Five Ways to Write Like Ted Olson and David Boies

By Ross Guberman

In Ted Olson and David Boies, opponents of California's Prop. 8 have some unlikely allies to thank.

Although the two men famously faced off in *Bush v. Gore*, their differences don't end there. Olson argued against allowing women into the Virginia Military Institute; Boies once represented filmmaker Michael Moore. Olson served as Bush 41's solicitor general; Boies is an avid Democrat. Olson has an elite Supreme Court practice; Boies is a top trial lawyer. Olson dresses by the book; Boies wears black sneakers to court.

But in other ways the two men are united. They both see the Prop. 8 case as the next *Loving v. Virginia*, the case that struck down laws against interracial marriage. They both wanted the federal-court proceedings in the case televised. And they both write with unusual skill; you'll find many excerpts from each in my soon-to-be-published *Point Made*.[1]

Speaking of writing, you can use the following five techniques no matter where you stand on Prop. 8. The examples are all drawn from Boies and Olson's reply brief supporting their motion for a preliminary injunction in *Perry v. Schwarzenegger*.[2]

1. Don't Be Fooled

Like many top advocates, Boies and Olson use their introduction to draw a line in the sand, forcing the court to choose between two competing views. Here, the two men urge the court to weigh the Prop. 8 supporters' abstract harm—"hypothesized uncertainty" about the legal status of marriages performed while Prop. 8 is enjoined—against the petitioners' claimed concrete harm—deprivation of a claimed constitutional right "for years":

> While State Defendants may find the hypothesized uncertainty discomfiting, that is not a remotely sufficient justification for withholding from Plaintiffs the relief to which they are otherwise entitled until—as State Defendants would have it—final disposition of this case on appeal, which is to say, for *years*.

"Don't be fooled," warn Olson and Boies. The question is not whether the Prop. 8 supporters can claim any harm at all if Prop. 8 is enjoined—it's whether that harm is as compelling or irreparable as the harm to the petitioners if Prop. 8 stays on the books.

Start your next advocacy piece with a similarly stark line.

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[1] *Point Made*: www.amzn.com/0195394879

[2] Olson-Boies reply brief: www.legalwritingpro.com/briefs/olson-boies-reply.pdf

2. Parallel Lives

As I mentioned in an earlier article on the Chief Justice's writing,[3] great legal writers, like all great writers, share a knack for parallel construction. Here are two ways for you to display that same skill.

First, use parallel constructions to **streamline lists**:

> Prop. 8 violates the Equal Protection Clause in several independent respects: **It irrationally strips** Plaintiffs of their state constitutional right to marry and singles them out for a "special disability" by relegating gay and lesbian individuals to the inherently unequal institution of domestic partnership (*Romer [v. Evans]*, 517 U.S. at 631), **it impermissibly deprives** Plaintiffs of their fundamental right to marry in the absence of a compelling state interest, and **it unconstitutionally discriminates** against Plaintiffs on the basis of their sexual orientation and sex.

Second, use parallel constructions to draw contrasts through the rhetorical device known as "**antithesis**."

Think "ask not what your country can do for you; ask what you can do for your country." Or "the thoughts of the righteous are right, but the counsels of the wicked are deceitful." Or this from Boies and Olson's reply brief:

> Heterosexual individuals—who, by definition, are attracted to persons of the opposite sex—are authorized under California law to marry a person of the opposite sex, while gay and lesbian individuals—who, by definition, are attracted to persons of the same sex—are prohibited from marrying a person of the same sex.

[3] "Five Ways to Write Like John Roberts": www.legalwritingpro.com/articles/john-roberts.pdf

3. That Reminds Me

Another distinguishing trait of top advocates is their generous use of examples.

Follow their lead when you want to crystallize an abstract idea that would otherwise fall flat.

