

Persuasive Legal Writing

By James A. Johnson

The quality of a person's life is in direct proportion to their commitment to excellence regardless of their chosen field of endeavor.

— Attributed to Hall of Fame NFL coach Vince Lombardi.¹

The most important tool in a consummate lawyer's toolbox is the ability to communicate effectively, both orally and in writing. Whether the person receiving one's communication is a judge, juror, or opposing counsel, the message should be precise, direct, clear, trustworthy, and engaging. Writing differs from oral expression because it creates a permanent record. Persuasive legal writing involves knowing precisely what one wants to say — and saying it — clearly and simply. Long sentences, for instance, are usually the product of the failure to think through what one wants to say and how to say it. Short sentences can be powerful and persuasive: *this is a case about a broken promise*. Aim for an average of about 20 words a sentence.

Precision is not possible in every instance, but the lawyer should strive for it. Each sentence should have an unmistakable meaning and not be reasonably susceptible of different interpretations.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

Word choice

Facts must be related in a manner that enables the reader to *see* the act, incident, or event portrayed. Choosing the right words is obviously important. Your goal is to command attention, preferably in the active voice, to create a mind-picture for the reader. For example: NBA legend Michael Jordan "flies toward the basketball hoop. His tongue is out, flickering like a cobra tasting the air to decide just how he is going to finish. It is not that he defies the laws of gravity, but rather that he is slow to obey them."²

One kind of word choice deserves particular mention — the use of intensifiers such as *clearly*, *obviously*, and *undoubtedly*. They may appear to add emphasis but often come across as a sign of weakness, a substitute for compelling argument. Try replacing phrases in which they appear with a single word: *completely wrong* = *mistaken*, *incorrect*, *very large* = *sizable*; *highly capable* = *accomplished*. Of course, if the legal standard involves an intensifier — *clearly erroneous*, *substantially outweighs* — then you use it.

Writing well is about making choices that produce clarity and grace. Good writers carefully choose what and how to write and what words to use. They arrange words in an organized fashion that the reader finds enjoyable. An enriched vocabulary is an indispensable aid. But as a general rule, plain, everyday words make the straightest connection to the reader's or listener's mind.

Clarity and coherence

Assume that the court knows nothing about the case. The lawyer must set out the issues, facts, and arguments with a clear point of view and not in a conclusory manner. Tell the court what relief you are seek-

ing, together with the motion standard or the appellate standard of review.

Just as a picture can be worth a thousand words, so can an analogy. The analogy — a simple comparison to a familiar subject — is the greatest weapon in the arsenal of persuasion. Perhaps nothing can move a judge or jury more convincingly than an apt comparison to something that they know from their own experience to be true. For example: "she is a prisoner in her own wheelchair"; "what goes up must come down"; "equity protects the vigilant and not those who slumber on their rights"; "like finding a needle in a haystack"; "life is like a box of chocolates — you never know what you are going to get"; and "like a good neighbor, State Farm is there." The goal is to permit the judge or jury to reach the desired conclusion on their own. They will hold that conclusion more firmly than if merely told what conclusion to reach. Use analogies to make a point.

A topic sentence connects the previous paragraph to the start of the next paragraph by repeating a word or concept and linking it to the point that will follow in the new paragraph. In other words, it bridges the paragraphs. If the logic and movement are clear, transitional conjunctions like *additionally*, *but*, and *therefore* may be superfluous. Then each new sentence must relate to the one before it and to the topic sentence in order to develop the topic sentence's promise.

Finally, lawyers should write clear arguments supported by precise citations. Precise citations are persuasive and establish the lawyer's credibility and the integrity of the research. Avoid string citations because they rarely add anything to writing; pick the one or two best citations to support the legal point.

Rhetorical devices

Properly and judiciously used, rhetorical devices give persuasion and polish to your words. A *triple* is a group of three words, three phrases, or three sentences: “life, liberty and the pursuit of happiness.” *Anaphora* is the repetition of a word or phrase at the beginning of successive clauses, sentences, or paragraphs. During World War II, U.K. Prime Minister Winston Churchill used anaphora powerfully in his speech to the House of Commons on June 4, 1940: “We shall go on to the end. We shall fight in France, we shall fight on the seas and oceans, we shall fight with growing confidence and growing strength in the air....”

