IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

JULY 2017

CHAIR'S COLUMN

Happy Summer!

With the IADC Annual Meeting upon us it's a perfect time to take advantage of all that your membership offers. Please capitalize on the myriad opportunities to market your firm and your practice through webinars, journal articles, CLE programs, and newsletter articles. Jim King takes the reins as Committee Chair after the Annual Meeting, so please let him know how you would like to get involved with the committee. In the meantime, see you in Québec!

Chris
Chair, Trial Techniques and Tactics Committee

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Trial lawyers are renowned for their oral advocacy, but solid communication begins with clear, cogent writing to organize and orchestrate one's thoughts and message.

A Trial Lawyer's Guide to Effective Legal Writing

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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I. Introduction

Trial Lawyers are professional communicators. Our stock in trade is the written word; our expertise is in expressing its meaning clearly and cogently. Good writing is a combination of practice, attention to detail, and discipline. The following principles, if embraced and implemented, will improve the clarity and persuasive effect of your legal writing.

II. Write for Your Audience

The style, content, and form of your writing should be tailored to your reader's needs and expectations. For example, if you are writing a letter to your client, an accountant you represent in a divorce case, your purpose should be to inform him, in practical terms, of the applicable law and how it affects the likely outcome of the case. He needs and expects you to translate the law into a focused, understandable paragraph or two that allows him to make an informed decision about his case. Case citations, law review articles, and stirring rhetoric seeking to persuade him to adopt your view are misplaced in this type of letter.

By contrast, a brief to a court of appeals should not be a dry, balanced presentation of the strengths and weaknesses of your client's case that leaves it to the reader to choose how to respond. The court, and the adversary system of litigation, need and expect you to zealously represent your client's interests by presenting his case in a persuasive argument supported by legal authority that directs the court to conclude the appeal in your client's favor.

When writing, customize the style, tone, and content of your writing to the type of document you are drafting and the reader you are addressing. The following are some general suggestions in this regard:

A. Legal Research Memorandum

This document, often prepared by an associate for the partner handling a case, is intended to inform — not advocate a specific position. It should identify and explain the applicable law and then review how it will likely affect the outcome of the case based on the facts presented. The form should be simple and well structured (facts, questions presented, short answer, and discussion).

B. Motion or Legal Brief

The purpose of this type of document is to persuade the reader (usually a trial or appellate judge) to rule a certain way based on the facts you present and the law you cite. This is no place for a dispassionate survey of the law. Present the law and facts in a manner most favorable to your client. Address weaknesses in your case (so that the court does not first learn of them from your opponent), but candidly explain why the bad facts don't affect the outcome and why the unfavorable law is distinguishable from the facts of your case.

The tone of any motion, brief, or pleading to the court should always be respectful. Also, unlike communications with your client or partner, writing for a judge generally calls for a proper degree of formality. Don't use

contractions (like "don't") in your briefs. Use parties' full names to first identify them, then refer to individuals by their last names, and refer to corporate parties by an appropriate, identifiable short hand form (e.g. American Motor Cross Associates, Inc. could be shortened to "Motor Cross Associates" or "AMC").

C. Letter to Client

Client communications are intended to inform and advise. They should be written in a manner that enhances the client's trust and confidence in you. The tone is more familiar and conversational than a legal brief or research memo, although clarity, precision, and accuracy remain of paramount importance. These communications should focus on informing clients of the status of the matter you are handling, and advising them of the strategy you recommend to resolve the matter favorably for them. Pedantic expositions on the law are misplaced and inappropriate in a client communication.

D. Letter to Opposing Counsel

The tone of this communication should always be professional and courteous. Your rapport with opposing counsel will affect the efficiency and legal expense associated with the case. When possible, establish a constructive relationship that allows the case to proceed with the focus on the clients' interests — not the lawyers' personalities. Although "chumminess" is inappropriate (and might be construed as a lack of professional zeal), courtesy and cooperation will advance the prompt disposition of the case on the merits without the cost and headaches clients suffer when their lawyers needlessly squabble.

The content of correspondence to opposing counsel depends on the purpose of the communication. For example, a settlement demand letter necessarily must contain legal argument supported by citation to legal authority to achieve its goal of persuasion. By contrast, transmittal correspondence should be short, direct, and courteous. As a general rule, never write a letter to opposing counsel that you wouldn't want the judge or your client to see.

III. Ten Tips for Better Legal Writing

1. Be Concise

Lawyers are not paid by the word, although many write as if we were. Get to the point. After introducing the topic or setting the context, if necessary to understand the issue, make your point. The effectiveness and persuasive force of writing is lost if your central point is entombed within peripheral information.

2. Be Precise

Say what you mean. As Mark Twain directed: "Use the right word — not its second cousin." Clients hire us to provide reliable information and correct answers to their questions. Take care to clearly communicate what you mean to say. If your writing is susceptible to reasonable misinterpretation, you have failed in your mission to communicate your client's message.

3. Avoid Extensive Modifiers

Adverbs rarely add to the effect or import of the point you intend to convey. For instance, describing someone as "extremely happy" makes it difficult to distinguish that person's emotion or mental state from being merely "happy." If what you meant to say was that the person was more than happy, use the proper word to communicate that (e.g. she was ecstatic, overjoyed, etc.). If something inspires awe, call it "awesome" or "sublime." Calling it "extremely awesome" does little to enhance the reader's appreciation of the event.

