Leland Communications

Rookie Mistakes

To avoid some of the common mistakes that new lawyers make when writing, remember that your readers are too busy to read everything that you write.

People often ask me if I think the quality of legal writing has deteriorated since I started teaching writing to lawyers 20 years ago. Taking no offense at the implied connection, I tell them I don't think the profession's collective intellect and talent are as bad as the jokes would lead you to believe; I don't even think most briefs are so bad, although some—even some submitted to the highest courts in the land—are awful. But here's something I have noticed about what happens to the quality of legal writing over time: Almost every lawyer gets better at it as he or she gets experience. Each lawyer's legal writing improves over time. And a corollary to that observation is this: You can usually tell when something was written by a new lawyer or a law student.

How can you tell? In sports, they call them "rookie mistakes"; in the practice of law, they're "the things you didn't learn in law school." But it's not fair to blame the law schools, certainly not the overworked, underpaid, unappreciated legal writing instructors. They can't teach how to practice law any more than you can learn in Little League how to hit a 97-mile-per-hour fastball. The game may be the same, but you're in a different league now, facing a different level of competition, and some of the rules have changed.

The first big change has to do with time. You don't have enough time to write what you want to, to do a perfect job. And the readers—whether judges, clerks, or bureaucrats, or the clients and senior lawyers you work for—don't have enough time to read what you write.

The other big change from school is that your goals are very different than they were when you were a student. In law school, as in the rest of your academic career, you tried to impress readers with how smart you were so they would give you a high grade. In persuasive legal writing, you are trying to persuade, not impress, the reader; you want a ruling in your favor, not an A on your brief. Of course, sometimes you hope to impress the people you work for, both senior lawyers and clients. But those people

will be most impressed if what you write accomplishes its purpose, whether explaining a question of law in a memo, or persuading a decision-maker.

Most of the rookie mistakes I've seen in new lawyers' writing come from those two things: inattention the reader's time pressures; or misunderstanding the goal of the document.

Here are four things new lawyers should consider to avoid sounding so much like new lawyers.

1. Lawyers and judges don't know as much as you think they do.
When writing a legal memo, a new lawyer often assumes that the attorney assigning the memo is thoroughly familiar not only with the facts and procedural history of the matter, but also with the law—certainly with the big cases in the area. Even if the assigning attorney is so well informed, however, he or she should not have to look, or remember, beyond the memo to find everything one needs to know; there isn't time. Indeed, there may not be time to read the memo carefully until the question it answers comes up again, perhaps months later, perhaps in a different case for a different client.

Similarly, the judge with dozens of matters on her law-and-motion calendar for the day may not remember the substance of, or the reason for, an order she herself issued a month ago, let alone the relationships among the parties to the case. Nor should an advocate assume that the judge (or clerk) knows the law, even of a simple issue. Remember that the court is asked to rule on many different issues every day. She may be able to keep them straight, but will appreciate it if you help by stating the rules simply and clearly, so the court can apply them to your case.

2. Get to the point right away.
Although the busy reader needs help remembering the facts and law of the case, the reader who is too busy to read the entire document also wants to know the point of the document right away. Thus, a brief should not begin by describing the issue, then analyze the issue, then apply the analysis to the case; rather, the brief should begin by saying what should happen in the case, and then discuss the reasons.

Imagine that the court looking at a motion begins by asking, “What’s the problem here, and what do you want me to do about it?” Answer those questions quickly and immediately, and expect the judge and clerk to skim the rest of the document to see if you’ve explained why what you want them to do is required, or at least authorized, by the law. Remember: they are skimming not because they don’t care or because they are unintelligent; they are skimming because they don’t have time to read as carefully as you would like them to.

Similarly, the basic format of a legal memo begins with a Short Answer because that is what the reader is looking for right away: the answer to the question that he asked. If he gets a clear answer, then he is able to save time by skimming the rest of the memo to confirm that the research supports that answer. A memo that answers the question without taking up too much of the reader’s time is an effective memo.

3. Tell the readers what they need to know, not everything you know.
One vestige of academic life is the injunction to “show your work,” not just the answer to a problem. But that was partly to show the instructor something about the writer, usually how much work went into the project. The court does not need to know every case that addresses your issue, not even every result favorable to you. You should use cases to advance the discussion by showing how the relevant rules were applied in a particular fact situation. A case that says the same thing as the one you’ve just cited does not advance the discussion; it simply wastes the reader’s time, and the reader has no time to waste.

Similarly, the attorney who assigned you a memo is not interested in the avenues of your research that reached dead ends. You may have reached the correct conclusion in a roundabout way, but you should show your reader how to reach that conclusion in the most direct way.

A new attorney understandably may feel it necessary to justify the many hours spent researching what turned out to be a twelve-page memo, especially if the time is being billed to the client. But the busy reader, who is more concerned about his or her own

time than about yours, would rather get an eight-page memo than a twelve-page one, as long as it says what he or she needs to know to understand the answer to the question.

4. A legal memo does not have to say what the other side will argue or how a court will rule.

A legal memo should do two things: First, answer the question, "What is the law on [some specific area of the law]?" and second, discuss how the law applies to a situation like the one your client is in. When summarizing and explaining the law governing an issue, you need to review what the law says, including what courts have said in different situations; however, you don't need to guess what your adversary is going to say. (If your adversary has actually made the argument, that's a different story; it may even be part of your factual background.)

I suspect that new lawyers write, "The plaintiff may argue . . . " because they are searching for a way to introduce a counterargument to the prevailing view of the law, or to the view the writer wants to advance. But it makes more sense to introduce such an argument directly, not through the other side. For example, you could say, "A few courts have disagreed, but each such decision was based on facts very different from ours."

Similarly, the memo author's job is to explain what factors courts consider when making a decision, not to predict what the decision will be. Yet new lawyers frequently write, "The court is likely to hold . . . ," as if he or she were familiar with the rulings and predilections of the judge hearing the matter. Indeed, predicting how a particular court will rule is usually based on the writer's experience with that court—which is, by definition, the one thing that an inexperienced attorney does not have.

The good news in all this is that lawyers' writing gets better with experience, as the practicing professional learns that the key is to remember whom and what we are writing for: We write so that readers too busy to read everything we wrote will understand what the problem is and how the law applies to address that problem.

T: 510-527-9415 • F: 270-682-1338 • www.lelandcommunications.com • clyde@lelandcommunications.com