



Persuasive legal writing succeeds when you help the reader

Tips to get your brief read (“by the Court” is implied – you don’t need it)

BY TED W. PELLETIER

In the December 2014 issue of Plaintiff magazine, I contributed an article titled, “Persuasive Legal Writing Starts with Knowing the Reader,” advocating that a key to persuasive writing is understanding that your reader is overworked and easily distracted – and thus that your primary job is to capture that reader’s attention and keep it. I posited that your reader will be intelligent and want to do the right thing. But she will also know little or nothing about your specific issue. And she will have myriad distractions, including not just a stack of other briefs that need her attention at work but also all of life’s other daily requirements. Provide your reader with a reason to get distracted from, or disinterested in, or aggravated by your writing, and your battle to persuade becomes even more difficult.

Thus, the “secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical.” [Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 310 (2002).] A perfectly crafted brief will lead the reader straight down the path to your desired result.

My prior article identified keeping the reader’s attention as “The Problem” and suggested that the fix is to do everything you can to “make the reader’s job easier,” offering several basic suggestions: (1) avoid ambiguity; (2) make your documents accessible, both individually and collectively; (3) provide analysis to connect the law to your facts; and (4) maintain absolute credibility. But the space constraints of that article did not allow for many examples or detail.

This article expands on the first item, offering a list of tips on the substance of the writing itself – and how to make it clean and clear and succinct and precise.

[1.] Remove unnecessary words

A tip of the cap here to Miles Cooper, whose excellent monthly column in this magazine (“Back Story”), discussing writing in last month’s issue, noted wisely that “[e]very word must serve a purpose.” Yes. Cut every word you can. “Unnecessary words waste space and the reader’s time, and they make strong writing weak.” [Gary Blake & Robert W. Bly, *The Elements of Technical Writing* 65 (1993).] Or, as Strunk and White put it more simply in *The Elements of Style*: “Omit needless words.”

You surely have opened an opposing brief to find a sentence like this: “It is the position of defendant ACME CONSTRUCTION AND SUPPLY, INC. that the three (3) published cases that govern the issue at hand require that this court rule in favor of defendant, ACME CONSTRUCTION AND SUPPLY, INC., and against plaintiff HOWARD P. JOHNSON and grant the March 5, 2016, motion for summary judgment in the instant matter.” What?!

•**Excise the clutter:** “It is the position of” goes without saying – legal briefs advocate a position. The “authorities that govern” are the law – just state it. The “issue at hand” adds nothing. Grant the motion “in the instant matter” – what else would you be talking about?

Legal writing gets packed with these extra words and phrases that can be cut: “in this case” (here); “prior to” (before);

“the instant matter” (this case); “at the present time” (now).

What this writer actually means: “This Court should grant summary judgment.” Say that.

•**Shorten the references:** If a party’s name has many words in it, you can use the full name in the case caption, and perhaps the first time you refer to it – but after that, shorten it. “Acme.” “Johnson.” The key here is clarity – if there is no other “Johnson” in the case, then “Johnson” will do fine. And *please* cut out the ALL CAPS with party names.

•**Use short case names:** The first time you cite a case, use the full cite (“*Jones v. Smith* (2015) 123 Cal.App.4th 3”). After that, use short cites, and in text just call it *Jones* – not “the *Jones* court.” “*Jones* holds that . . .”; “Under *Jones*...”

•**Numbers:** We can all now drop the parenthetical numbers, i.e., “the three (3) published cases.” A legal brief is not a check or other legal instrument that could be forged. The number in parentheses does nothing.

•**Dates:** Lawyers love dates. Big, long, full dates: “The March 5, 2016, motion for summary judgment.” But if your brief is addressing that motion, the date adds nothing; omit it. Sometimes a date is important – but what part? Is the exact day critical – or is sufficient context provided by “March 2016”? What about the year – if all the action in your case takes place in 2016, do you need to keep saying it? Or can you just say “January 10,” and “February 6,” and “March 3”? Cut what you can.

Many of these things sound small, but they add up. Cut the clutter, and your point will shine through.



[2.] Use pronouns

A corollary to removing unnecessary words – replace larger names with pronouns. As long as the context is clear, once you are talking about “plaintiff Howard Johnson,” your following sentences can refer to “he,” and “him,” and “his.”

