, the no-solicitation rule does not pick and choose among speakers on the basis of point of view or subject matter, and is thus content-neutral. Second, in enhancing the government's ability to provide postal patrons with prompt, reliable, and efficient service, the prohibition is "reasonable in light of the use to which the building and grounds are dedicated." *Grace*, 461 U. S. at 178. City or suburban post offices frequently are busy and crowded. Access walkways and entryways such as the one at issue here carry a significant volume of traffic to and from the post office building. Although it is for this very reason that access areas are attractive to person seeking public attention for their cause, the crowds of patrons also contribute to congestion that interferes with the expeditious conduct of postal business. Pedestrians use the walkway at issue for one purpose and one purpose only—to get to and from the post office—and solicitation interferes with that purpose. Where solicitation occurs at the few entrances through which all patrons must pass, it is even more likely to result in the delay and annoyance of significant numbers of customers. Thus, the regulation advances the government's interest in providing postal patrons with unimpeded access to the premises, and with reliable and pleasant service.¹⁰⁷

¹⁰³ *Id.* at 18.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.* at 19-20.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.* at 33.

4. Punctuate to control pacing.

Even simple choices like the selection of a punctuation mark can affect pacing. Lynn Truss explains that some punctuation marks, such as the exclamation point and the dash, are “expressive punctuation—punctuation that cuts a dash; punctuation that can’t help saying it with knobs on[.]”¹⁰⁸ These punctuation marks slow down the reader.

One fiction writer advises writers to think about punctuation marks in the same way we think about signs and signals on the roadway when we drive.¹⁰⁹ She suggests that each punctuation mark signals something to the reader about how quickly or slowly to read the text. A period means stop (“full brake”). A comma means pause (“slow brake before speeding back up”). An ellipsis means pause during continuation (“rubbernecking”). An exclamation point means stop (“yelled stop from the passenger”). A question mark means pause plus prod (“sharp turn—not a stop because the need for an answer creates a continuum”). The em-dash means pause plus an aside (“slowing down to read a billboard”).¹¹⁰

Judge Gerald Lebovitz agrees that punctuation “helps speed up or slow down language.”¹¹¹ One example, “The associate won her first trial today,” shows language speeding up because there are no stops or pauses for punctuation.¹¹² In contrast, “The associate, fresh out of law school, won her first trial today,” shows how language can slow down because the two commas cause the reader to slow down before reaching the end of the sentence.¹¹³

Roberts is a master at using the em-dash to help a reader slow down and see what is crucial. He noted, “In this case, as in Greer, the walkway at issue—which is set back from the street and plainly

¹⁰⁸ LYNNE TRUSS, *EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION* 135 (2003).

¹⁰⁹ Josi S. Kilpack, *Power of Punctuation in Pacing*, <http://writingonthewallblog.blogspot.com/2016/04/power-of-punctuation-in-pacing.html> (last updated Apr. 8, 2016) (last visited Nov. 22, 2019).

¹¹⁰ *Id.*

¹¹¹ Lebovitz, *supra* note 101, at 64.

¹¹² *Id.*

¹¹³ *Id.*

dedicated to the post office use—is readily distinguishable from an ordinary municipal sidewalk.”¹¹⁴

5. Make your text visually interesting.

“Writing is visual—it catches the eye before it has a chance to catch the brain.”¹¹⁵ Paragraph length, heading style, and even font type can all impact pace. The general rule still holds: variety and balance are key.

Short paragraphs are visually inviting to the reader.¹¹⁶ “But don’t go berserk.”¹¹⁷ Don’t break up the train of thought with a paragraph break.¹¹⁸

Headings, often called point headings, do just what their name implies—they make critical points about the legal analysis in an organized way. They also serve as a quick visual way for the reader to skim through the Argument section in a brief to find where a particular legal issue is discussed. They chunk information.¹¹⁹ To be effective, these headings must “jump out at readers, visually”; they must “attract readers’ attention rather than cause them to look away.”¹²⁰ A point heading will often slow the reader down, but in precisely the right place because the point heading forces the reader to focus on the crucial legal point.

Here are the point headings, which appear in a bold text in the actual brief, from Robert’s brief:

The Postal Service regulation prohibiting solicitation from the off-street walkway on the premises of the Bowie Post Office does not violate the First Amendment.

A. The off-street walkway on the premises of the Bowie Post Office is not a public forum.

B. The ban on solicitation on postal premises is a legitimate restriction on speech in a nonpublic forum.

C. Even if the Bowie Post Office off-street walkway were a public forum, the no-solicitation rule

¹¹⁴ Brief for Petitioner at 27, *United States v. Kokinda*, 497 U.S. 720 (1990).

¹¹⁵ ZINSSER, *supra* note 26, at 79.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Zinsser points out, “A succession of tiny paragraphs is as annoying as a paragraph that’s too long.” *Id.*

¹¹⁸ *Id.*

¹¹⁹ ROBBINS, JOHANSEN & CHESTEK, *supra* note 23, at 200.

