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More Questions From Summer Associates

Good legal writing is a function of strategy, clarity and support, not style

By Kenneth F. Oettle

Summer associates wonder if a special style is required for law firm writing — something in the structure perhaps, or the tone, such as an affected gravitas ("It has long been held … ") or an acerbic edge ("Plaintiff fails to present a scintilla of evidence that … "). They wonder if they should use big words, like "commence."

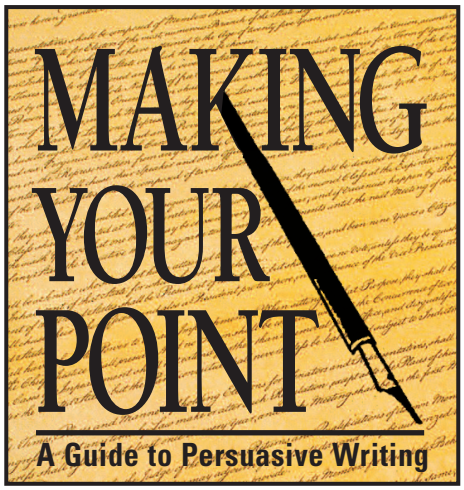
Actually, style is irrelevant. Good legal writing requires a credible point made quickly and clearly, whatever the style. The qualities of good writing that earn an A in law school will serve just as well in practice.

This column responds to questions that summer associates have asked about style.

Q & A

Q. My writing for law school was highly structured and formulaic. I am concerned about adapting my writing style from the rigid law school format to a more fluid law firm style.

A. Law school writing isn't rigid, just basic. The IRAC format (issue, rule, application or analysis, conclusion) also works in practice, with slight adjustments. In a memo for an assigning attorney, you state the question, provide a short answer, and follow with citations and analysis. The short answer, which is effectively a conclusion, goes up front because the reader, being very busy and having good money riding on the answer, wants it there. You can repeat the conclusion and possibly embellish it at the end if you wish.



Q. I am concerned that my writing style may vary greatly from that of the person requesting the work.

A. Your work may look different from that of your assigning attorney, but rarely is that a function of style. Don't fool yourself. If your writing is criticized, it probably isn't clear or complete.

That said, I know assigning attorneys who insist on engrafting their idiosyncratic excesses on all briefs they sign. They drive associates crazy (that's the way the associates put it) and, by clogging the brief, do more harm than good. Ironically, such excesses are usually a misguided attempt to add emphasis where the associate fell short.

Q. What opportunity is there to instill creativity into legal writing? How can we create our own style while adhering to form and convention?

A. Don't try to engraft your personality onto your work. The effort almost always backfires because a show of personality (e.g., through levity or an overly ambitious metaphor) suggests greater interest in one's ego than in the point. Legal writing is all about the point. Develop one; get to it; and support it. Your style should be "transparent." If the reader notices your style, you have diverted the reader from the point.

Q. What writing mistakes are particularly annoying to assigning attorneys?

A. Most assigning attorneys have pet peeves, meaning that they find something distasteful out of proportion to the degree of the offense (for example, I hate "there is" and "there are," "as" in a causative role, and run-on sentences), but to suggest that major concerns are personal to the reader

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would be misleading.

The worst mistakes are universally repugnant: aimlessness; general disorganization; statements that lack support; failure to answer to the question asked; no transitions; sentences out of order; excessive verbiage; sloppy spelling and punctuation; and typos, all of which can make writing turgid, pointless, convoluted, messy, and, consequently, unresponsive and unclear.

Q. In law school, I was told that when writing the fact section of a brief, the author should "slant" the facts favorably for the author's side (while still remaining truthful). How does one do this?

A. Slant is a loaded word. It has connotations of sleaze, unfairly so. You slant the facts by featuring your best facts and by telling a story that shows the reader that your side deserves to win, and the other side deserves to lose. If you are the plaintiff in a contract case, it is a story about broken promises. If you are the defendant, it is a story about unreasonable expectations.

Slanting does not mean editorializing, as with "astonishingly" or "surprisingly," nor does it mean you should omit important facts that the other side is sure to emphasize. Acknowledge bad facts but don't feature them.

Q. I understand that the proper tone for a memo is informative, whereas the proper tone for a brief is persuasive. But most of my classmates' briefs sound more like memos — mostly exposition of case law, with little argument. What should the difference in tone be between the two kinds of documents?

A. Briefs look to move the reader toward a viewpoint. Memos are largely informative. Unless you have an agenda, your memo will show the reader both sides of a question and, subject to the internal political requirement that you not appear to be a Devil's Advocate, you will call it as you see it. (One way to avoid being seen as a Devil's Advocate is to say, "The other side may [or can be expected to] argue that this case hurts us because … " rather than "This case hurts us because … ").

Good legal writing almost always discusses the facts at length, but novice writers shy from long factual discussions, possibly because they are trained to spot issues and remember rules rather than parse complex fact patterns, and because they haven't yet realized that judges reason from the facts to the law, raher than vice versa. A clear, credible factual discussion is part of an effective argument. Perhaps you sense the absence of this from your classmates' briefs.

The following may also be missing from those briefs:

• A strong opening, tied to the facts, to show confidence and win the reader over quickly, thus benefiting from the tendency of readers to interpret new information to support their initial hypothesis.

• A story in the Statement of Facts that evokes the reader's sympathy and shows why the writer's client deserves to win and why the other side deserves to lose. The story should accommodate all key facts, acknowledging bad facts but giving them a subordinate position in the story.

• Emphasis, such as repetition of important thoughts or placement of important words or thoughts in positions of prominence, particularly at the beginning or end of sentences and paragraphs. Ineffective emphasis, which reflects poorly on the writer, includes editorializing ("Foolishly, plaintiff argues … "), intensifying ("Clearly, the case law holds … "), and exaggerating.

• Lead-ins to quotations to provide the writer's interpretation of what the quotations say, aiming to shape the reader's understanding and to build trust when the reader realizes that the writer's précis is correct.

Ultimately, the best persuasive tool is a well-supported theme — a reason why your side deserves to win and why the other side deserves to lose. The need for clarity, brevity, precision and strong support applies equally to memos and briefs.

Puzzler

Which is better, Version A or Version B?

> Version A: After some debate, the parties hired an appraiser to determine the actual worth of the company.
>
> Version B: After some debate, the parties hired an appraiser to determine the company's actual worth.

The focus of the sentence is the company's actual worth. End with the focus because the end is a position of power. Words at the end of a sentence receive more attention and leave a more lasting impression.

Sound out the versions to yourself. Doesn't Version B sound better? It ends firmly on "worth," with the writer in control, showing no reluctance to spotlight the issue.

Editor's note: this column is a continuation of Kenneth Oettle's July 23 column, "Questions From Summer Associates." ■