

Getting a Judge's Attention

The Hon. Justice Paul M. Perell



It is my intention to get your attention about getting my attention. I and my judicial colleagues very much need you and your fellow advocates to pay attention to getting our attention.

Everyday, judges and masters read a vast amount of written advocacy – pleadings, affidavits, motion records, application records, correspondence, pre-trial conference memoranda, case-conference briefs, trial memoranda, and factums – all written to persuade, and we want and need to be persuaded. We read the advocates' deluge of written materials, and in their efforts to persuade us, the advocates swamp us with information. In the daily torrent of written advocacy, there is no scarcity of facts, law, and arguments, but what is often missing are ideas and sentences that stand out and that have a presence that gets enduring notice. In written advocacy, what is often missing are those elements of legal writing that get a judge's attention.

As an economist would point out, it is in the scarcity of a commodity where its value is found, and as a judge will point out, the scarcity and the value in written advocacy is not in the superabundance of information found in the factums, etc. but in the writing that commands his or her attention. The scarcity and hence the valuable ingredients of written advocacy are those elements of written persuasion that get a judge's attention.

It is the judge's solemn obligation to be attentive in every case, and an advocate with the aim of persuasion might believe that paying attention to getting a judge's attention is therefore unnecessary. Why bother working to get a judge's attention when attentiveness is a given? That way of thinking, however, is wrong. Attentiveness and paying attention is not the same thing. An advocate should be able to rely on a judge being attentive, but that's not the same thing as getting a judge's attention, which requires purpose and action by the advocate. Attentiveness is something that a judge can do without assistance; in contrast, paying attention requires some thing to pay attention to, and the judge is absolutely dependent on the advocate to create that thing. Thus, the judge, who is eager to be persuaded, needs the advocate to pay attention to getting the judge's attention.

Persuasion is about moving the mind of the judge to a particular result, and getting a judge to pay attention requires the thoughtful exercise of persuasive force by the advocate. If an advocate simply asks himself or herself what needs to be done to make a piece of written advocacy capable of getting a judge's attention, then timeless and countless principles of good writing and effective persuasion immediately present themselves to guide the advocate to his or her goal of moving the mind of the judge to the desired result. Insight and action overtakes instinct and happenstance, and the advocate purposively knows what is needed to make his or her writing get the judge's attention.

Focusing on getting attention, the advocate will immediately reflect that as a matter of style, the arrangement of the written advocacy, in its whole and in its parts, should be "point first" writing. Point first writing provides the answer or conclusion before the explanation, tells the reader the ending at the beginning, moves from the general to the particulars, and tells the reader what to look for in advance. A point first writing style recognizes that the mind of the reader must be focused before it can absorb and remember all the facts and all the legal principles. This style accepts that readers absorb information best if they understand its significance before they receive it.

While suspense will get attention, suspense is an anathema to legal writing. Point first writing is more persuasive, comprehensible, transparent, emphatic, and effective than prose that builds from the details to the ultimate conclusion. The advocate should accept that before any serious reading, the judge will skim the legal prose until he or she finds the structure and the conclusion, and the advocate should not put the judge to this bother. Effective persuaders add overview statements to their written advocacy that make the points of persuasion first, and provide the details later.

Effective written advocacy uses the point first style throughout the various parts of the written advocacy, which typically includes an overview, the statement of facts, the identification of the issues, argument, and conclusion. The point first approach is designed to allow the judge immediately to follow along, and, with point first writing, the judge will know what to look for, and he or she will be able to decide how it fits into the description and the argument. A point first style identifies topics, and it marks transitions between topics. A point first style not only gets attention, it makes getting attention possible.

Point first writing also focuses the attention of the advocate to his or her own task and compels the advocate actually to have an idea, message, theme, lesson, point, or story to tell. Disclosing at the outset the advocate's goal guides the advocate in the written advocacy and captivates the attention, interest, and adherence of the reader.

A judge cannot pay attention to something that is incomprehensible, and thus the advocate in looking for principles to get a judge's attention will realize that the writing should be clear. Millennia ago, Aristotle advised how clarity is achieved. Clarity is achieved by correct grammatical structures and by the correct use of connectives. It is achieved by avoiding ambiguous words and ambiguous syntax. It is achieved by calling things by their specific names and not circumlocutions.

Clarity is achieved by choosing words that are an accurate fit with meaning. To use Aristotle's example, "if you are speaking of sound and colour, "seeing" is not common to them, but "perceiving" is. Providing Aristotelian advice, George Orwell, in his famous essay *Politics and the English Language*, recommended as the first priority that a writer use

clear and concrete language. To command the language, Orwell advised that the author should think of the concrete object he or she wished to describe through pictures and sensations, and then afterwards choose the phrases that best cover that meaning.

Writing that gets a judge's attention is neither voluminous nor prolix. Out of some sort of fear that something crucial will be left out, the advocate opens the verbiage floodgates and the possibility of getting the judge's attention is washed away. The advocate interested in getting a judge's attention should have the confidence to write concisely, realizing, again as an economist might point out, that when the supply of words exceeds the demand, the value of the words diminishes and getting the judge's attention becomes unlikely.

Rather than opening the floodgates of words and information, the advocate who wants to get a judge's attention will be a gatekeeper carefully selecting the factual and legal information to let through the gate. Irrelevancies, redundancies, superfluities, expendables, jargon, gibberish, and incivilities will be barred. The writing will be concise, which is to say no longer than it needs to be.

The lawyer, in recounting the facts and the law of his or her client's case, should be a premeditated storyteller. A story is a purposeful ordering of events in time. It is more than a chronology—it has an organizing purpose, and the best stories have a theme. A story identifies the central action of the situation and brings together time, scene, actor, motive, and means and gives them a shape or pattern that is understandable to the reader. A story makes disparate facts appear coherent and compatible.

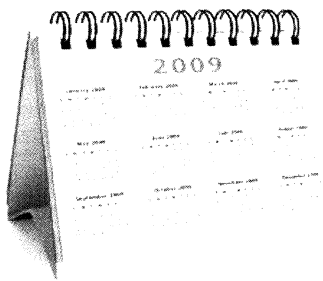
A story links facts to a social norm through which the facts can be compared, understood, and evaluated. A story is a way to present, analyse, compare, interpret, and evaluate social behaviour. A story inevitably involves selection of facts, and for the advocate it involves the classification and selection of applicable legal principles.

The persuasive advocate tests the written advocacy by continually asking why and whether the words and information need to be included and whether there is a better thought or word to make his or her point. What emerges from this exercise is emphatic prose. As a word "emphasis" is derived from a Greek word that originally meant "appearance," and the advocate's careful selection of information and his or her careful articulation in clear, concise, and concrete language of the argument will make the written advocacy stand out and have a presence that gets a judge's attention.

If an advocate offering written advocacy pays attention to what is necessary to get a judge's attention, then the advocates' reward will be, at a minimum, the prospect of persuading the judge and, at best, the prize of successful persuasion.

The Hon. Justice Paul Perell is a justice of the Superior Court of Justice. He is a former member of the Briefly Speaking Editorial Board, a former editor of the Ontario Reports and an author of numerous articles and several books.

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