

Editorializing, Gratuitous Verbiage, and Verbatim Tracking Don't Persuade

By Kenneth F. Oettle

This is the first of a two-part series on what does and doesn't persuade. First up is what doesn't persuade. You will probably agree with most of the criticisms below of rhetorical tactics that don't persuade, but you will also probably continue to use those tactics, perhaps a little less wantonly, because they are hard to resist.

Aggressive tactics, such as using intensifiers and taking potshots at the other side, appeal to clients' bloodlust and the attorneys who pander to it, and they satisfy the desire to vent. Most attorneys acknowledge that aggressive tactics can offend the court, mark the writer as a screamer, and suggest to the court that the writer may be covering for the absence of a viable point, but attorneys also know on which side their bread is buttered (the client side), so they continue to use tactics that clients demand.

Indeed, I dare you to find a law-firm partner who eschews all intensifiers and ad hominem attacks. Even I—though I teach this stuff—have to force myself not to take potshots at opposing counsel who make blatantly foolish arguments. The tactics are too client-friendly and too vent-worthy, and frankly, the partners who use these tactics, and thus the associates who train under them, think the tactics work.

Rhetorical tactics that add bulk to one's work—such as overquoting from cases and statutes and arguing every point one can think of—allow writers to avoid the hard, sometimes frustrating work of analysis. It's easier to quote from opinions than to think

a point through, and it's easier to make every conceivable argument, weak or strong, than to judge where to concentrate one's forces.

Rhetorical tactics that seem effective, but aren't, can be classified in groups (sets) under the following rubrics: "Editorializing," "Posturing," "Bulking Up," and "Avoidance." These categories are flexible. Some tactics could fit into more than one.

This column does not address writing mistakes—typos, errors in grammar and punctuation, or sloppy citational form—that detract from the persuasive effort but aren't intentional. And it does not address helpful tactics that are often ignored, such as choosing a persuasive theme, starting strong, being generous with headings and subheadings, introducing quotations, and providing internal summaries. This column is about tactics that do not work, though we think they do.

Editorializing

Intensifiers. Writers think they are driving home their points with adverbs and adverbial phrases such as *clearly*, *obviously*, *ever*, *never*, *whatsoever*, *in any way*, and *simply*. The intent is to emphasize, but the principal effect is to editorialize—to insert the writer's personal view. This is not persuasive. Readers are persuaded by facts and by law, not by a comment that something

is clear or (to the chagrin of all you *simply* users) simple.

It is important to note falls into this category. It is an editorial (the writer's personal view) within the subset of "intensifier" (because of *important*), but it is used less to intensify than to avoid explaining why something is important. It's a classic red flag that what you are talking about is not important or that you have not figured out why it is important.

Potshots (ad hominem attacks). Irritated by the brashness of the opposition and the insult to your intelligence in their baseless arguments, you can't resist impugning their arguments and their motives (for instance, you say that the other side's position "defies all logic" or that it is "utterly without factual support," or that counsel "cynically argues" or "disingenuously contends"). You are entitled to your opinion, but the court won't be impressed. The court will view you as a name-caller and will judge you accordingly.

Posturing

Legalese and Latinate words. Just as you instinctively want to tear the other side down, you want to build yourself up, if you can. To this end, you may try to sound important with technical legal terms like *vel non* and Latinate words like *commence*,

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forgetting (or never having learned) that readers are persuaded by facts and law, not by your persona.

Bulking up

Mind-numbing repetition. Sometimes, for lack of anything better to say, you repeat yourself. The first, middle, and last sentences of a paragraph may be nearly identical, or you may say the same thing several different ways, well past the point where the repetition is beneficial. You rationalize that anything worth saying is worth saying two, three, or even four times. Probably you are covering, consciously or unconsciously, for the absence of anything else worth saying.

Overquoting cases and statutes. You quote lengthy passages from cases and statutes because you don't trust your ability to summarize, and you feel that you need bulk. If you are a beginner, you may distrust summarizing altogether, believing that candor requires verbatim reporting. It doesn't. Candor requires only fair reporting, not reporting in bulk. Sometimes, you try to piece together an argument from dicta without having to craft a full sentence yourself. Unsure of your own words, you would rather depend on someone else's.

Oversummarizing cases. Instead of encapsulating the holding, you report the facts of a case and the arguments made by both sides. You rationalize that you are educating the court and being candid through completeness, but you are really just avoiding the harder task of capturing the essence of the holding.

Adding words. You think incorrectly that you add weight to your argument when you add words ("The contractor is in the

process of building an addition" vs. "The contractor is building an addition"). Possibly you are trying to divert attention from your not having much to say. Weight may be good in sumo wrestling, but not in persuasive writing.

Avoidance

Dropping a footnote to address the other side's best point. You think, wrongly, that you can minimize the other side's best point by tucking it into a footnote. You can't. Many writers who use the footnote dodge don't even realize that it is a dodge.

Failing to address the other side's best point. Sometimes the other side's best point is so formidable that you fail to come up with a refutation, you resist thinking about it, and, accidentally on purpose, you forget to address it. Or maybe you know you aren't addressing it and just *bold your breath*. You can't win that way. ■

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