On Legal Writing

By Christopher Keleher

For some, the word "appellate" triggers a Pavlovian-like response: move on to something else. Appellate litigation is equated with writing, which many lawyers dislike. Others brush writing aside as elementary and thus beneath them. Still others downplay its worth. Such reactions are understandable.

What legal writing lacks in excitement is compensated by its importance. We live in an age of burgeoning court dockets and vanishing oral arguments.

Lawyers, especially litigators, live for case-defining moments. Such instances are not engendered by the methodical process of writing. Unlike a dramatic closing or case ending deposition, good writing does not create epic moments. The fruits of good writing are often not borne until months after the seeds are planted.

What legal writing lacks in excitement is compensated by its importance. We live in an age of burgeoning court dockets and vanishing oral arguments. Motions are routinely adjudicated without oral presentation. Arguments in some appellate courts are becoming *pro forma*. Whether this state of affairs should be lamented is not the point. These developments confirm the sacrosanct status of good legal writing.

The need for good writing raises the question: *What is good writing?* This article sets forth three lodestars that should guide legal writers: thoughtfulness, economy, and persuasion. The latter two are axiomatic. The first concerns an oft-overlooked facet of legal writing, consideration for your reader. Following these three points will not guarantee you success. However it will ensure your position is presented in a positive light, and in close cases this can make the difference between defeat and victory.

A. Writing Thoughtfully.

Thoughtful writers consider their reader. Too often, attorneys forget to whom they are writing. This section discusses four ways to exhibit consideration for your reader.

First, judges are a time constrained lot. Your case is fungible and it will be granted a finite amount of time before being dispensed. In sharp contrast, you have devoted years to the case, bonded with your client, and become emotionally invested in the outcome. Human nature makes us susceptible to the throes of advocacy. We think our case is the most important. And it is. But to our audience it is not.

Thus, a clear disconnect exists between writer and reader. Thoughtful writers bridge this gap. They recognize the court needs to be educated in a forthright manner as to what the case is about. Courts need the factual nuances spelled out. They have not lived with the case for years. Things that may be self-evident to you may not be so when viewed through the purview of a neophyte. While the relevant facts should be explained, black letter law should not. Judges know the law. Point them to the relevant principles and move on. Precious space is squandered by enunciating peripheral legal principles. Thoughtful writers understand this law/fact dichotomy. They also recognize their audience needs the issues delivered in a quick, concise, and straightforward fashion.

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Second, thoughtful writers strive to keep their audience happy. Attorneys are in the business of persuading. In writing, as in life, you ingratiate yourself to others by being considerate. Ways to create consternation in your audience include:

- Page-long paragraphs
- String citations
- Block quotes
- Excessive parentheticals
- Three pages without a break
- Sentences that run for four lines

- Using all caps
- Using exclamation points

Style is subjective. However, avoiding the above will engender a more amenable audience. First, each of these devices impedes judges' ability to read your brief. This frustrates their ability to comprehend what you are saying. If judges cannot comprehend, you cannot convince. Long sentences, paragraphs, and sections create too much work for the reader. When a sentence, paragraph, or section overflows, the reader is left to clean up the mess.

Third, thoughtfulness is reflected by a respect for the reader. Every sentence should make sense. A reader should never have to work to divine the meaning of what you are saying. At the end of the drafting process, it is helpful to engage in a simple exercise. Read each sentence and then ask yourself, does this make sense? Briefs are too often riddled with sentences that leave dazed readers in their wake. An opaque sentence will hurt your cause because it frustrates the reader. If *you* cannot understand you, the *court* certainly cannot understand you. Leaving readers to figure things out shows disdain for them. Do not force judges to do extra work simply because you chose not to do the work.

Fourth, a final manifestation of thoughtfulness is the recognition that all attention levels were not created equal. Judges are human. Their attention levels vary. Studies show, and human nature confirms, that attention levels peak at the beginning and end of a document. Additionally, they rise around headings and subheadings. A thoughtful writer recognizes placement of material is critical and writes accordingly. Each introduction should be written for maximum impact. Conclusions should end with a bang, not a whimper. Subheadings should be used liberally. Utilizing these techniques will emphasize your strongest qualities when the reader's attention is at its zenith.

Many of these suggestions reflect common sense. While being considerate of your reader is obvious, this attribute can get overlooked in the heat of battle. However, thoughtfulness is reinforced by economical writing, the focus of the next section.

B. Writing Economically.

Lawyers have a lot to say. This habit transcends the spoken word. But a reader is not a listener. Legal writers often forget this reality. This is unfortunate. Courts are drowning in paper, much of it superfluous. Lawyers must write succinctly. A lengthy discourse can obscure your message, weaken your argument, and inhibit the court's understanding of your case. This section suggests way to eschew this plight.

