

The Scrivener: Modern Legal Writing



Judges' Pet Peeves I

by K.K. DuVivier



Over the summer, I had an opportunity to poll four Denver District Court judges about problems they encounter in the writing attorneys submit to their courtrooms. This column addresses one of their leading complaints.

Figure out your thesis before writing, not in the process. The judge does not want to muddle through your thought processes with you.
—Judge X's Complaint

A brief or memo must evolve through several stages to communicate effectively to the reader. Start by formulating your opinion or argument mentally. Next, you must reduce the concept to writing.

The writing process itself involves two very different activities. First, the mental concept is translated from a non-verbal idea "into a linear verbal design called prose."¹ At this first point, you must write for yourself. Second, you must revise and edit your writing to make it communicate with your reader. At this second point, you must rewrite for your reader.

Conceptualization and Outline

With writing, as with most other works of art, the author first develops a mental concept of the work. This concept exists solely as an amorphous impulse firing across neurons and synapses in your cerebral cortex. Use this conceptualization phase as the time to flesh out theories and to jot down notes on initial themes and phrases as they come to mind. Keep a separate sheet while researching to note key words or concepts from cases as you read them.

During this brainstorming phase, you also may want to prepare an outline. However, when I began teaching writ-

ing, I discovered an interesting secret. Although many writers work effectively from a detailed outline, some of us do not prepare an outline before we write. We may prepare a list of points we wish to cover. However, the final formal structure of the work does not take shape until the ideas are out on paper and can be cut and pasted into some logical order.

Writing for Yourself

When writing, the author faces the difficult task of translating one language—thought—to another—words. In this process the glorious abstract ideas must be reduced to simple words, which can never quite equal the thought.

It is during this initial drafting that you should write for yourself. This is the time to muddle through your thought processes. Figure out your thesis. Give rudimentary clarity and form to formless ideas. But this writing is not what to file with the court.

Writing for Your Reader

The second crucial step in writing is revising and editing the draft to direct it to the reader. While it was appropriate to muddle when trying to get the idea out of your head, you now want to convey absolute clarity to your reader.

Your original thought processes may not be the most lucid. Hooray for word processors! Rearrange discussions and move whole sections to achieve an order that highlights the strength and priority of your arguments.

At this phase, direct your writing to your reader. Consider your reader when writing each paragraph. Who is your reader? What does your reader want to know? Can your reader readily discern the paragraph's purpose? Scrutinize your writing to address these questions.

Next, change your focus to communication. The objective is to convince the judge that your thesis is sound. Do not make the judge's task more difficult by allowing the writing itself to interfere with conveying the thesis. The writing and organ-

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

K.K. DuVivier is an instructor of Legal Writing and Appellate Court Advocacy at the University of Colorado School of Law, Boulder.

ization should be simple and direct. Help the judge grasp the idea without needing to reread any sections. Convey to the judge your thesis, not your muddlings.

William James described the process as follows: "Everything comes out wrong with me at first, but when once objectified in a crude shape, I can torture and poke and scrape and pat it until it offends me no more."

NOTE

1. The concepts of "Writing's Dual Nature" and the distinction between "Writer-Centered Writing: Writing for Yourself" and "Reader-Directed Writing: Writing for Your Reader" are artfully described in Phelps, *Problems and Cases for Legal Writing* (Notre Dame, IN: NITA, 1990) at 13-18.



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