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Sherri Keene

University of Maryland - Baltimore, skeene@law.umaryland.edu

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## **Standing in the Judge’s Shoes: Exploring Techniques to Help Legal Writers More Fully Address the Needs of Their Audience**

*By* SHERRI LEE KEENE\*

LEGAL DOCUMENTS ARE NOT READ for the purpose of entertainment or even to provide the reader with general information. Rather, legal writing serves the purpose of helping its readers—often judges—make legal decisions.<sup>1</sup> Moreover, a legal writer must determine how best to deliver her message to persuade the reader to reach a particular decision.<sup>2</sup> As such, a legal writer’s ability to consider and incorporate the legal audience’s needs into her written work is of the utmost importance.

Writing a legal document that will respond to an audience’s needs and achieve its desired purpose, however, is no small task. When making an oral argument, an attorney has the opportunity to

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\* Sherri Lee Keene is the Director of the Legal Writing Program at University of Maryland Francis King Carey School of Law. Ms. Keene has taught legal writing for ten years. Prior to teaching legal writing full-time, Ms. Keene was a staff attorney for the Office of the Federal Public Defender for District of Maryland. As a staff attorney, Ms. Keene briefed and argued cases before Maryland’s federal district court and the Fourth Circuit Court of Appeals.

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1. Mark K. Osbeck, *What Is “Good Legal Writing” and Why Does It Matter?*, 4 DREXEL L. REV. 417, 426 (2012) (“[L]awyers and judges read legal documents because they need to extract information from these documents that will help them make decisions in the course of their professional duties.”).

2. Barbara P. Blumenfeld, *Rhetoric, Referential Communication, and the Novice Writer*, 9 LEGAL COMMUN & RHETORIC: JALWD 207, 209 (2012) (“In rhetorical communication, because the purpose is to persuade, the author of the message must consider the best manner of delivering the message so as to invoke the desired reaction from the audience.”).

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hear the listeners' thoughts and witness the listeners' reactions, and to adjust the argument accordingly. To the contrary, when an attorney writes, she lacks the opportunity to observe the listener, and then correspondingly to adjust the text. Thus, in order to persuade in writing, the legal writer must anticipate how her audience will respond to the argument presented and then use this information to make her writing more effective.<sup>3</sup>

While most legal writers understand the general idea that good legal writing must consider the audience's needs and serve its intended purpose, many legal writers still struggle with the challenge of actually producing persuasive legal documents. Many novice legal writers lack knowledge of and experience with the professionals who comprise the legal audience, and often find themselves considering a more familiar audience as they write. Instead of asking how the legal decision-maker will react, the novice legal writer may revert to judging her own reaction to the text.<sup>4</sup> But experienced practitioners, with more knowledge of legal practice, also can find it difficult to draft a document that responds to the legal audience's concerns.

The challenge of writing to the legal audience often stems from the writer's inability to step back from the draft and view it as the intended reader would. To critique and improve their written work, legal writers must detach themselves from their drafts and be open to taking new approaches to their arguments.<sup>5</sup> Writers who cannot detach from their documents may find that their writing fails to meet the audience's needs and expectations. For example, an argument may lack clarity because the writer neglected to include sufficient context, or it may lack focus because the writer is unable to separate information that is important to the reader from information that is not. Even worse, the writer may misjudge the substantive challenges to her argument, and fail to identify and thoroughly examine matters of concern to the legal audience, often at the heart of the matter that the court needs to decide.<sup>6</sup>

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3. *Id.* at 208.

4. *Id.*

5. Susan M. Taylor, *Students as (Re)Visionaries: Or, Revision, Revision, Revision*, 21 *TOURO. L. REV.* 265, 276 (2005) ("When rewriting one's own work, any affection for it must be set aside."); Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better*, 8 *J. LEGAL WRITING INST.* 23, 49 (2002) (discussing experienced legal writers willingness to revisit their original writing decisions, "paying special attention to their purpose, audience, scope, and stance").

6. Sherri Lee Keene, *One Small Step For Legal Writing, One Giant Leap for Legal*

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Legal writers need to have a method by which they can explore the legal audience's perspective if they are to fully consider the audience's needs. To better predict the potential responses to their arguments, legal writers need to do more than simply be aware of their legal audience—they need to place themselves in their readers' shoes.<sup>7</sup> Through a deliberate process, legal writers can work to detach from their advocate role and commit themselves to the role of the decision-maker in order to better understand this perspective.

