



Persuasive legal writing starts with knowing the reader

With every brief, every motion, every opposition we file, we are trying to persuade the judge to act in our favor

BY TED W. PELLETIER

In law-and-motion and appellate practice, we don't practice legal writing. We practice *persuasive* legal writing. With every brief, every motion, every opposition we file, we are trying to get the judge to do something for us: to reverse a judgment; to grant a motion; to exclude evidence. To *persuade* the judge to act in our favor.

Successfully persuading a judge with written briefs begins with understanding who your reader is. Yes, in the simplest terms, the reader is of course the judge – or perhaps, more accurately, the judge's clerk, staff attorney or extern. But successful persuasive writing depends on understanding who *that person* is, including his or her pressures and limitations. Only then can you identify the problems this creates for you – and then how best to overcome those problems to help the reader help you. To *persuade*.

Who is your reader?

The reader of your persuasive writing – your brief, motion, or opposition – is (for our purposes) two primary things: (1) intelligent but ignorant; and (2) incredibly busy.

First, your reader is no doubt very bright, but he or she knows *nothing* about your issue. One colleague of mine used to call this “intelligent but ignorant.” Every judge, and every judge's staff personnel, is sure to be intelligent – it is a job prerequisite. But on your particular issue,

they are ignorant. Even if your judge has some expertise in the subject matter – e.g., a law-and-motion judge on a procedural matter; or (in my line) an asbestos-department judge – he or she has not seen the issue presented in the precise frame in which it arises in your case. Indeed, your issue is likely being disputed *because* it raises a new twist. And if your subject matter is at all complex or esoteric, you can be sure that the reader will be learning about it, for the first time, from your papers.

This assumption *must* be your starting point: the judge knows nothing about your issue. Over the years, I have seen many, many briefs that suffer from the failure to realize this – and thus leave holes that, the writer apparently presumes, will be filled by the reader. They won't be. (Or if they are, you are very lucky.)

Second, your reader is incredibly busy – just like you and your colleagues are. Every day, judges and their staff are juggling multiple issues in numerous subject matters spread over many cases. You are battling for the reader's attention – for his or her time. If you want the reader to do something for you – which is of course the point of your writing – you must capture and keep that attention.

What is the problem?

The battle to keep the reader's precious attention is an uphill one. The reader, pressed for time and with much else to do, will find any reason to put down your papers. I always tell writers to

assume that your reader, upon picking up your papers, has on the desk a stack of other papers from other cases. (This assumption is most often valid.) Not to mention a myriad of other matters, large and small, that can infiltrate the consciousness: a child's grades; the upcoming holidays; a fantasy-football lineup; you name it. The easiest thing for the reader to do is to become distracted from, or disinterested in, your papers. Accordingly, your papers cannot be confusing. Or ambiguous. Or aggravating. If your writing gives the reader any reason to switch his or her attention from your papers, you can bet that he or she will do so.

This notion was captured well by the late writer C.S. Lewis, who warned that the “reader, we must remember, does not start by knowing what we mean. If our words are ambiguous, our meaning will escape him. I sometimes think that writing is like driving sheep down a road. If there is any gate open to the left or the right the reader will most certainly go into it.” [“Cross-Examination,” in *C.S. Lewis: Essay Collection and Other Short Pieces*, p. 555.]]

Thus, our job, as persuasive writers, is to chart our course carefully, to survey the road around and ahead, and to keep those gates closed – to keep our reader firmly on the road we want traveled.

How can we help?

So how do we help the reader? How do we keep the escape-gates closed?

We do so by honoring one simple rule: every decision about your writing



should serve to make the reader's job easier. Don't make the reader do any of the work for you.

This rule can be applied in countless ways – but in persuasive legal writing, several things recur frequently:

Avoid ambiguity – don't make the reader parse your meaning

Always avoid ambiguity. Remember Lewis's warning? The reader "does not start by knowing what we mean. If our words are ambiguous, our meaning will escape him."

Or, at a minimum, grasping our meaning will take *effort* – the reader will have to stop, consider our words, identify the alternative meanings, and then extract the correct one from the context. This process is sometimes laborious. Sometimes it is relatively quick, even subconscious. But even a small forced pause is a distraction. Those distractions add up. And each is an escape gate through which our reader's attention can easily slip.

So how do we avoid ambiguity? The full answer to this question is the proper subject of another article. But for our purposes, a few suggestions:

- **Remove unnecessary words:** Nothing – *nothing* – makes writing clearer than stripping it of unnecessary words. I have the following posted on my office wall: "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).] Strip your writing of all unnecessary detail, redundant language, and overblown wording.
- **Word choice:** Be sure that the word you use means what you think it does. If you are not certain, the reader won't be either. Nothing slows the reader quite like contemplating the meaning of a word – let alone being forced to look it up. If your reader will have to consult a dictionary to understand your writing, choose a different word.
- **Alternate meanings:** If a word has different meanings, be careful. For example,

many legal writers for some reason like to use the word "as" to mean "because": "As the court has already ruled on this issue, the motion should be denied." But the word "as" also (and indeed much more often) means "at the same time." Thus, the reader's first impulse is that the sentence means "At the same time the court was ruling...." This creates a hiccup in the reader's comprehension. Avoid it.

