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Use Emphasis To Overcome the Reader's Resistance

Repetition and word placement help drive the point home

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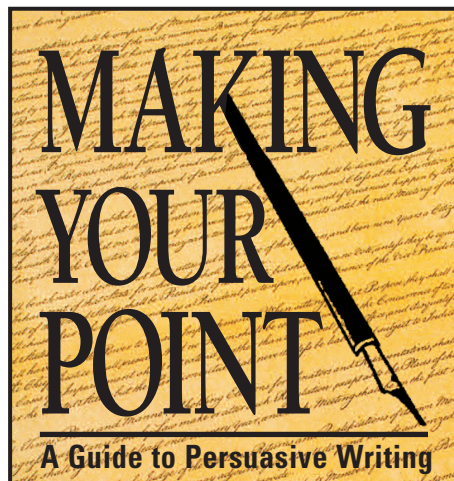
This is the second of two columns presenting the seemingly obvious thesis that the tactics of persuasive legal writing are directed toward human tendencies or, some might say, human imperfections. The first column recommended that briefs begin strongly because readers choose sides quickly, look to support their initial choice, and tend to reject evidence to the contrary.

The recommendation that one pander to, or take advantage of, human frailties may seem too cynical (after all, judges aren't so easily swayed, are they?); too risky (what if you are caught at it?); or downright unnecessary (doesn't it all just come down to having better facts or a better precedent?).

These are reasonable concerns. Judges are smart, streetwise and fully capable of spotting tactical maneuvers; you don't want to get caught at anything; and in the kingdom of stare decisis, precedent rules.

But the concerns are also a bit naïve. Judges are human: they not only tolerate but welcome rhetorical manipulation if it makes their job easier and guides them to the right result. Besides, precedent usually supports the right result. In the king-

dom of stare decisis, facts share the throne if they don't rule outright.



This week's column addresses the tactic of emphasis, which includes repetition and strategic placement. Emphasis compensates for the mind's imperfect powers of absorption and its resistance to new ideas, and it taps the mind's tendency to give more weight to the beginnings and ends of things.

Humans get diverted, disbelieve and forget. A reader's ability to comprehend is compromised by, among other things, the limitations of the brain, environmental distractions, competing demands and

personal agendas, that is, the reader's eagerness to embrace ideas that comport with the reader's value system and to reject or ignore ideas that don't.

Repetition and strategic placement address these tendencies. We repeat key words or phrases to intensify the reader's experience of the idea, compensating for the mind's imperfect ability to retain facts and overcoming its resistance to ideas that are new or conflict with something the reader believes. We place key thoughts in positions of prominence, such as the beginnings and ends of sentences and paragraphs, where they are more likely to be noticed and to leave an impression.

Some writers are reluctant to use repetition lest the tactic seem obvious, much as they might hesitate to begin a brief powerfully for fear of being obvious. It's a fear of being caught advocating rather than presenting, of being seen as speaking for the facts rather than letting the facts speak for themselves.

This is an overreaction. On the whole, emphasis through repetition is more helpful than harmful, and it doesn't mark you as devious. To the contrary, it shows you to be confident enough in your point to highlight it.

Emphasis gets a bad name from faux emphatics like redundancy ("certifies and says"); editorials ("Clearly, the case law holds ..."); intensifiers ("ever," "never" and "any"); and name calling ("Defendant brazenly argues that ..."). Writers often think they are adding emphasis when they are merely inserting their personal view. Better to eschew the editorials and intensifiers, avoid name calling altogether, and be spare with motive-spotting like, "Seeking to divert the court's attention from the case law, defendant contends ..."

You will resist this last piece of advice because I resist it myself. The

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urge to expose a subterfuge is nearly irresistible. When you think the other side is trying to get away with something, you feel compelled to expose the scheme so that you aren't taken advantage of and the court isn't taken in.

But courts can see through fakery. They read a ton of briefs, and they tend not to make decisions until they have seen past the puffery and understand the point. If the issue is being obscured by either side — whether through self-absorption, wishful thinking or design — the court will know it.

For the most part, courts stay a step ahead of the advocates. All you need to do is discretely point out that the other side has “misinterpreted” a case or “incompletely reported” the facts, and your understated characterization will sufficiently identify the flaw in the other side's argument without need for you to speculate about the other side's motives. Let the court spot the motives. It will.

Another form of faux emphasis is exaggeration, a self-defeating technique that tempts us in advocacy as it does in life. In life, we exaggerate to enhance our personal image. In advocacy, we exaggerate to enhance our case, or so we think. We shade the facts or claim that a case stands for more than it does. This tactic is no more successful in briefs than in life.

If statements aren't supportable, we

lose the reader's trust. An exaggeration is a form of lie, and readers don't trust writers who lie. The relationship of trust between reader and writer is crucial to the rhetorical process because the reader has to rely on the writer. The reader cannot check every record reference or read every case. Besides, judging is, in part, an emotional enterprise, and judges, like most people, don't like liars.

In contrast to human readers, computers have no need of repetition. Their memories are perfect; they don't get distracted; and they have no agendas that haven't been programmed in. Word placement makes little difference because a computer pays as much attention to, and remembers just as well, what it reads in the middle as what it reads first and last. Sometimes we seem to write as if our readers were computers.

Similarly, unless a computer has been given human emotions, as in the movie “AI,” it has no need of trust. I suppose you could tell a computer to downgrade an argument if the writer makes the same unsupported statement three times in one paragraph. And I suppose you could program reliability factors that would function like trust. But we don't have to solve those issues. Computers don't judge legal arguments and make judicial decisions. Our readers are still human.

Puzzler

How would you tighten and sharpen the following sentence?

Defendants' utter lack of communication provides ample and sufficient evidence of their bad faith.

Drop “utter” and “sufficient.” It's a classic case of a writer thinking that editorial intensification (utter) and redundancy (ample and sufficient) constitute effective emphasis. “Ample” means “more than sufficient.”

Assuming that “utter” is intended to convey that no communication took place at all, you could use “any” in front of communication, thus describing the degree of communication rather than your feelings about it.

Though I delete four out of five “any's” from drafts, it would work here structurally as well as for meaning (“any communication ... ample evidence”).

The new version:
Defendants' lack of any communication provides ample evidence of their bad faith.

Alternate version:
Defendants' lack of communication confirms their bad faith. ■