### **I. Critique Prior Decisions and the Briefs That Contributed to These Decisions**

One way to predict how a judge might react to an attorney's argument is to read how judges have responded to similar arguments in past cases. In law school, novice legal writers are trained to read and assess prior cases to predict how a judge might decide a new case. They are later taught how to use case precedent to make their argument—to illustrate for the judge how a prior decision warrants a ruling in their favor, or does not prevent one. Law students, however, are rarely directed to read the briefs in these cases to determine what arguments were made by the advocates, and to consider how these arguments may have impacted the court's decisions.

The process of reading and critiquing other advocates' briefs on the legal question at stake, as well as the outcome of the court's opinion, can help the writer to focus on the needs of the legal audience.<sup>8</sup> If the attorney's goal is to consider the case from the decision-maker's perspective, it is important that the attorney read these works in a manner that encourages reflection on the relationship between the advocates' briefs and the court's decision. An effective methodology for the reader to accomplish this goal is threefold: first, read the court's decision; second, attempt to predict what the advocates in the case argued; and third, read the advocates' briefs.

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*Education: Making the Case for More Writing Opportunities in the 'Practice-Ready' Law School Curriculum*, 65 MERCER L. REV. 467, 476–78 (2014) (discussing what is required for a clear and concise legal document).

7. Blumenfeld, *supra* note 2, at 218 (“[T]here is a wealth of information about the various legal audiences that may receive a legal writer’s work” but there is less information describing “a method for allowing the novice legal writer to actually experience the needs of the audience, to stand in that audience’s shoes.”).

8. Taylor, *supra* note 5, at 283 (discussing the benefits of assessing other writers’ briefs to help student writers learn to focus on the needs of their audience).

Consider the situation where a defense attorney is writing a motion to suppress evidence, arguing that his client was subject to an illegal stop and search by police in violation of the Fourth Amendment. The attorney has found few prior cases in the defendant's favor, but did find a case where the court held that police officers lacked reasonable suspicion to detain and search a defendant, and granted the defendant's motion to suppress.<sup>9</sup> Reading the court's opinion should help the defense attorney predict how a judge might decide her case, and the defense attorney will probably use the prior decision to support an argument for suppression in her client's case. But, reading the court's opinion, reflecting on what arguments may have been effective with this audience, and then reading the advocates' case briefs, can help the defense attorney to understand further how the court might react to the argument that she will present. This will enable her better to frame the argument.

For example, legal rules afford deference to police officers' judgment in assessing suspicion.<sup>10</sup> In reading the court's opinion in the prior case, the defense attorney will likely be focused on learning the facts that contributed to the court's holding that the police lacked reasonable suspicion, despite this judicial deference. However, the court's opinion may fail to shed adequate light on how the court grappled with the legal rule affording deference to police officers, but nonetheless found in the defendant's favor. While an assessment of the opinion alone may lead the defense attorney to believe that the favorable decision was largely the result of good case facts, reading the briefs will reveal whether the advocate in the prior case addressed the rule regarding deference in her brief and, if so, how she went about it.<sup>11</sup> By not only reading the court's opinion, but also thinking

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9. *United States v. Sokolow*, 490 U.S. 1, 2 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968), in holding that the police must establish that they have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'" to support a stop and search).

10. *See, e.g., United States v. Foreman*, 369 F.3d 776, 782 (4th Cir. 2004) ("Because the Terry reasonable suspicion standard is a commonsensical proposition, '[c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.'") (internal citations omitted).

11. The author used the Fourth Circuit's decision and the appellate briefs in *United States v. Digiovanni*, 650 F.3d 498, 513 (4th Cir. 2011), in an advanced legal writing class to help law students develop their arguments for motions to suppress that they were drafting. In *Digiovanni*, the court found in the defendant's favor and granted his motion, holding that police lacked the reasonable suspicion required to

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about the hurdles to this decision, the defense attorney gains valuable insight into the needs of her legal audience and how she might address them in her argument.

