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When Writing a Memo, Keep the Reader in Mind

Dispel preconceptions as quickly as possible

By Kenneth F. Oettle

Your most important task in creating a memo is to deal with the substance — to determine, for example, whether your client breached a contract or committed a business tort. You deal with the substance by gathering the law and the facts and applying each to the other. Your research should be thorough and your analysis sharp.

Your second most important task in creating a memo is to get your point across. This is where “the reader” comes in. Your memo is useless unless its message is received.

Who receives it? The reader.

Because readers aren’t robots, you have to account for human factors that can interfere with transmittal of the message, such as attitudes (e.g., impatience), preconceptions and prior knowledge. For every sentence if not every word, ask yourself, “What does the reader need to know? What do I want the reader to know? What is the reader thinking?”

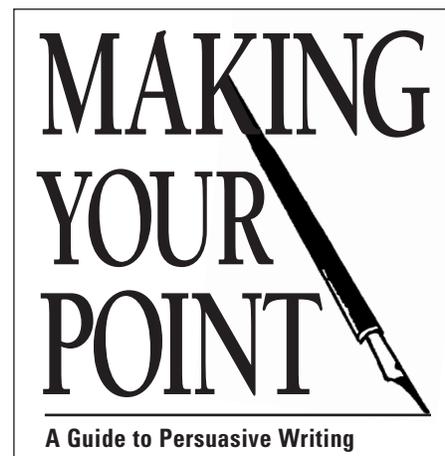
Suppose your client in a civil case wants to depose a criminal defendant who has entered a plea of *nolo contendere* (no contest) and is out on bail awaiting sentencing. You have been asked whether a defendant who has entered a *nolo* plea is deemed to have waived the Fifth Amendment privilege against self-incrimination. If the defendant retains the privilege pending sentencing, he can quash a civil subpoena because a deposition would place him at

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risk of self-incrimination.

Your assigning attorney believes that the Fifth Amendment privilege is waived when a guilty plea is entered because the defendant has incriminated himself. The attorney reasons that *nolo* pleas should also waive the privilege because a *nolo* plea functions like a guilty plea, exposing the defendant to incarceration.

The case law does not support his views. Courts have held that persons



awaiting sentencing after a guilty plea retain their Fifth Amendment privilege against self-incrimination. The rationale is that anything they say to their detriment pending sentencing could be used against them in the sentencing proceeding. According to the case law, the “incrimination process” isn’t over until sentencing.

You find nothing about the effect of *nolo* pleas on the privilege against self-incrimination, but you conclude that the rationale for the privilege surviving a guilty plea should sustain the privilege after a *nolo* plea as well. Both pleas are dispositive.

Let’s examine three choices you’ll

make in drafting the memo: (1) how to formulate the question; (2) how to formulate the short answer; and (3) how to shape the discussion. The factual elements are as follows:

- (1) defendant
- (2) *nolo contendere* plea
- (3) Fifth Amendment privilege against self-incrimination
- (4) pending sentencing hearing

Listing these elements helps you draft the following question:

Does a defendant who has pled *nolo contendere* retain the Fifth Amendment privilege against self-incrimination pending sentencing?

The question tracks the facts. First you establish the subject — the defendant. Then you “modify” the subject (describe it) to show the reader that your focus is on defendants who have entered *nolo* pleas. Then you move to the verb “retain,” which is particularly efficient. It implies that the defendant has a privilege (you have to have something to retain it), and it primes the reader to receive the temporal information in the phrase “pending sentencing” (the reader asks, “Retain when or how long?” and the answer is “Pending sentencing”).

A possible reformulation of the question, favored by several members of my informal polling group, is as follows:

Does a defendant retain the Fifth Amendment privilege against self-incrimination after entering a plea of *nolo contendere* and prior to sentencing?

This formulation gains by posing the question early (Does a defendant retain the privilege?), but it loses by posing the question before presenting the reason for the question (that the

defendant has entered a nolo plea). It gains a bit of clarity by highlighting the time frame (“after entering...and prior to”), but it loses some fluidity. I prefer the original version. It presents the information in optimum order and it is more compact.

Your Short Answer also presents a choice. You can begin with the conclusion (that the Fifth Amendment privilege survives) or with the reason why the privilege survives (a defendant could be prejudiced at sentencing by self-incriminating statements made between plea and sentencing). Because of your reader’s preconception, begin with the rationale, not the conclusion.

Beginning with your conclusion — that a defendant who has entered a nolo plea retains the Fifth Amendment privilege pending sentencing — may trigger a doubting response in a reader who has a preconception to the contrary. Weaken the preconception by beginning with the reason:

Because anything a defendant says before sentencing can be used against him at sentencing, the Fifth Amendment privilege against self-incrimination is not extinguished by a dispositive plea, whether “guilty” or “nolo contendere.” The privilege survives until sentencing is complete.

Now the reader is “softened up.” By leading with the rationale, you have

shown respect for the reader and loosened the grip of his preconception. You can now begin the discussion.

Assume you found no case addressing whether the Fifth Amendment privilege against self-incrimination survives a nolo plea. The rationale for survival of the privilege between guilty plea and sentencing should apply to nolo pleas as well. A person awaiting sentencing after a nolo plea is as vulnerable to self-incrimination as a person awaiting sentencing after a guilty plea.

The logical chain would run as follows:

Defendants who plead guilty retain the Fifth Amendment privilege against self-incrimination pending sentencing.

A nolo plea places a defendant in the same position of vulnerability pending sentencing as does a guilty plea.

Therefore, a defendant who enters a nolo plea retains the Fifth Amendment privilege against self-incrimination pending sentencing.

You always need a logical chain. Outlining it helps confirm its validity.

Puzzler

How would you tighten and sharpen the following sentence?

The court in *Smith v. Jones* applied a five-part series of factors for consideration in determining whether to permit limited discovery from the ISP of sufficient information to permit service of process on defendant Jones.

Internet service providers (ISPs) can be compelled to reveal the identity of persons who post defamatory material on the Internet if the requesting party satisfies a multipart test. Shorten “series of factors for consideration” to “test.”

Change the concept of “permitting” discovery to “compelling” production. Words like “order,” “grant” or “compel” more accurately describe the judicial process because the court will order discovery, not merely permit it. Such words are also more assertive. “To determine” is more forceful than “in determining.”

“Limited and “sufficient” cover the same ground, so you don’t need both. You can drop “defendant” at the end of the sentence because it is implicit, but you probably need “on Jones.”

The revised version:

The court in *Smith v. Jones* applied a five-part test to determine whether to compel the ISP to produce sufficient information to permit service of process on Jones.■