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Writing: "It" is a Start; Getting "It" Read is the Goal.

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Writing: “It” is a Start; Getting “It” Read is the Goal.

By Timothy D. Blevins*

The “it” in the title of this article is any document worth expending your resources writing. Procrastination, writer’s block, or lack of confidence in one’s own writing are among the many excuses used by the well meaning writer to forego the task of creating the written word. Moreover, once the task is undertaken there may be the desired rush to finish “it” so that you may sit back and revel in what must be a well-written document. After all, you wrote it and it must be good. Nevertheless, before you release your latest missive, answer the question, “For whom did I write?”

If the answer to the question, “For whom did I write?”, is that “it” is a document for your eyes alone, the task is complete and you can continue your day. However, if your answer involves anyone other than yourself, you now must critically re-read the document through the eyes of your intended audience. This is no small undertaking and, for the novice writer, it may mean forcing yourself to give up the assumptions you had regarding your audience when you first began to write. For the inexperienced legal writer, this may become a monumental task but, alas, it is the foremost task of all that you do when writing the legal document.

Accept your position as the expert of the subject you address in the document. No one should know your subject any better than you do because you are the most recent person to research the subject. The people that will have the opportunity to read what you write will be highly educated and knowledgeable in their own right. If you accept

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your position as the expert, then you can recognize your obligation to your reader to educate them on your subject. With the quick and easy accessibility of information, it will not surprise you that your reader has heard or seen something related to your subject, but all that they have is information. Your need is to turn that information into knowledge. Knowledge is information effectively communicated to others. So, think back to the stories and fables that included the task of the alchemist, for you must turn the lead of information into the gold of knowledge.

You must consider the needs of your intended audience and the needs can vary widely from the judge, to the partner, to the client, and even to the law professor. To keep you audience engaged in reading your writing you must keep your audience interested. Ideally, all of your readers will share some points of interest but it is more likely that you will need to revise and edit your writing for each of these intended audiences.

JUDGES

As a litigator, you will need to consider and understand what the judge has asked of you in completing the litigation. Before you get to the judge however, you will recognize that judges are generally assisted by judicial clerks or research attorneys. Well educated and enthusiastic about their positions, many judicial clerks and research attorneys lack legal experience, typically having less than three years on the job. Regardless of other commitments, these bright individuals are loyal to their courts and with that loyalty comes the intrinsic desire to keep their judges well informed concerning developments in the law and the value of your case. Judicial clerks will complete their own research, distill the rules of law, and digest the facts of your case



with the result being a memorandum or a draft opinion. A judge will often read the clerk's work product prior to indulging the lawyer's persuasive take on the case. You must write for the clerk before you can get to the judge.

Research has shown that judicial clerks favor those writings that exhibit, among others, the following characteristics:

- Clarity and precision in the arguments;
- Use of plain English and the avoidance of legalese;
- Thorough writings that educate while informing;
- Organizational structure that includes effective transitions; and,
- Point headings that assist in focusing the arguments.

In fulfilling the wants and desires of those same clerks, you will need to eliminate or minimize the use of the following traits:

- Legal citations that are incomplete or mistake ridden;
- Uninteresting writings that appear to use a cut-and-paste style;
- Undeveloped or underdeveloped arguments;
- Poorly stated rules of law, and;
- Disorganized and redundant construction.

When you assist the judicial clerk in the fulfillment of his or her duties, your client benefits when the clerk adopts your arguments as being clearly and corrected stated. With expertise and knowledge in the law, and the judicial clerk's inexperience in the law, you must help the judicial clerk learn the law while advancing your client's arguments. Teach the clerks this new area of law without becoming pedantic in the writing. Look for gaps in your analysis that arise when you believe a point should be



“obvious” or “clear” to the clerk. Judicial clerks do not share your comfort in the area of law and any attempt at humor runs the unnecessary risks of insulting the clerk with the result that your document is pushed aside.

Judicial clerks will be impressed with good writing that reflects good analysis. Do not try to impress an inexperienced clerk by using arcane or obtrusive language. By being clear in the development of the law for the clerk, you may find that your reader adopts more of your points just because they understand your use of language better than opposing counsel’s document. When the clerk feels that you have provided all of the pertinent law, the clerk will be empowered. Once empowered, the judicial clerk may find that your arguments should prevail.

The empowerment felt by the clerk creates a sense of comfort and that comfort will be reflected in the clerk’s work product to the judge. Persuasion is a natural by-product of good writing and something that the clerk will value. Remember that the judge has charged his or her clerks with specific requirements. The easier it becomes for the clerk to satisfy their judge(s), the more positive your clients’ position becomes.

PARTNERS

The firm exists as a business and, to one degree or another, partners will want the essence of a business plan. How many and what type of resources need to be marshaled for a particular claim? With litigation calendars that span months, and sometimes years, the firm must make critical decisions regarding the direction of the firm.

Again, clarity in the writing will expose the strengths and weaknesses of legal issues. Organizing the internal or office memorandum allows the partner to follow the flow of the analysis while providing a sound foundation for your synthesized rule of law.



Make use of point headings to maintain the focus of your arguments. The fluidity of the writing creates a comfort zone for the partner, akin to that of the judicial clerk, as your document refreshes and refines an area of law.

