Trial Practice Tips and Tricks: Federal Court and Beyond[1]

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I. Effective Legal Writing

The principles of good legal writing have been summarized by Professor Terrell of Emory University (a noted expert) as follows:

> To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that something non-lawyers assume to be relatively plain – the "rules" of "the law" – is in fact quite complex. Second – perhaps in law school, but usually much later – we learn that, to communicate the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of the law's complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.
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> In the first stage, as we learn to "think like a lawyer," we worry mostly about logic and precision – about having exactly the right information or ideas and putting them in exactly the right order. In the second stage, we realize that logic and precision are not enough. To "think like a writer," we also have to be coherent: we must make our logic easy to see and understand. And we have to be persuasive: we must convince readers to accept our judgment about what matters, to believe us when we say that we have a fact or idea worth their attention.

Consequently, to "think like a writer" means, in turn, thinking like a reader – turning our documents around so that we see them from our readers' perspective.

Following these principles means to always put context before details and familiar information before new information.

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William Zinsser, in his best-selling guide to writing nonfiction, *On Writing Well* (1998), describes an important technique for good writing:

> Examine every word you put on paper. You'll find a surprising number that don't serve any purpose. . . . Be grateful for everything you can throw away. Reexamine each sentence you put on paper. . . . [S]implify, simplify.

Successive rewriting of an initial draft is the essence of writing well. Build in time for revising (content/organization) and editing (proofing for grammar/syntax/typos).

"Don't Give Your Adversaries Free Airtime"—Kenneth F. Oettle in *The Scribes Journal of Legal Writing* (2007).

> Approach 1 (common, less effective approach):
> (1) reiterating the opposing side's allegations/arguments
> (2) stating what is wrong about said allegations/arguments
> (3) supporting rationale
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> Example: "Insurer X alleges that ABC Co.'s retention of environmental consultants shows that ABC Co. knew or suspected that its groundwater was contaminated. This is untrue, and Insurer X is unable to muster any evidence to support this contention. Quarterly groundwater testing was mandated by RCRA." *Id.* at 122.
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> Approach 2: (more effective)
> (1) explanation of your side's position
> (2) the opposing side's position, now read in the context of your position
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> Example: "ABC Co. retained environmental consultants because RCRA mandated quarterly groundwater testing, not because ABC Co. knew of or even suspected groundwater contamination as Insurer X contends." *Id.*

Other Tips

- Do not be afraid to use graphics, such as charts or photographs.
- Brevity is key.

II. Oral Argument

Purpose

Allows counsel to clear up doubts and misunderstandings in the judge's mind.

Prepare and Organize

Do not read lengthy passages from cases or briefs

Outline focusing on the essence of the case

Lead with your strongest point, but focus on the issue(s) that may invoke the most doubts and misunderstandings

"A recent study about the impact of oral argument conducted by the Federal Judicial Center puts it [] bluntly: 'Many lawyers can't write; their briefs are unfocused. Argument gives you a chance to focus the issues.'" J. Thomas Greene, *From the Bench: Oral Argument in District Court*, 26 Litig., Spring 2000, at 3 (quoting Cecil & Sienstra, *Deciding Cases with Argument*, Fed. Jud. Ctr. Pamphlet at 136 (1987)).

Federal Court: no need to rehash facts (judges are prepared), but weave law with the facts in making points

Avoid personal criticisms of other party

Balancing Act: Do not shy away from weak points (credibility), but do not concede points on important issues

Primary focus: why your client wins, not why the other side loses

Conversational

III. Voir Dire and Other Jury Issues

Common Translation: To speak the truth

Purpose: Weed out those who would have difficulty being fair/impartial

Attorney Prediction Accuracy

In Dennis Devines's book *Jury Decision Making: The State of the Science*, Devine discusses several studies on the efficacy of attorney predictions when it comes to jury selection. In one study, researchers found:

> With regard to the effective use of peremptory challenges, defense attorneys were able to strike more pro-conviction jurors than pro-acquittal jurors in seven of the ten trials whereas prosecuting attorneys were successful in doing the opposite in five of the trials. On the other hand, defense attorneys struck as many friendly jurors as hostile jurors in two trials, and in one trial they actually removed more. Prosecuting attorneys were even worse, striking an equal number of sympathetic and hostile jurors in two trials and removing more pro-conviction jurors than pro-acquittal jurors in three trials.

Dennis J. Devine, *Jury Decision Making The State of the Science* 47 (2012) (discussing a 1974 study by Diamond and Zeisel).

Federal Practice: the court "may permit the parties or their attorneys to examine prospective jurors or may itself do so." Fed. R. Civ. P. 47(a).

Be prepared to propose questions even if the court will conduct voir dire.

"Real jurors come from communities where their attitudes, beliefs, and values have been shaped extensively by many life experiences before they ever set foot in a court room." Devine, *supra*, at 68–69.

"The way jurors perceive and categorize trial participants, particularly the defendant, is likely to affect the stories they formulate with the evidence." *Id.* at 92.

Jury Instructions: "Studies have also addressed the question of whether jury instructions can be revised to make them more comprehensible. Modifications have included removing legal jargon, simplifying complex sentence structures, and

clarifying logic, and such changes appear to result in a noticeable improvement. Studies of simplified or enhanced instructions with mock jurors have generally yielded comprehension scores 10–30 percent higher than those associated with standard instructions." *Id.* at 57.

Help shape the instructions: submit proposed instructions to the court.

Jury perception of you as a litigator

Distractions at counsel table

Visible or audible reactions

Demeanor with judge and witnesses: confrontation and sarcasm

IV. Recent Evidentiary Issue

Fed. R. Evid. 801(d)(2)(D): A statement is not hearsay if it is offered against an opposing party an "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed[.]"

> Responses to FOIA requests admissible. *Flores v. Va. Dep't Corr.*, 5:20-cv-00087, 2022 WL 3329932, at *3 (W.D. Va. Aug. 11, 2022).
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> School board members'/superintendent statements about employment decision admissible. *Jenkins v. Russell Cnty. Sch. Bd.*, Case No. 1:20CV00058, 2022 WL 1557271, at *3 (W.D. Va. May 17, 2022).
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> Insurance adjuster's statement regarding a defendant's liability not admissible because the plaintiff failed to meet his burden showing that adjuster was acting as the defendant's agent rather than the insurance company's employee/agent. *Scott v. Cruz-Ramos*, BPG-19-3343, 2021 WL 1985016, at *3 (D. Md. May 17, 2021).
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> Record must reveal "independent evidence establishing the existence of the agency." *Sutton v. Roth, L.L.C.*, 361 F. App'x 543, 547 (4th Cir. 2010) (unpublished) (finding such evidence because the record showed that the declarant was wearing the employer party's unform, responded to questions about the employer while working, and helped complete an employment related task).
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> "[S]pecific authorization to speak need not be shown." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982).