How Lawyers Can Write More Persuasively for Trial Court Judges

by Judge Lynn W. Davis

Benjamin Franklin once observed: “I have made it a rule, whenever in my power, to avoid becoming the draftsman of papers to be reviewed by a public body.” He made this comment in 1776, at the time the Second Continental Congress was considering the Declaration of Independence. Like Mr. Franklin, lawyers, too, would sometimes prefer to avoid the public scrutiny of their writings. For trial lawyers, however, this is not an option. Because the work of lawyers will inevitably be reviewed by a trial judge, as well as by their colleagues and perhaps the media, knowing what judges look for in a memorandum should help attorneys write more effectively.

A lawyer’s “points and authorities” is one of several hundred the judge may consider during the course of a year. A motion may be one of a dozen or more the trial judge has under advisement. State trial judges rarely have the luxury of a law clerk’s services, and many are located some distance from an adequate library. Although the latter problem is being remedied with the implementation of electronic services to all Utah judges, progress is slow. For these reasons, written trial court advocacy can differ significantly from appellate court advocacy.

No trial court judge can take the time to “grade” a memorandum as to form and substance. But if lawyers received their memoranda back with marginal notes, which are now made only mentally by the judges, they might see some of the following comments:

“Persuasive”
“Well-reasoned point”
“Misreading of case”
“What in the world does that mean?”
“Non-responsive to plaintiff’s argument”
“If I see another non-word like ‘irregardless’ again!”
“Avoid string cites”
“Purchase ‘spell-check’! Now!”
“If I had a personal case in this field, I would hire this firm”
“Whatsoever the client is paying this guy, it’s far too much”
“Dictated but evidently never read before submission”
“A new record; a 238-word sentence without a comma!”
“Have you considered writing fiction, full time?”

Without feedback, even the most flagrant errors may be perpetuated throughout an entire legal career. Direction must come, typically, through non-judicial sources; much can be gleaned from reading the briefs of respected colleagues and helpful journal articles or texts on effective writing. But the judicial influence cannot be totally discounted. A lawyer who is attentive to the line of questioning at oral argument, and does a detailed reading of opinions and decisions, can pick up collateral clues as to the strengths and weaknesses of briefing.

Because there are legitimate differences of opinion as to what constitutes good legal writing, some variations in style are unavoidable. There is no magic formula that will either make a skilled legal writer or insure success. A good judge will not require that an attorney become a clone of her style. Like good attorneys, good judges differ in their writing styles and skills. Nevertheless, certain principles cut across all legal writing and will help a lawyer write more persuasively for trial court judges.

With this background, allow me to share observations from my eight years as a circuit and district court judge.

Credibility

Perhaps the most important ingredient of good legal writing is credibility. The best written memorandum in the world will not help a client if the judge doesn’t believe it. The following suggestions will help you gain credibility with trial judges.

1. **Represent the facts fairly and in good faith.**

   - Never misstate or conceal facts.
   - The misstatement of facts, or the deliberate concealment of facts detrimental to a case, results in a loss of credibility. Advocacy never
justifies misrepresentation. Once lost, credibility is hard to regain.

- Begin with the facts. Many advocates wish to argue first the applicable legal theory without establishing or reciting relevant and material facts. The facts are recited first in any brief or memorandum for good reason; they are threshold. A judge cannot tell what the applicable law is until he knows the facts.

- Do not assume or refer to facts not in evidence; refer to the record or supporting affidavits. The judge will likely search the record for the facts on which you rely. If he doesn’t find them, he may doubt your competence and integrity.

2. Don’t argue irrelevant points, even if raised by opposing counsel.

- Arguing irrelevant issues directly reflects on credibility. Some lawyers, unfortunately, give disproportionate attention to irrelevant or peripheral arguments. Reserve your energies for your best arguments; you cannot afford to dissipate precious time and energy on non-issues. Judges sincerely hope that counsel know the difference.

3. Be careful and fair in reliance on case law.

- Identify controlling case law for the court.

