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Writing Is a Self-Analytical Process

Quiz yourself relentlessly and without mercy as you compose

By Kenneth F. Oettle

The quality of your brief is a function of the questions you ask yourself during the writing process. If you respond honestly and assiduously to the following questions, you will markedly increase your chances of writing something good.

• What is my point?

No question could be more important. Everything flows from it. Your point isn't, for example, that the other side "fails to state a claim" or "fails to prove that any material facts are contested." Your point is that the low bidder's proposal was defective because it omitted a \$70,000 line item or that an employee was fired because his incompetence ruined seven batches of product, not because he turned in somebody for stealing scraps. Your point must be premised in fact.

• Is my point credible?

The answer is usually yes. Most points are credible. The problem is that the other side's point may be more credible.

• What will the other side argue?

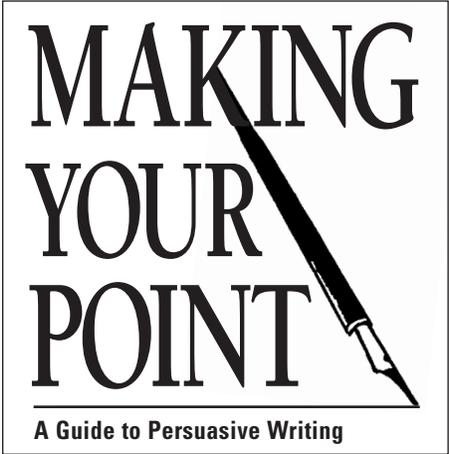
Put yourself in the other side's position. What would you argue? Whatever it is, confront it. Don't hide with the ostriches — i.e., put your head in the sand. (I know they don't really put their

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heads in the sand.) The other side is competent, and they want to win, too.

• What have I done to win the reader over as soon as possible? Is my opening persuasive? If not, is it at least interesting? Does it build toward something persuasive?

This is crucial. Readers are busier and more impatient than ever. They want to be persuaded, but they don't want to



MAKING
YOUR
POINT

A Guide to Persuasive Writing

wait for the warmth of your argument to spread slowly through them. They want action. If you give them action, you may get them on your side early. Once converted, they will be more indulgent of what follows because readers, like jurors, interpret new evidence to support their working hypotheses.

• Have I been careful not to assume the reader knows everything I know about the subject? Do I need to educate the reader?

• Is the reader likely to have preconceptions I need to dispel? If so, how do I handle them?

• If I were the reader, what would be

going through my mind right now?

Ask yourself this question frequently. Continually put yourself in the place of the reader.

• Have I given the reader reason to distrust me? That is, have I exaggerated? Ignored bad facts? Mischaracterized my adversary's arguments? Drawn unsupported conclusions? Restated my conclusions instead of presenting fact or argument to support them? Used intensifiers like "clearly" and "obviously" instead of presenting fact or argument? Made weak arguments?

• Have I made the most of my case law? Even if the facts of a case with good dicta are largely different from the facts of my case, can I find meaningful similarity?

• How about cases cited by my adversary? Am I truly distinguishing them or just pointing out immaterial differences?

• Does a common thread run through my cases? Through my adversary's?

• Have I mastered my facts? That is, have I reviewed all the documents and affidavits and read all the transcripts? Have I asked myself if each fact is good or bad for my case?

• Am I missing any facts that I could fill in by means of another affidavit?

• Have I used all my good facts to support my argument?

You may wish to create working lists of good and bad facts to assist in determining how to feature or neutralize each of them.

• Am I merely reciting dicta, or am I tying the facts of my case to the facts of the cases I cite?

• Am I being clear? Can I make the reader's job easier?

• Do the sentences flow smoothly, or are they disjointed?

• Does each paragraph flow into the next?

- Am I repeating myself not for emphasis but as a substitute for factual support and analysis?

- Can I eliminate words without losing substance? (You can. Do it.)

- Can I be more precise? (You probably can. Give it some thought.)

- Can I find stronger words (e.g., defendant “committed” rather than “agreed” to do something). Do any of my words carry connotations that hurt my argument?

- Have I checked my punctuation? If I don’t understand punctuation, have I asked someone knowledgeable to check it for me?

- Have I tested every passive construction (“a meeting was held”) to see if it works better in active form (“the parties met”)?

- Is my tone appropriate? Am I being sarcastic? Strident? Cute? Whiney?

- Have I shown why the other side deserves to lose?

This is a watershed question. Even if the court decides the case on a technical point, it needs the comfort of believing it is doing the right thing. If the other side deserves to lose, then the court is only rendering a judgment that is, in effect, pre-ordained, which means the court does not have to feel responsible for the litigant losing.

- Have I persuaded the court by the end of my preliminary statement? (If not, that’s one strike against you.)

- Am I merely reiterating my equities without accounting for my adversary’s? (If so, that’s two strikes against you.)

- Have I made the result I advocate look fair? (If not, then it’s strike three. You will almost certainly lose.)

- Finally, have I failed to think anything through?

You usually know the answer to this question, but you may not be willing to face it. The issue you won’t confront is the one you are afraid will defeat you.

Puzzler

Should you use a comma after “premises” in the following sentence?

The tenant could either maintain possession of the premises, or find another retailer and enter into a sublease.

Generally, you should not place a comma between subject and verb. The subject is “tenant,” and the compound verb is “could ... maintain ... [or] find ... [and] enter.” Do not place a comma between tenant and any of the elements of the compound verb. If you restate the subject using the pronoun “he,” then you would need a comma:

The tenant could maintain possession of the premises, or he could find another retailer and enter into a sublease. ■