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## Use Underlining for Emphasis, Not for Editorializing

### Highlight quotations, not your own prose

By Kenneth F. Oettle

**U**nderlining can illuminate quotations. It guides the reader and adds emphasis. But underlining doesn't work so well on a writer's own words. It usually makes the writer appear to be trying too hard.

Suppose the defendants are taking a position inconsistent with admissions they made in their answer to the complaint. You are plaintiff's counsel. In a motion brief, you call the defendants' inconsistency to the court's attention, arguing as follows:

In their answer, the defendants admitted facts that are undeniably inconsistent with their new defense.

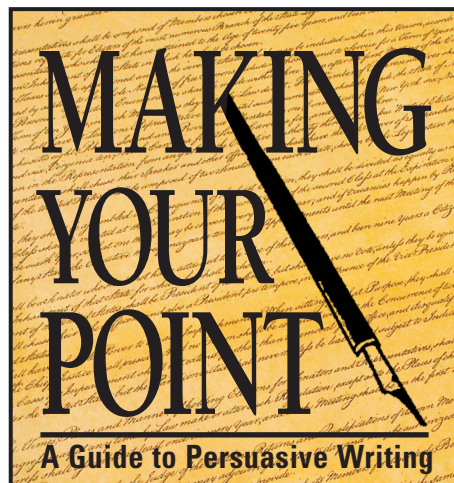
You underline "admitted" because you are outraged that the defendants changed their position and even more outraged that they did so without acknowledging it. You envision yourself standing at the lectern and gesturing emphatically as you raise your voice to say, "The defendants ADMITTED facts that are inconsistent with their new defense."

On your feet, you can raise your voice, but in print, you are expected to be

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more reserved. Because you have time to refine a brief, you are expected to make



your point without the written equivalent of emphatic gestures. Spikes in amplitude are almost always counterproductive on the printed page.

Underlining portions of a quotation helps the reader, assuming you don't underline ponderous chunks of text, which creates other issues. But underlining your own words suggests that you lack confidence in the articulation of your point. Why else would you augment it with what is essentially a gesture?

Underlining your own words can also suggest that the reader isn't bright enough to get your point without a typographical assist. As one member of my Informal Polling Group says, "The effect is that of raising your voice to a not very bright listener, and it insults the reader."

You can make your point just as well without the underlining:

In their answer, the defendants admitted facts that are undeni-

ably inconsistent with their new defense.

"The defendants admitted facts" is clear and forceful. It is just as strong as "the defendants admitted facts," and it is better than the underlined version because it is not tainted by a gratuitous editorial.

In the motion brief, you would set forth the admissions inconsistent with the new defense. The persuasion is in the inconsistency between the admissions and the new defense — in other words, in the facts — not in your conclusory statement that the defendants admitted something. Underlining "admitted" steals attention from the facts by focusing unnecessarily on the conclusion.

Ideally, you will state no conclusion until after you present your facts because the best persuasion occurs when the reader reaches the conclusion independently. If the reader draws a conclusion before you assert it, the reader embraces the conclusion and owns it. You sold it, but the reader owns it. The facts make the sale. The underlining does not.

### A Second Example

Suppose you represent ABC Corp. (the "company") in a proxy contest against XYZ Co. (the "dissenter"), which is looking to replace the company's board of directors with its own nominees. The dissenter's initial draft proxy statement, filed with the SEC and available on-line to all shareholders, contains false statements about the character of the company's directors. You successfully petition the court to require the dissenter to amend its draft proxy statement.

The court orders the dissenter to

change the text of its draft proxy statement, but the court rejects your request that the dissenter be required to identify and acknowledge the errors in the original text. The dissenter then chooses not to revise the original draft proxy statement but merely to supply an insert with corrected language, leaving the original draft intact.

At the election a few days later, the dissenter's nominees win seats on the board by narrow margins. You immediately seek an order enjoining the installation of the new board until the court can determine the extent to which the hotly contested voting process was tainted by the materially misleading statements that remained in the dissenter's draft proxy statement for all to see. You write the following, underlining the phrase "materially misleading":

The cumulative effect of XYZ Co.'s erroneous statements, which this Court concluded were materially misleading, resulted in the election of the XYZ Co.'s nominees by a razor-thin margin.

You add the underlining for emphasis, thinking you need to drive home the point that the false statements by the dissenter were materially misleading. It is a good fact, and you have noticed that senior lawyers harp on good facts.

Erase the underline. It is diverting and potentially insulting to the court. It is diverting because the court may pause to wonder why the two words are underlined. It is potentially insulting for at least two reasons.

One, it suggests the court is not alert enough to remember — without your help — that it found the dissenter's statements materially misleading. Two, it suggests you may be trying to put one over on the court by means of a diversion, given that the underlined phrase "materially misleading" is off-message.

Your point on this application is that the dissenter's final proxy statement was misleading because the dissenter never revised the text of its draft proxy statement. It merely provided an insert. Emphasizing the falsity of the proxy statement rather than the failure to revise it is a diversion from what you need to prove — that the insert failed to correct the problem. It goes to what you have already proved — that the draft proxy statement was materially misleading.

The court may be particularly sensitive on this application because it looks like an attempt to get a second bite at the apple. Be forthcoming in the difference between what you previously sought (a ruling that the dissident not only make revisions but confess its sins) and what you are seeking now (a ruling that the insert was an inadequate fix).

#### Can I Ever Underline My Own Words?

Upon occasion, you can underline your own words to good effect. As one member of my Informal Polling Group says, "Sometimes your adversary will make a statement that needs to be rebuffed with a little indignation." He proffers the following example:

Plaintiff's brief: "Joe beats his wife."

Defendant's brief: "Plaintiff offers no evidence that Joe beats his wife. In fact, Joe's son confirmed that Joe never beat his wife."

Using underlining to emphasize negation can work. But do it sparingly, and bear in mind this observation from a very experienced writer of my acquaintance: "When I see underlining other than in a quotation, I tend to think the person who wrote the brief is inexperienced, i.e., a junior attorney."

### Puzzler

How would you tighten and sharpen the following sentence?

There is nothing in the contract which suggests that the parties agreed to less than six shipments.

"Which" should be "that," but the whole "There is nothing...which" construction should be deleted in favor of one word — "Nothing."

You don't need "that" after "suggests," but it is acceptable. "Less" should be "fewer," which is the preferred usage for numbers, whereas "less" is the preferred usage for amount (e.g., "He brings fewer lawsuits and wins less money.>").

The revised version: Nothing in the contract suggests the parties agreed to fewer than six shipments. ■