- Properly identify the holding. Dictum may occasionally give some guidance, but many advocates rely on it as if it were controlling. A fair reading of a case requires actual reading and scrutiny.

- Be fair in distinguishing case law relied upon by an opponent.

4. Be cautious in submitting boilerplate, computer-generated memoranda.

- Some very high-volume practices involve the submission of hundreds of memoranda weekly. Far too often, these memoranda lack the individualized attention from a lawyer that is necessary to confirm their accuracy. Although a court may be conscious of the need for such briefing, the lawyer who appends a signature to a pleading without examining the contents of the file seriously jeopardizes credibility.

5. Be familiar with and properly cite applicable rules.

- For too often, lawyers make motions which are expressly precluded, or move to strike motions which are expressly allowed by the rules. The applicable rules of procedure should be the Bible for legal writers.

6. Always be fair.

- “[T]he lawyer assists the judge . . . by demonstrating sensitivity to the need for justice in the case, an obligation that will weigh heavily on the judge. The lawyer therefore tries to transmit his belief in the justice of his own argument. He shows that the result he wants is not only legally correct, but also the best result in terms of public policy and fairness to the parties.”

Mechanics and Form

Gaining credibility with the judge is an important task. Although a memorandum that is perfectly pleasing in form and style cannot compensate for misinterpretation of the law or slanting the facts, an attorney cannot rely solely on truth and justice; the other side will be claiming the same. Thus, the attorney has a duty to communicate the client’s position in as effective a manner as possible. Therefore, some comments on mechanics and form are appropriate.

1. Become familiar with Bluebook standards.

- Although many judges, admittedly, do not comply with Bluebook citation standards in their own writing, that does not give an advocate license to ignore them.

- If necessary, hire a law student to help incorporate the standards.

2. Avoid sloppiness and negligence.

- All pleadings and affidavits should be signed.

- Use “spell-check” and proofread all written work before signing it.

- Properly identify the party you represent; the caption should be consistent with the content.

3. Be clear and concise.

- Senior United States District Judge Bruce Van Sickle of the District of North Dakota recently announced that he will not read anything past page fifteen of any brief. He reasoned that if a lawyer’s position could not be presented within the first fifteen pages, it was probably an unnecessary increase in billable hours. I have not found that to be the case; Utah lawyers generally reserve lengthy briefing for very complex cases. However, the thrust of Judge Van Sickle’s comment should be borne in mind: Be as concise as circumstances allow.
Never relegate substantive arguments to a footnote.
Avoid legal jargon, gobbledygook and nonsensical, vague, unending quotes. Long quotes are not only distracting, they sometimes appear to be the lazy lawyer’s substitute for analysis. Plainness and simplicity are the way to a judge’s heart.
Avoid string cites. They make the text unreadable, and a powerful point can be lost with the mental interruption.
Make it readable. There is no substitute for good grammar. A harried judge won't appreciate the added burden of enduring perplexing prose.

4. Have a disinterested person in the firm or a respected colleague read and edit all briefs and significant memoranda.
Honest feedback to cure a lawyer’s jaundiced, narrow legal vision is crucial. Law firms ought to consider hiring a non-lawyer with an English degree to read and critique crucial pleadings and briefs for form and style.

5. Know your audience.
Keep in mind you are writing for a trial judge, who lacks the research staff of higher courts. The better your research, the better the chances for success.
The trial judge will read memoranda, but her time is extremely limited. Pare ruthlessly, and only submit memoranda that are candid and concise.

6. Attach copies of the controlling cases to the memorandum.
At the very least, a lawyer should be prepared to tender copies at oral argument. This is particularly true in rural jurisdictions.

7. Do not turn a conclusion into a free-standing mini-brief.
Simplicity, brevity, and plainness, even if subordinated in the brief or memorandum, cannot be ignored at the end.

Conclusion
A lawyer writes to communicate the client’s position to the court and to advocate and advance that client's cause. A lawyer can best focus the court's attention on these issues by writing fairly, plainly, and simply. Substance will always prevail over form, but it is so much better to have both.

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