In addition to affording the partner the opportunity to align the firm's practice profile with the client's claim, a professional and precise document reflects a good hiring or retention decision. The administration of justice is served while your professional position is preserved. Every writing you present to the partner becomes part of your working relationship within the firm

This critical reader likewise appreciates the same attributes of good writing which the judicial clerk appreciates. Your credibility, and the firm's investment in you, increases with each well thought out legal argument. Professional pride in your work product will be seen in your observance of the rules associated with grammar and citation form. Seek out a trusted associate that will provide you with that final critique, the critique done just before you send the document on to the partner.

CLIENTS

From a writing perspective, forget for a moment that you are a well-educated attorney having an expansive lexicon and ask yourself, "Would my [father/sister/aunt] understand what I am writing?" If you can pick up the telephone and call your client, read your document aloud to them, and feel comfortable the client has understood your use of language, you have satisfied the needs of most clients. Your choice of words will vary depending on the nature of the claim and the type of client but the challenge is the same. In this writing paradigm, exclusion of legalese is a must.



The most frequent complaint addressed by state Bars is the failure of lawyers to communicate with the client. This complaint hinges on other factors, such as the lack of returned telephone calls and unanswered letters from clients. Communication has a broader implication when it involves writing. You need to reduce the most complicated of claims and legal defenses to the level that clients can completely comprehend the message. This does not mean the lawyer should dumb-down the communication, it does mean that the lawyer must have an appreciation for the sophistication of his or her client. The lawyer must then adjust, up or down, word choices and organization to meet that level of sophistication.

Clients can become confused by explanations geared for their specific needs in a manner similar to the layperson's comprehension of a medical prescription written in the doctor's hand. Here, too, the use of arcane or obtrusive language rarely will impress the client. Re-write and edit your document for clear understanding and if your paralegal, staff assistant, or any other person not formally trained in the law can read and understand the document with a single read through, you most likely have a good document in front of you.

LAW PROFESSORS

Because I hope that some of my students will read this document, I included the point heading to develop interest. Logically, all lawyers receive training in the law and many of them were exposed to legal writing as a required course in the law school curriculum. Logic begins to break down when the law student does not effectively transfer good legal writing habits into the stress of a law school exam. It is during the



examination period that the rubber meets the road and some students become casualties.

My experience has identified for me that most students have writing skills. For many, these skills have decayed due to disuse. Now, in the midst of dealing with all of the other stresses associated with law school, those writing skills must be resurrected, redirected, and polished. Student writing skills must become useful enough, in a short period of time, to allow first-year students to effectively communicate their analysis when it comes to answering the call of the exam question.

Law professors want clarity in the writing. Students must clearly state the rule of law, identify the relevant issue(s), and organize a correct response that incorporates the key facts from the question fact pattern. Law professors teaching writing skills will go further, demanding that students demonstrate the rudiments of basic written language, e.g. correct grammar, punctuation, and spelling. Many law professors will comment on the need for these characteristics when assessing student work but most focus on the substance of the response.

Organization and information management in the law school exam is often addressed through the use of acronyms, the most frequent of which is IRAC. There are many other identifiable structures, e.g. CIRAC, CRuPAC, pre-IRAC, CREAC, TREAT, etc. Regardless of the acronym associated with a structure, each share a similarity to the basic writing format, the Five Paragraph Essay. When the law professor undertakes to assess student understanding, the professor needs to recognize the topic of the essay, most frequently identified as the issue. As a novice legal writer, the student must begin by recognizing the reader as being someone trained in the law but who does not know



the student's subject as well as the student does. Succinctly put, the student must spell out the issue for his or her reader. In order to identify the issue effectively for the reader, the student must be capable of associating the issue with a synthesized rule of law.

Here my reader will note that I addressed the necessity of issue spotting before I discuss the need for rule synthesizing. I have purposely addressed issue spotting first to remain true to the expected legal writing paradigm, the "I" in IRAC. However, the issue cannot be completely formed until the writer has devised the rule, the "R" in IRAC. After having synthesized the rule of law and developing the issue statement, the student now enters the realm of legal analysis, the "A" in IRAC. This paper focuses on the writing skill and I leave the discussion of legal analysis to those who have authored the many books on that subject. The analysis section of the law school exam answer is analogous to the three paragraphs in the Five Paragraph Essay that support and flesh out the topic, the focus of the introductory paragraph.

All good writings must come to an end and so, too, must the law school exam response. The writer must include a conclusion, the "C" in CIRAC, CRuPAC, and IRAC. The conclusion must flow reasonably and logically from the analysis, but a surprising number of students will leave the conclusion out of the response or conclude in contradiction to the analysis. The challenge to the exam response writer is to continue the writing process to its natural end.

CONCLUSION

The writer's audience is easily identifiable, or is it? I included the use of sub-heading to cordon four separate but related groups of readers but the reality of the undertaking was to write for the student, because it is the student, the person seeking to



improve on the skill of legal writing, which can best be served. The student here, however, is anyone who is willing to work at improving his or her writings. By keeping the perspective of the reader in focus, the message becomes clearer and the argument is advanced.