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Be Upbeat But Not Pollyannish

In memos that deliver bad news, you should spin, not pander

By Kenneth F. Oettle

Suppose that after substantial research and analysis, you cannot find support for a proposed transaction, or you conclude that your position in a lawsuit is not as strong as your assigning attorney would like to think. How do you write it up?

Do you let the chips fall where they may, or do you give your message a rose-colored cast, succumbing to the almost palpable pressure to return with good news?

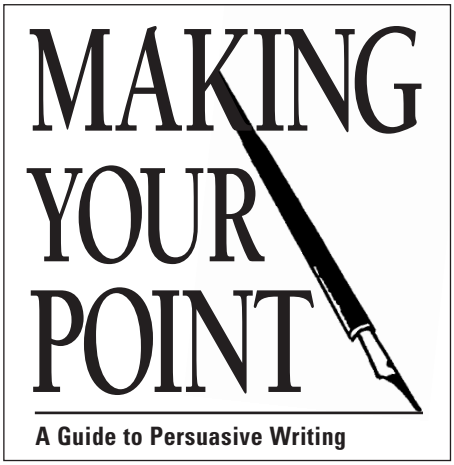
Associates have suffered reversals doing it both ways.

When an associate delivers discouraging news, the assigning attorney or the client may wonder why the associate could not find better law. After all, the transaction or the lawsuit seemed like a good idea. Suspecting that the associate lacks resourcefulness and willpower, the reader may be sorely tempted to wound, if not kill, the messenger.

On the other hand, when the associate invokes ostensibly helpful dicta despite divergent facts or conjures distinctions without a difference in an effort to defuse harmful law, readers are likely to see through the illusion and to be equally disappointed.

In law firm jargon, the bearer of bad news is not "tenacious" enough, and the cheerleader is "sloppy." Both "lack judgment."

Of the two approaches — telling the harsh truth harshly or taking refuge in wishful thinking — the greater offense by far is wishful thinking, which is exemplified by exaggerating or minimizing precedent to support a position. If you are lucky, your effort to tell people what they want to hear will be woefully transparent, and the only harm will be to your reputation.



If you are less lucky, your optimistic presentation may play upon the predisposition of the client and the assigning attorney to believe the client is right, and you may persuade them to enter a battle that should not be fought. When the adversary or the court later reveals the weakness in your client's position, all eyes will turn to you.

As a memo writer, you must deal with bad law (meaning, essentially, bad facts) before the client makes a bad deal or loses a lawsuit. The trick is to soften the blow rather than shade the truth.

Bedside Manner

An associate recently wrote a thoroughly accurate and well-supported analysis of an issue only to be told by the assigning partner that the memo could not go to the client in that form. The memo said, quite unsympathetically, that the client's case was a dead loser.

As it turned out, the case was a dead loser. The associate was right. But writing as if judging rather than advocating wasn't politic, either within the office, where the assigning attorneys are the "clients," or between the office and the client. It wasn't good bedside manner.

As one in-house counsel told me, "You have to give the client the bad news, but you also have to make them feel as if you totally agree that what happened to them was wrong."

Though you must maintain professional distance in addressing a client's problem, you should present your analysis in a style that reassures the client of your unquenchable desire to obtain the best result possible.

I once told to a group of summer associates that because clients don't like to hear bad news, lawyers need to accent the good and temper the bad. The associates were astounded if not scandalized. They spoke of pushing things under the rug.

I tried to explain the difference between law as an intellectual exercise and law as a business. To serve the people who pay us — the clients — we must tell them the truth, but with discretion. We shouldn't deceive clients, but we shouldn't smack them in the face, either.

Just as doctors need bedside manner, lawyers need a sensitive touch. If a doctor is gruff, you may go elsewhere the next time you need care, notwithstanding the accuracy of the doctor's diagnosis and even the efficacy of the treatment.

The same is true for lawyers. If a

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lawyer doesn't make the client feel that the lawyer is sympathetic to the client's cause and entirely on the client's side (delivering bad news can, regrettably, create the appearance that you are not on their side), then the client may not return, notwithstanding the comprehensiveness of the research, the strength of the analysis, and sometimes, notwithstanding even a good result.

Questions of Loyalty

If your presentation lacks partisan zest, or at least a sympathetic tone, the assigning attorney and the client may think your first loyalty is to your perception of the law — in which they have uncertain faith — rather than to the client and, secondarily, to the firm.

Clients want to know that the people to whom they are paying hundreds of dollars an hour are vigorous advocates for their cause. A memo that sends a negative message without a tone of positive concern may lead the client to believe that some other lawyer with more enthusiasm, perhaps at another firm, might offer a more satisfying answer.

Assigning attorneys want to know that the associate is making every effort not only to support the client but to back the assurances (of which the associate may not even be aware) that the assigning attorney gave the client when the matter came in.

Rarely should you write a memo to a client that says, "The law is such and such; the facts are thus; and so you lose." Instead, write a memo that says, "These offensive things were done to you, and you wish to bring a claim against the perpetrators. The law creates several hurdles to a claim such as this. The hurdles are as follows."

Again, a word of caution: Just as you shouldn't callously discourage the client, you shouldn't give false hope. If a precedent is harmful, or if a fact is bad, say so. The truth must come out. The art is in how you do it.

You can soften the message with qualifying phrases such as "seems" or "would appear." You can anticipate trouble without appearing to be the author of it by saying, "The other side can be expected to argue," or "The agency will likely be concerned that . . ." You can judiciously insert "may" where your first instinct might be "will." If your analysis is solid, "may" won't be deemed indecisive, merely gracious.

Even though you must deliver a cautionary message, show the client that you sympathize with their problem and that you understand why they have reason to feel angry or betrayed. It is a simple principle that will cost you little.

Your audience can be a client or an assigning attorney. Both need to know that you have faith in the cause and will leave no stone unturned. That is why you are well-advised to acknowledge the client's side of the story, or the assigning attorney's view of the law, before you reluctantly don the robes of the devil's advocate.

Puzzler

How would you tighten and sharpen the following sentence?

> The defendant certainly had constructive notice by reason of the recording of the documents.

Drop "certainly." If you don't persuade with your facts, you won't persuade with your intensifier. Substitute "because" for "by reason of." It is shorter and more direct. Finally, end the sentence with an important fact — the recording.

The revised version:

> The defendant had constructive notice because the documents were recorded.

Alternate version:

> Recording the documents gave the defendant constructive notice. ■