

# Tips from Justice Liu on brief writing

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and Ben Feuer

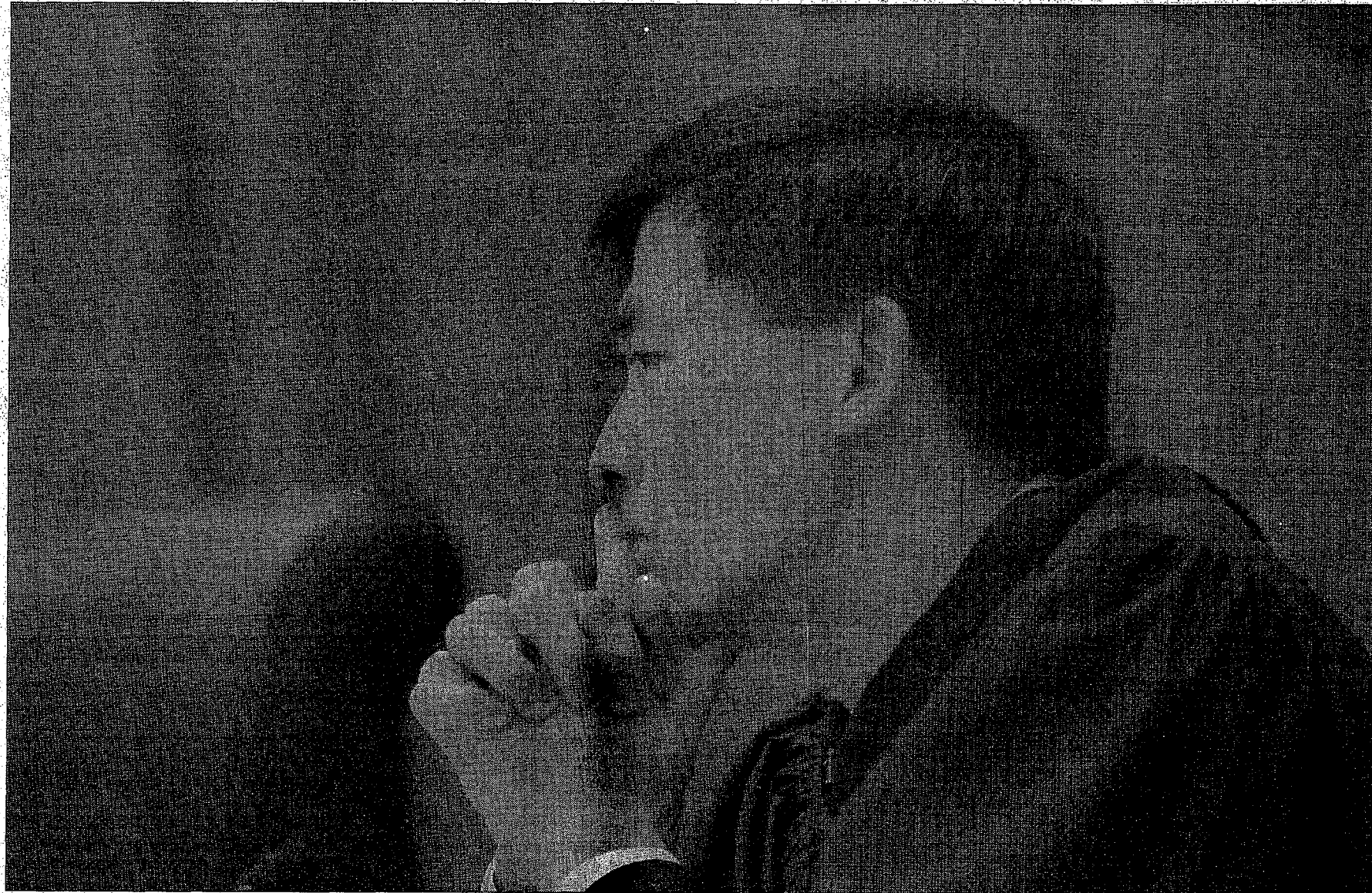
As appellate attorneys, we spend an inordinate amount of time thinking about how to write in the most effective and persuasive a manner possible. But sharp writing is important not only on appeal — from demurrer to post-trial motions; clear writing is essential to success in the trial court also.

To that end, Associate California Supreme Court Justice Goodwin Liu recently presented to the Bar Association of San Francisco nine tips for persuasive writing. Although Justice Liu illustrated many of his points with examples from a U.S. Supreme Court brief (the “Brief for Petitioner” in *Bond v. United States of America*, written by former U.S. Solicitor General Paul Clement), his suggestions are valuable for motions and papers filed in all tribunals and at all levels.

We have recorded his nine tips and offer them here for wider distribution.

## 1. Let perfection be the ally of the good.

Justice Liu took an old adage — “don’t let perfection be the enemy of the good” — and turned it on its head. He urged lawyers to strive for perfection in all aspects of their writing and suggested good results flow from that perfection. Imperfections Justice Liu identified ranged from catastrophic, like attributing a statement in a dissent to the majority, to minor, such as punctuation errors. But any imperfection, large or small, may distract the reader. For example, Justice Liu recalled that U.S. Supreme Court Justice



Justice Goodwin Liu is shown at the California Supreme Court in San Francisco Nov. 10, 2011.