[3.] Choose the right word

Make sure that the words you use are both correct and understandable.

Be sure that the word you use means what you think it does. If you have any doubt about a word’s meaning, look it up. And then, even if you were right, consider changing it to another more common word. If you had to look it up, so likely will the reader – wasting time and risking distraction.

Know the difference between commonly used words: “imply” and “infer” (the speaker implies; the listener infers); “effect” and “affect” (most commonly a noun and verb, respectively); “fewer” (countable) and “less” (not) – fewer dollars, less money; “flaunt” (show off) and “flout” (ignore or show contempt for).

Keep your words understandable. Avoid esoteric words, or at least think before using such a word – does it *help* the reader, or is it just showing off (flaunting!) your vocabulary? Your judge knows that you are smart. She will appreciate you keeping it simple – and not having to look up the meaning of your word. Justice Scalia could get away with using “panopticon” [see *Maryland v. King* (2013) 133 S.Ct. 1958, 1989 (Scalia, J. dissenting)] – we shouldn’t try.

[4.] Organize

Keep your points organized. The best briefs contain a detailed, structured table of contents, which shows the brief’s organized outline. Each major topic heading should discuss a different issue or make a different point. Under each major heading, each minor heading should support that major point – and likewise for

every sub-heading under a minor heading.

Many briefs are cluttered by the writer’s uncontrolled desire to make a point over and over again – in every section. An all-too-common example: A brief contends that an objection was both untimely and lacked merit. Section A argues untimeliness. Then Section B begins: “Even if plaintiff’s objection was timely (*and it was not*), it lacked merit.” I’ve seen this too many times – including the underlining (and sometimes even an exclamation point). Section A argues untimeliness; section B can argue an alternative (“even if”) without conceding the prior point.

[5.] Keep it parallel

Use the same words, phrasing, and structure to describe the same or similar things. Often there are multiple appropriate ways to say something – but once you choose one way, stick with it. Using parallel structure not only provides clarity but is actually pleasing to the reader’s ear (or eye), not dissonant.

[6.] Continuity – make it flow

The best writing flows from section to section, paragraph to paragraph, sentence to sentence. Many key points here echo back to law school . . . or high school.

•**Paragraphs:** Start most every paragraph with a topic sentence. Orient the reader.

IRAC/CRAC: The law-school classic is still helpful. State the issue (or the conclusion, i.e., topic sentence); describe the governing rule; analyze (connect the rule to your facts); conclude.

One concept per paragraph: Each paragraph should make one point. When it’s made, it’s time for a new paragraph.

•**Sentences:** Structure your sentences for maximum impact.

Use the active voice – not “the motion was denied” (passive) but “the Court denied the motion” (active). This will

usually put the sentence’s subject at the beginning.

Put the emphasis of each sentence at the end: not “Defendant never raised this argument in his summary-judgment motion” but “Defendant’s motion never raised this argument.”

Use links to echo back to the prior sentence: “this, that, these, those”: “Before trial, the court excluded the scientific evidence. *This ruling* prejudiced plaintiffs, depriving them of the ability to show a product defect. Lacking *that evidence*, plaintiffs could not prove their case.”

Use these devices to make your sentences flow from one to the next.

We’re talking about practice, man.

One final flashback to my last article: clean, clear writing that helps the reader, like any skill, is best accomplished through practice. Relentless practice.

Your first draft should be just that – your *first* draft. Then edit. And edit again. And do it *on paper* (not just on screen). Make it pleasurable, or at least different – take it to lunch, or work on it at home after dinner. Find what works for you, but do it.

This process is more time consuming, especially at first, but as your skill grows, the process will accelerate. Take the time. Your reader will appreciate it. And having an appreciative reader is a major step toward persuasion.



Pelletier

Ted W. Pelletier runs the appellate and writing department at Kazan, McClain, Satterley and Greenwood in Oakland. Prior to joining the Kazan firm in 2013, he handled appeals and motions for over a decade through the Law Office of Ted W.

Pelletier, representing plaintiffs/consumers in cases involving many subject matters. He is a member of CAOC, SFTLA, and ACCTLA. ☐