In his speech at the 1963 March on Washington for Jobs and Freedom, Martin Luther King Jr. began eight consecutive sentences with “I have a dream.” He ended with a triplet: “Free at last! Free at last! Thank God Almighty, we are free at last!”

Winning

Written trial briefs, motions, and appellate briefs are the first opportunity, uninterrupted, to persuade the court. Courts today allow limited or no time for oral advocacy and often rule on the pleadings. *Lawyers must write to win*. They should make every word count. The cornerstone of persuasion is twofold: (1) make the court want to rule in your favor, and (2) make it easy for the court to do so. Power in persuasion comes with the steady accumulation of a series of facts and arguments that all point in the same direction.

Editing and revising

Preliminary editing should be done with the writing. As each thought or argument is completed, review it for choice of words, errors, and logical development of the subject.

Revising requires restructuring sentences and paragraphs and reorganizing material

to create clarity. Revising is time-consuming and requires prolonged concentration to retain the precise thought contained in the original writing.

Writing a persuasive motion or brief takes time and effort. Lawyers should know that they are not done after their first draft. Flaws in the arrangement of material, colorless words, bad sentence structure, and verbosity may not penetrate the writer’s consciousness during the first draft. So set the piece aside for a few days and then reread it. Also, ask an associate or partner to read the motion, memorandum of law, or appellate brief to help improve it. All good writers welcome editing.

It is a painful but necessary exercise to put the scalpel to one’s own writing. You will find that less is almost always more.

Conclusion

Mastering a case means stepping into your audience’s shoes and viewing it from their perspective. This is true in both oral and written advocacy. Persuasive legal writing is the product of meticulous editing, revising, and logical thinking to ensure continuity of thought.

Civility and professionalism are marks of the consummate lawyer, who does not engage in personal attacks. Do not use terms like *preposterous* or *absurd*. Lawyers win by stating accurate facts and providing explanations and evidence to prove their conclusions.

Keep in mind that to develop into an outstanding writer, in addition to my suggestions, you must write often. Write articles for your bar journal and state-bar sections. Join Scribes — the American Society of Legal Writers (www.scribes.org). A lawyer who seeks competence as a writer must continue to grow.

The ideal style is clear, forceful, precise, attention grabbing, and so elegant that the reader has no choice but to adopt the writer’s view of the law. For those of you who

may not have reached this pinnacle, I remind you of Scarlett O’Hara in the movie “Gone with the Wind”: “After all, tomorrow is another day!” ■

James A. Johnson is a prolific writer and an accomplished lawyer. He concentrates on serious personal injury, insurance coverage under the commercial general-liability policy, sports and entertainment law, and federal criminal defense. Johnson is a member of the Michigan, Massachusetts, Texas, and Federal Court bars. He can be reached at www.JamesAJohnsonEsq.com.

Helpful Writing Sources

1. Garner, *The Redbook: A Manual on Legal Style (4th Edition)* (St. Paul: West Academic Publishing, 2018);
2. Williams & Bizup, *Style: Lessons in Clarity and Grace (12th Edition)* (New York: Pearson, 2016);
3. *The Scribes Journal of Legal Writing*;
4. Kimble, *Seeing Through Legalese: More Essays on Plain Language* (Durham: Carolina Academic Press, 2017) and Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Durham: Carolina Academic Press, 2012);
5. *The Bluebook: A Uniform System of Citation (21st Edition)* (Cambridge: Harvard Law Review Association, 2020);
6. Adams, *A Manual of Style for Contract Drafting (4th Edition)* (Chicago: ABA Publishing, 2017);
7. Burlingame, *On Beginning a Court Paper*, 93 Mich B J 52 (June 2014); and
8. Busk, *Why I Made Plain-Language Changes to Your Contract*, 94 Mich B J 38 (February 2015).

ENDNOTES

1. *Famous Quotes* by Vince Lombardi, available at [Vincelombardi.com <http://www.vincelombardi.com/quotes.html>](http://www.vincelombardi.com/quotes.html) (accessed August 11, 2021).
2. Tip of the cap to sports journalist Roland Lazenby for inspiring this description.