Notice how Olson and Boies use a pair of dashes to set off concrete examples of the abstract phrase "changed circumstances":

> Not only does this state-sanctioned discrimination cause Plaintiffs irreparable emotional distress and psychological harm, but each day that Prop. 8 remains in force augments the possibility that changed circumstances—**strain on Plaintiffs' relationships created by their inability to marry, the unpredictable vicissitudes of life, or even illness or death**—will prevent Plaintiffs from ever marrying their partners.

With a bit of creativity, you can also craft evocative analogies, creating a parade-of-horribles effect that pushes the judge where you want to go:

> Indeed, the discriminatory message conveyed by Prop. 8 is **no different from the message** that would be conveyed by a federal statute that granted U.S.-born persons of Chinese ancestry all the benefits of U.S. citizenship but denominated them "nationals of Chinese descent" rather than "United States citizens."
>
> The fact that Plaintiffs are not able to produce children together through "natural" means does not permit the State to exclude them from the institution of marriage **any more than it would permit** the State to prohibit marriage by senior citizens, by felons incarcerated in separate prisons, or by couples who intend to use contraception to prevent procreation.

4. Mince Their Words

When and how to quote language is almost as controversial in advocacy circles as Prop. 8 is in the nation at large.

Judges say that we lawyers quote too much and too often, and yet sometimes the exact words are just too good to pass up. For a concise and persuasive compromise, quote snippets from your authorities, but merge those snippets into a passage about your own dispute, as Boies and Olson do here:

> Indeed, the implausible justifications proffered by Proposed Intervenors merely reinforce **"the inevitable inference that the disadvantage imposed"** on gay and lesbian individuals by Prop. 8 **"is born of"** nothing more than naked **"animosity."** *Romer*, 517 U.S. at 634.

Merging snippets into a passage is particularly effective when you can quote your opponent's own words—or when you want to rebound after your opponent tries to distinguish a case that goes your way. Olson and Boies accomplish both goals below—the short quoted language is just a means to an end, a way to talk about today's dispute, not yesterday's:

> Proposed Intervenors' efforts to distinguish *Romer* are unavailing. They emphasize, for example, that, unlike Prop. 8, the Colorado "amendment at issue in *Romer* prevented the government from protecting gay and lesbian individuals against discrimination" and argue that "[d]enying legal protection from invidious discrimination hints of animosity, but denying **official legal promotion** does not." That Proposed Intervenors cast access to the fundamental right to marry as **"official legal promotion"** cannot mask the reality that both Prop. 8 and Colorado's Amendment 2 stripped gay and lesbian individuals of state-law rights that they had previously possessed and imposed a **"special disability upon [them] alone."** *Romer*, 517 U.S. at 631. Like Amendment 2, Prop. 8 is an irrational measure that cannot be explained **"by anything but animus"** toward gay and lesbian individuals. *Id*. at 632.

5. Parting Thought

If you're a traditional brief writer, your conclusions are probably one sentence and start with a phrase like "For the foregoing reasons." If so, be sure that your argument section ends with a bang, not a whimper. As bestselling author James Stewart has said, "If the lead provides the first impression necessary to propel readers through a story, the ending provides the last. What is freshest in readers' minds is what they read most recently, which is the ending."

See how Olson and Boies distill their message into the last two sentences of their argument—a parting thought:

> While Proposed Intervenors possess the right under state law to use the initiative process to propose amendments to the state constitution, the U.S. Supreme Court has repeatedly made clear that this power may not be used to deprive a disfavored group of their federal constitutional rights. Permitting Prop. 8 to remain in force would condone Proposed Intervenors' discriminatory and unconstitutional use of the state initiative process.

About the Author

As the president of Legal Writing Pro, Ross Guberman conducts hundreds of writing programs a year for top law firms, governmental agencies, and bar associations. He holds degrees from Yale, the Sorbonne, and The University of Chicago Law School. An adjunct professor at GW Law School, Ross is also an award-winning journalist. In January, Oxford University Press is publishing his *Point Made: How to Write Like the Nation's Top Advocates*. Contact Ross at ross@legalwritingpro.com.