4. Avoid Use of the Word "Not" to Convey the Negative

Use a prefix to convey the negative rather than the word "not." This helps to clarify the meaning of the sentence and eliminates a needless word. For example, changing "I was not happy" to "I was unhappy" better describes the speaker's mental state, and eliminates twenty-five percent of the words in the sentence. The former sentence explains what the speaker was not, but leaves to speculation what the speaker's true mental state was ("not happy" could mean either sadness or euphoria**,** whereas "unhappy" clearly identifies the person's mental state). By clarifying meaning and eliminating words, you have achieved the dual objectives of concision and precision (see Rules 1 and 2 above).

5. Use the Active Voice

Lawyers are advocates. As such, they must communicate forcefully. Using the passive voice weakens the message you intend to convey. Compare the sentence "I drove the car" with "The car was driven by me." The former is shorter and more direct than the latter. Simply put, it is better writing.

6. Avoid "Legalese"

The law is not a secret society, although lawyers often use archaic legal phrases as though they were passwords to the profession. Legal documents have become so laden with esoteric legal jargon that many states have passed laws requiring the use of "plain English" in consumer contracts. An exception to this rule, of course, applies where the legal phrase has independent legal significance. For example, *res ipsa loquitur* is a doctrine that allows an inference or presumption of negligence without direct evidence of negligence. This Latin phrase has achieved an accepted and recognized meaning in the American legal lexicon and remains appropriate in modern legal writing. Outdated or stilted forms of legal writing should be abandoned for clarity's sake. For instance, at the trial of a criminal case arising from the defendant's alleged theft of a car, the prosecutor should not refer to "said" car, but should simply say "the car." Likewise, in a letter rejecting a contract offer, the author should say "we reject your offer," rather than saying "we have reviewed the terms of your offer and reject the same."

7. Check for Subject and Verb Agreement

When referring to an individual subject, make sure that you use the singular verb (e.g., "The defendant is going to jail."). This simple rule is often confused when referring to a corporate defendant, which should be

referred to in the singular, impersonalized "it," which would then require the singular verb tense "is." Too often we see sentences such as "ACME Airlines, Inc. was sued, and they are planning to counterclaim." The plural verb in the preceding sentence does not match the singular corporate defendant, ACME Airlines, Inc.

8. Organize your Writing into Short Sentences Forming Short Paragraphs

Grammar and punctuation are too often lost in lofty rhetoric. Let your sentences pack punch in their direct simplicity. By forcing too many different ideas or predicates into one sentence, you weaken the message. When structuring sentences, avoid the comma splice (which consist of two independent clauses separated by a comma rather than a period), and the fused sentence (which contains two independent sentences following one after the other without any punctuation between them). If there is a logical connection between the two sentences, separate them by a comma and use of a conjunction to link them and to highlight either their consistency or their transition. For example: "They fell in love, and they got married," or "He loved his dog, but hated its smell." Also, take care when using hyphens, because they can totally alter the meaning of the sentence. For example, ordering five foot-long hotdogs is much different than ordering five-foot long hotdogs. Your opponent would relish this type of error.

The writing must be clear, concise, and precise, because the reader will rely on it in taking risk, investing time and spending money and making important decisions about the case (e.g. what discovery to take, whether to settle the case, whether to proceed to trial, whether to appeal, etc.). Consequently, the tone should be objective, and the content should present a balanced discussion of law. The memorandum should not simply report what the law says. It must also include your evaluation of how the law helps or hurts the case, and should conclude with your advice about how to organize and direct the case to meet or rebut the pertinent legal standards.

9. Beware of the Wayward cc

Including a cc at the bottom of a letter is a simple way of ensuring that people other than the addressee will receive a copy of the letter. The decision to circulate a copy of legal correspondence should not be made lightly. For example, identifying the other parties who will see the letter may change the dynamic of the message you intend to convey to the addressee. A letter written to opposing counsel chastising her for failing to timely answer discovery requests will be more embarrassing to her if you copy other counsel in the case or your client. If that is what you intended, fine. However, if you wanted to communicate your message without influencing the message by external considerations, consider using a blind cc (bcc) rather than a cc on your letter. Also, remember that the attorney-client privilege will be lost if a privileged communication is distributed to anyone other than your client. A cc carelessly picked up on your computer from an old letter can destroy privilege and create a basis for malpractice or professional discipline, Circulating copies of your correspondence should be a conscious decision, not a reflex.

10. Rewriting Is Good Writing

Lawyers pride themselves on being able to crank out correspondence and even memoranda off the top of their heads. However, anything more substantial than a transmittal letter should be reviewed in more than one draft. Serious writing begins with the organization of an outline of the points you wish to convey and the order and manner in which you intend to do so. The outline should then be transformed into a rough draft, which is akin to putting flesh on the bones of your presentation. The rough draft should then be dictated so that a final proof reading can be conducted on double-spaced, typed written text. The final draft of your written work should reflect care, attention, and diligence. The readers of your writing who never meet you in person or hear your stirring oratory will judge you and your client mainly by your written work.

IV. Conclusion

It is axiomatic that you get only one chance to make a first impression. As lawyers, the first impression we make on clients, opposing counsel, and court personnel is often based on our writing. If you want to establish (and maintain) a reputation as a smart, skillful, and careful lawyer, ensure that your writing reflects these traits. Write well.

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