¹²⁰ *Id.*

would be a constitutionally valid “time, place, or manner” restriction.¹²¹

These point headings are short, direct, clear, and persuasive. They summarize the heart of the legal arguments; they are visually effective in breaking up the arguments into manageable chunks.

Typography, the visual component of the written word, can also affect pacing; it is not just “frosting on the cupcake.”¹²² Typography “helps you engage readers, persuade them, and ultimately spur them to action.”¹²³ Good typography conserves your reader’s limited attention because it means that your reader can “devote less attention to the mechanics of reading and more attention to your message.”¹²⁴ Things like font type and size, spacing of the text on the page, and page layout will increase or decrease the speed at which your reader can read the text. In almost every situation, a writer should choose the typography that allows the reader to read as fast, or at least as effortlessly, as possible. The United States Supreme Court should be a role model because it produces the “the best-designed court opinions in the country[.]”¹²⁵ But there are places where a legal writer should deliberately select the typography that forces the reader to slow down. For example, inserting a table or chart into a legal brief will prompt the reader to take a closer look.¹²⁶ Adding white space before and after a heading creates a “dramatic pause” that draws the reader’s attention.¹²⁷

¹²¹ Brief for Petitioner at Table of Contents, *United States v. Kokinda*, 497 U.S. 720 (1990).

¹²² MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* 19 (2015). Note that some courts have specific rules about font type, font size, spacing, and other typography. A brief writer may be constrained by these rules because a lawyer must follow all court rules. *See* ALDISERT, *supra* note 6, at 219 (“[Y]ou diminish the efficacy of your brief when you do not follow a court’s briefing rules.”).

¹²³ BUTTERICK, *supra* note 122, at 19. Justice Scalia and Bryan Garner urge lawyers not to “spoil your product with poor typography.” SCALIA & GARNER, *supra* note 23, at 136. “A brief that is in an ugly typeface, with crowded lines, will not invite careful perusal.” *Id.*

¹²⁴ BUTTERICK, *supra* note 122, at 24. “Conversely, bad typography can distract your reader and undermine your message.” *Id.*

¹²⁵ *Id.* at 210.

¹²⁶ *Id.* at 150-54 (suggestions for adding tables to text).

¹²⁷ *Id.* at 156.

6. Read it out loud or ask someone else to read it.

Good pacing has the right rhythm, speed, and sound. One way to find and then correct a failure in pacing is to read your work out loud. Readers “read with their eyes. But in fact they hear what they are reading far more than you realize.”¹²⁸ William Zinsser cautions, “If all your sentences move at the same plodding gate, which even you recognize as deadly but don’t know how to cure, read them aloud. . . . You’ll begin to hear where the trouble lies.”¹²⁹

Alternatively, or in addition, ask someone who is not familiar with the case to read your legal brief. The main question for this reader is whether the legal analysis is clear and easy to follow. Chief Justice Roberts recommends that legal writers ask a layperson or non-litigation colleague to read the brief.¹³⁰ The test is simple. “[I]f that person can’t come back to you after reading through it once and answer two questions—what is this case about and why should I win?—you need to go back and start over . . .”¹³¹ You are finished only when you can explain what the case is about and why it is fair that your client wins—in five minutes and in simple English.¹³²

King describes how he writes for the Ideal Reader—the reader that he most wants to impress and the one that he thinks about while he writes.¹³³ “Ideal reader is also the best way for you to gauge whether or not your story is paced correctly and if you’ve handled the back story in satisfactory fashion.”¹³⁴ This reader is valuable beyond measure:

The best way to find the happy medium [in pacing]? Ideal Reader, of course. Try to imagine whether he or she will be bored . . . Is I.R. going to feel there’s too much pointless talk in this place or that? That you’ve under explained a certain situation . . . or over

¹²⁸ ZINSSER, *supra* note 26, at 35. *See supra* notes 115 - 127 (writers should create visual interest to help them write with good pace).

¹²⁹ ZINSSER, *supra* note 26, at 36. Zinsser offers further advice for how to cure a plodding pace, “See if you can gain variety by reversing the order of a sentence, or by substituting a word that has freshness or oddity, or by altering the length of your sentences so they don’t all sound as if they came out of the same machine.” *Id.*

¹³⁰ Roberts Interview, *supra* note *, at 25.

¹³¹ *Id.*

¹³² *Id.* at 25-26.

¹³³ KING, *supra* note 3, at 215, 219. King’s ideal reader is his wife Tabitha. *Id.* at 215, 219.

¹³⁴ *Id.* at 220.

explained it . . . ? That you forgot to resolve some important plot point?¹³⁵

Our Ideal Reader is always the judge, but another reader can tell us whether we have achieved the appropriate balance in the brief. Legal writers should ask the reader who is not familiar with the case to pay attention to places in the brief that moved so slowly that the reader lost interest or focus or stopped reading or, alternatively, places that moved so quickly the reader had to reread sentences because the reader could not understand or process the legal arguments. Legal briefs underexplain when the reader is struggling to figure out exactly how this particular law or precedent applies or overexplain by repeating points too often or giving too much background about the law or facts. Ask the reader to tell you where she felt like throwing her hands in the air saying, “Wait, what?” or “Enough already, I get it, I get it.” Then we can make the needed adjustments, so that the judge isn’t ever throwing her hands in the air with exasperation.