- **Organization, lists, and numbers:** Keep your thoughts organized. If there are three reasons why you should prevail; tell the reader this. "*The motion should be denied for three reasons.*" Then list them: "*(1) the limitations period was never triggered; (2) defendant fails to shift the summary-judgment burden; and (3) plaintiffs' evidence raises a triable issue of fact.*" After this list, discuss each reason, in turn, under a separate heading and/or in a separate paragraph. Make the organization of your presentation clear.

Accessibility – don't make the reader dig through other documents

In addition to choosing your words carefully, take great care to package them for the reader in a way that makes them accessible. The Golden Rule here: never make the reader dig to find something that you need her to see.

- **Cross-reference everything:** Nothing annoys a reader more than having to strain to find something among various documents. For example, on summary judgment, include in your points and authorities citations to both your separate statement and the underlying evidence. Don't make the reader go to the separate statement, find another citation there, then open a third document to find the evidence.
- **Give precise cites:** When you cite anything as support for your position, your intent is to allow the reader to find that support. Don't send the reader to the vicinity of that support, then rely on her to find its precise location. For testimony, give a precise citation to page *and line*: [Smith Depo. at 3:14-19] – not just a page

number. For case law, give a precise citation to the page – and if needed, even more specific direction (*Jones*, 123 Cal.App.3d at 54 (1st full par.))

- **Internal references:** Particularly in lengthy documents, if you want to refer the reader to something you have already said, or will say later, do it with precision. Don't just say "as shown above" – say "as shown in Part B above," or "on page 3 above." If the reader wants to see that other matter, she will know right where to go.

Analysis – don't make the reader think for you

This is one of the most common, and costly, defects in persuasive writing: counting on the reader to provide something important. This usually occurs in one of two ways:

- **Assumed knowledge:** Many writers mistakenly assume that the reader already knows something important – e.g., foundational law. These writers will jump directly to the specific nuance of their issue, without explaining the foundation on which that nuance rests. The reader, to comprehend your nuance, needs the underlying foundation. It need not be lengthy, but take a moment to orient the reader: e.g., *this issue is governed by a statute; the statute's key language is in subdivision (b); that language has been interpreted to mean X by several cases; but a recent case reached a different conclusion.* Now, on that foundation, you can make your argument about how the law applies to your case.
- **Omitted analysis:** This deficiency also pervades legal writing: showing the reader the facts and the governing law, but failing to *analyze* how the law *applies* to your facts. Or, citing the applicable language of a governing case but then failing to *show* how that language applies to *your* case. No matter how clear it seems to you, don't leave the analysis to the reader. Show the reader; connect the dots.

As my colleague Daniel Smith, an excellent attorney and writer, used to preach, "Don't ask the reader to think; she just might not do it."



Absolute credibility – don't make the reader distrust you

One final, sure way to lose the reader's attention and interest is to provide a reason to distrust you. Your credibility is paramount. Never assert something that is not supported. Don't stretch your facts. Quote accurately. Acknowledge weaknesses in your case and deal with them – don't pretend they don't exist.

Remember, the reader has countless other things to do. And when you want the reader to do something for you, the last thing you want is to provide an impetus not to do it.

No, seriously – How can I help?

At this point you may be thinking, "These are great suggestions – but how do I implement them into my writing?"

The short answer is, "Practice." Excellent persuasive writing is a skill that, like all skills, is mastered through practice. It must be worked at, relentlessly.

But in the short term, the most important suggestion that I can make is this:

Edit your writing. I know. We are all busy. Accordingly, our instinct is often to get something written and be done with it. But this – the first draft – is only the beginning. Your writing will improve immeasurably with careful, focused editing. Not just on the computer screen – print out your draft and edit it on paper. Be ruthless. Cut away anything that doesn't need to be there.

Try to approach your draft from the perspective of an objective reader – will he or she understand what you are saying? To this end, I often read my drafts to myself aloud. Often hearing your prose – as a reader might hear it for the first time – will reveal quickly ambiguities and omissions that you could not see on the paper.

And have your writing edited by *someone else*. If a colleague in your office cannot understand something, an objective reader surely will not be able to either.

Yes, these things take time. But they are worth it.

In sum, always remember your reader: Your poor, tired reader, with a

pile of briefs to get to. Imagine the delight when, from that pile, comes a brief that is clear, and organized, and user-friendly, and educates the reader on the issue at hand. That is the brief that will command the reader's attention. And capturing and holding that attention is a major, necessary step toward *persuasion*.



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