Avoid loquaciousness by following the rule of one. This rule is simple yet often ignored. Limit each sentence to one idea. Limit each paragraph to one topic. Limit each section to one subject. Following the rule of one will result in writing that is more succinct, organized, and readable. The rule of one is essential to economical writing. When in doubt about whether you are trying to say too much, assume that you are, and break it up.

Emphasis on economy does have consequences. For example, judges on the Seventh Circuit must pour over 500 pages each time they sit for oral argument. Most judges read your brief once and then make their determination. Judges do not have the luxury of devoting an afternoon to ruminate the nuances of your position. Trial courts have heavier case loads, and consequently even less time to read. Thus, the maxim "less is more" is not an abstraction.

Merit is not proportionate to weight. You need not spell out every element, variation, or argument, for courts are unimpressed by treatises. They will appreciate a brief that does not exhaust the page limit. Moreover, short briefs exhibit confidence. Use common sense in gauging what is imperative to your position. If you are unsure why you have something in your brief, it probably needs to go.

In sum, be ruthless in purging issues, arguments, sentences, and words from your writing. Readability is the offspring of brevity. A brief is readable when it is clear and concise. Writing with such attributes is more persuasive and persuasive writing wins cases.

C. Writing Persuasively.

We often hear admonishments about writing persuasively. But actual techniques that accomplish this end are rarely articulated. There is no one right way to be persuasive. Each case presents unique possibilities. Whether emphasizing facts, law, or policy, you must show the court why your position is correct in the underlying instance and as a matter of future precedent. This section discusses three measures that will increase persuasiveness.

First, a brief should stand out. An uninspiring and nondescript offering will not accomplish this end. There are different ways to make an impression. But the *sin qua nons* are clarity, conciseness, and thoughtfulness. In other words, adhere to the points set forth above. Judges will take notice of a brief that

is short and direct, and piquing their interest is half the battle.

Second, every major section should begin with a short paragraph stating why you should prevail. This is especially true in the introduction section of a motion. Too often, motions begin with a scathing attack on the other side. A wiser course is to start on a positive note. First say why you win, not why they lose. An opening paragraph should provide the court with the tools of implementation. Tools of implementation include precedent, statutes, facts, or policy. This gives the court something on which to hang its hat, and thus it will be more predisposed to your position. Leave attacks upon the other side for later. That the other side is wrong does not, by itself, give the court reason to rule for you.

Third, even a strong case will lose its luster when a writer engages in ad hominems, erects strawmen, or exaggerates implications. It is advisable to avoid such arguments because judges are unswayed by them.

It is tempting to lambaste the opposition, especially when their position is untenable. Resist it. Let the court reach this determination with nothing more than a gentle prod. Cull words like "meritless," "preposterous," "ludicrous," and "absurd." Not only do these words add nothing, they run the risk of inflaming a reader who might agree with the position you denigrated. While at times it may be difficult, your writing should always show respect for the opposition and the court. If a position is as anemic as you believe, this frailty should be transparent to an experienced judge.

Strawmen are the telltale sign of a weak case. Some litigators are content with addressing what the problem *is not* because they are uncomfortable addressing the problem itself. Such a tactic will backfire. It will annoy judges, waste time, and be easily parried by your opponent. In short, it detracts from your persuasion. Save your ammunition for what your opponent is actually arguing, not what it is not. By focusing on the issue at hand, you will keep the court's attention on what is truly at stake and why your position is superior.

Finally, judges are inundated with "the sky is falling" type arguments. While there are a multitude of permutations, the refrain is the same: if the court grants the opponent's relief, society will break down. This is a useless ploy. Unless the world will truly end, do not say it. Or suggest it. Judges have granted relief that was supposed to bring civilization to its knees only to awake the next morning to find civilization still functioning and work waiting. Exaggerating the implications of your opponent's position will leave a judge not only unpersuaded, but more inclined to adopt the opposing view. A writer should certainly expound on the deleterious consequences of an opponent's position. But do so with two feet on the ground.

These suggestions only scratch the surface as to how to write persuasively. In the end, to be persuasive, you must believe in your position. With that foundation, the techniques set forth here will accentuate the merits of your position, and hopefully convince the court.

D. Summation.

Legal writing need not be staid or stilted. It can be lively and engaging. Each brief presents a *tabula rausa* on which you can project originality and creativity. Writing that is thoughtful, economical, and persuasive is time consuming. But the time and cost are worth it, for such writing can make the difference.

As oral argument continues its decline, lawyers need to be vigilant of their writing skills. Writing that is thoughtful and economical will engender a happy audience. A happy audience will be more amenable to your position. An amenable audience is more apt to be swayed by a persuasive argument. And a persuaded court will grant the relief you seek.■