Associated Press photo

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viduals in civil appeals. He is a former law clerk on the 9th U.S. Circuit Court of Appeals and is the founder and chair of the Appellate

like attributing a statement in a dissent to the majority, to minor, such as punctuation errors. But any imperfection, large or small, may distract the reader. For example, Justice Liu recalled that U.S. Supreme Court Justice Ruth Bader Ginsberg, for whom he clerked, notated in pencil, even minor errors in her clerks' memoranda. Apparently, she was sufficiently distracted by them to pull herself out of the flow of the argument to mark them off.

Better to be a careful writer and avoid even the smallest mistakes, so the reader will infer that you are also a careful thinker.

## 2. Keep sight of the forest as well as the trees.

Invoking the concept of feng shui, Justice Liu counseled that a writer should not overwhelm the reader with details, but instead strive for balance and coherence across the entire document. The writer should present an overall portrait, in addition to the important details of the problem. One way to do that, Justice Liu suggested, is to ensure that a brief's table of contents shows balance among the various issues in proportion to each issue's importance in the overall structure of the argument. Clement's brief in *Bond* did just that, devoting 20 pages to the first issue, 10 pages to the second issue, and five pages to the third issue. This 4:2:1 ratio across the arguments brought each of them

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## 3. The structure of your organization must be clear.

The reader is greatly aided when the structure of the brief or motion's organization is clear from the outset. One way Clement's brief in *Bond* achieves this clarity of organization is by using topic sentences for each paragraph. Justice Liu observed that in the *Bond* brief, if you take each paragraph's topic sentence, you can create a separate, intelligible paragraph that summarizes each of the component points in Clement's argument.

Another way Clement achieves organizational clarity in his *Bond* brief is through assertive section headings that make his case right in the table of contents. His headings are complete sentences. As a result, the table of contents appears as a "scaffold" that supports his arguments. Justice Liu also suggested that writers not be afraid to be thorough and detailed in the "summary of the argument" where required by court rules, to serve as a first layer explaining the organization of the brief or motion.

## 4. Balance authority with logic and reasoning.

This tip may sound obvious, but the skilled writer is more than a legal technician. In addition to

citing authority, she invokes logic and reasoning to explain why the authority makes sense. Justice Liu pointed out that Clement goes out of his way to identify first principles relevant to the authority he cites, as well as the practical consequences of the rules he suggests. Especially in a court of last resort, where authority may be lacking,

skilled advocate show herself as a careful student of the particular court by citing to the decisions of that court, using the court's preferred style and directing argument to the likely swing judges. Clement cites helpful language in decisions written by swing judges — even in concurring or dissenting opinions.

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arguments from reason and logic may be the most persuasive. The *Bond* case involved Congress's power to enforce international treaties, and Clement identified and discussed basic structural constitutional principles that applied to the question.

## 5. Show expertise to enhance credibility.

Justice Liu explained that Clement actively enhanced his credibility by displaying expertise in the use of authority. This included faithful yet nuanced readings of statutes and precedents and careful research into the parties' and judges' past positions on similar topics. Clement even looked to transcripts of oral arguments of the key authorities relevant to his case and cited helpful statements made by the judges or by counsel for his adversary.

## 6. Show that you know your audience.

Justice Liu suggested that a

## 7. State the rule the court should adopt.

In any court, but especially at a supreme court, an advocate should argue not just that her client should win, but that the court should adopt a certain rule. Whatever that rule may be, it will become precedent and may have long-term effects. Clement is careful to state the rule he would like and explain why the rule warrants broader application than just to his case.

## 8. Clarify the limits of your position.

Judges instinctively avoid extremes. Justice Liu suggests that advocates be prepared, within the constraints of their clients' goals, to state the limits of the position they are urging. Advocates should put themselves in the shoes of the decision-maker and address any likely concerns ahead of time, clarifying the outside limits of the position and why the position does

not lead to absurd results.

## 9. Give the court options.

Justice Liu advised advocates not to stake out a single absolutist position. Instead, where possible, offer a variety of rationales and outcomes, each of which allows the court to rule in your favor. In an intermediate appellate court, for example, an advocate can take a layered approach, arguing that he can prevail if the court simply construes a precedential case in his favor, but if the court disagrees, then the precedent should be distinguished or rejected. Similarly, in constitutional litigation, Clement takes an onion-like approach: that the statute at issue should be interpreted favorably to his client, thus rendering the statute constitutional; but if that interpretation is not possible, then the statute should be held unconstitutional as applied to his client; and if even that interpretation is not possible, the statute must be held unconstitutional on its face. This allows the court to choose the path with which it feels comfortable.

Taking these nine tips together, a thoughtful advocate can write more persuasively in whatever court she appears.

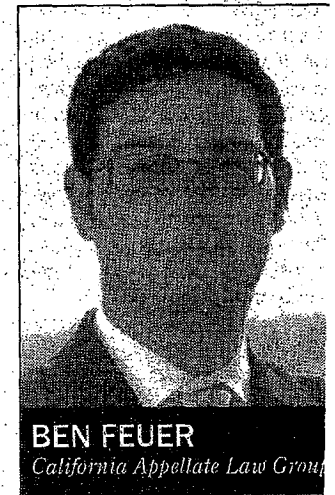
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