7. Cut out the boring parts.¹³⁶

King remembers that one editor, after rejecting his story wrote, “Not bad, but PUFFY. You need to revise for length. Formula: 2nd Draft = 1st Draft-10%. Good luck.”¹³⁷ King claims that once he adopted this “Rewrite Formula” good things started to happen to him.¹³⁸

Rewrite with a focus on pace. Writers know that first drafts are only the beginning and that great writing is the result of rewriting. Anne Lamott explains:

All good writers write [shitty first drafts]. This is how they end up with good second drafts and terrific third drafts. People tend to look at successful writers . . . and think that they sit down at their desks every morning feeling like a million dollars, feeling great about who they are and how much talent they have and what a great story they have to tell; that they take in a few deep breaths, push back their sleeves, roll their necks a few times to get all the cricks out, and dive in,

¹³⁵ *Id.* at 221.

¹³⁶ *Id.* at 222 (repeating advice from Elmore Leonard).

¹³⁷ *See* KING, *supra* note 3, at 222.

¹³⁸ *Id.* at 222-23.

typing fully formed passages as fast as a court reporter.

But this is just the fantasy of the uninitiated.¹³⁹

Lamott assures us that most authors, including the ones we all read and love, write multiple drafts.¹⁴⁰

Legal writers know that editing is crucial,¹⁴¹ but many have not thought to edit for good pacing. King's Rewrite Formula would satisfy Olive Wendell Holmes Jr.'s recommendation that lawyers should "strike at the jugular and let the rest go."¹⁴² Not all lawyers would agree that the rest is "boring," but if it is not necessary, then the writer should omit it, so that the reader can slowly savor all the nuances of the main legal argument.¹⁴³

8. Please do all these things with subtlety.

Good pacing will help you "pull your readers along without their noticing the tug."¹⁴⁴ Chief Justice Roberts agreed that the pacing

¹³⁹ ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* 21 (1994). In a memorable commentary on writing, jealousy, and life she adds:

All right, one of them does [write elegant first drafts], but we do not like her very much. We do not think she has a rich inner life or that God likes her or can even stand her. (Although when I mentioned this to my priest friend Tom, he said you can safely assume you've created God in your own imagine when it turns out that God hates all the same people you do).

Id. at 22.

¹⁴⁰ *Id.* at 21-22.

¹⁴¹ See, e.g., GALLACHER, *supra* note 5, at 77 (noting that editing and proofreading are crucial to produce a brief that "will educate, and perhaps, persuade a skeptical reader to rule in your client's favor"); OATES & ENQUIST, *supra* note 10, at 176 (noting that revising, editing, and proofreading "produce a professional product that is easy to read and understand").

¹⁴² Ross Guberman, *Judges Speaking Softly: What They Long for When They Read*, 44 *LITIGATION* 48, 49 (Summer 2018).

¹⁴³ Guberman surveyed more than a thousand state and federal judges. The judges want to move quickly through procedural details. One judge wrote, "The procedural history does not have to go back to the Creation." *Id.* But they want to savor critical parts of the brief such as the Introductions. Guberman noted: "Judges find strong introductions invaluable. They help lawyers hone their theory of the cases, and they help shape the fact section and legal arguments to come." *Id.* at 51.

¹⁴⁴ ZINSSER, *supra* note 26, at 261-62. Zinsser says organization and logic are essential for nonfiction writing. He continues, "The only thing [the reader] should notice is that you have made a sensible plan for your journey. Every step should seem inevitable." *Id.* at 262.

should be invisible; the writer “isn’t doing a very good job of drawing you in” if the reader is consciously analyzing the pacing.¹⁴⁵

Readers shouldn’t be able to notice any of the writing techniques you used to create pace. That ruins it. Instead, your techniques should be invisible. The only thing the reader should notice is that the entire brief was engaging. The reader may not be able to articulate that the brief had “good pacing,” but should recognize that parts of the brief were page-turners and other parts, in exactly the right places, slowed down.

Conclusion

When listing the Italian words for tempo I noted that “allegro” means “speedy.”¹⁴⁶ But another translation of the word is “joyful.”¹⁴⁷ That translation made me wonder what compliment would make a legal writer joyful. Maybe it would be a judge noting that we have explained a difficult legal concept in a plain and easy way. Maybe it would be an affirmation that we write about the law so that lay people can understand. Maybe it would be a confirmation that we are fair and honest even as we advocate for our clients. But maybe more of us should think about how delightful it would be to hear a reader say, “I wasn’t expecting to be pulled into a legal brief. Part of that brief was a page-turner. But thanks for slowing down when I needed more time.”

¹⁴⁵ *Roberts Interview*, *supra* note *, at 40.

¹⁴⁶ *See supra* note 49 and accompanying text.

¹⁴⁷ Cambridge Dictionary,

<https://dictionary.cambridge.org/us/dictionary/italian-english/allegro>

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