## II. Practice the Oral Argument While Writing the Brief

Attorneys often remark that after preparing for oral argument, they wish they could go back and rewrite their briefs. If done correctly, the process of mooted for oral argument will force an attorney to be confronted with the challenging aspects of her case and require her to find succinct, yet thoughtful, answers to the difficult questions raised. Ideally, an attorney will improve upon her written brief by engaging in a practice oral argument before submitting the brief.

If time does not afford an attorney the opportunity to engage in a full moot, where her colleagues act as judges and ask her hard questions about her case, an attorney can still find ways to get feedback on her arguments. While many attorneys may find themselves working alone in their writing process, it is important for writers to seek the input of others as they write. While working on a brief, it is helpful if an attorney has a colleague with whom she can engage—who can listen to a quick oral presentation of the argument and provide her reaction.<sup>12</sup> In practicing the argument aloud, the attorney might find herself explaining it in a different way than she had on paper. The attorney might find that she is emphasizing

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turn a routine traffic stop into a drug trafficking investigation. *Id.* at 513. The prosecution emphasized in its brief in opposition to the motion, the deference that should be afforded to police officers, and chided the district court [who had found in defendant's favor] for "substitut[ing] its judgment" for that of the officer. Brief of Appellant United States of America, *United States v. Digiovanni*, 650 F.3d 498, 513 (4th Cir. 2011), 2010 WL 3907903, at 19–28. The defense counsel in its brief, emphasized the importance of the district court's review. *See* Brief of Appellee. *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011) (No. 10-4417), 2011 WL 11496, at 24 (" In support of its effort, the Government quotes at length from this Court's [prior decision . . . regarding the role of an officer's expertise, but stops short of noting the part of the text wherein the Court makes clear, that 'while officers have the advantage of experience, they do not necessarily have the advantage of neutrality, and that is where district courts come in.'").

<sup>12</sup> Because an attorney's colleagues may share similar perspectives if they handle similar cases, it may be better in some circumstances for an attorney to present her argument (without identifying client information) to an attorney who is not in her office or to a layperson.

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different aspects of the argument or putting a new spin on the facts to make the case. Even better, the attorney may find that her questioner raises issues that she had not anticipated or expresses concerns over aspects of the brief about which the attorney had not previously been concerned.

Feedback from detached listeners can go a long way in helping the legal writer get a better picture of how the intended reader might respond to her arguments. This process assists the writer to see the gaps in her argument—the facts and analysis that she had assumed because she was too close to the case. For example, the defense attorney discussed above might find herself explaining why the facts of her case do not support a finding of reasonable suspicion, or what makes her case distinguishable from the prior cases where courts denied defendants' motions to suppress. The defense attorney may even be asked to explain where the court should draw the line between facts that are sufficient to support a finding of reasonable suspicion and facts that are not. Moreover, the defense attorney may be asked why the court should not defer to the police officer's judgment, given the officer's high level of expertise. Thus, by engaging in a mock argument, the writer can consider a different perspective and get a better sense of how a judge might view her case.

### **III. Be the Judge and Decide the Case**

Another way that an attorney can gain perspective and identify the challenges to her arguments is to put herself in the role of the decision-maker. Attorneys who are former judges or who have had the opportunity to serve as judicial clerks can attest to the fact that a great deal of perspective can be gained from the experience of acting as the decision-maker. Through these experiences, attorneys can acquire first-hand knowledge of how courts use briefs in their decision-making process, and see up close the missed opportunities that occur when attorneys neglect to fully explain or brief the important issues in their cases.

However, as a practicing attorney, putting oneself in the role of the judge is easier said than done, especially when an attorney is close to her case and strongly committed to her argument. To succeed in this exercise, the attorney will need to consciously take off the advocate's hat and put on the judge's. The attorney should ask herself: "If I was the judge and decided this case in the other party's favor, what would be my reasoning?"

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Consider the case again involving the defendant's motion to suppress evidence. If the defense attorney put herself in the role of the judge and asked how the case might be decided in the prosecution's favor, she would quickly appreciate the significance of the legal rule giving deference to the police officer's judgment. In addition, beyond relying on the arguments that her opponent might raise, the defense attorney can assess for herself how the court might use prior cases to support its decision. Where there are cases favorable to the defense, the defense attorney can also consider how, as the judge, she might distinguish these cases and not allow them to impede her decision in favor of the prosecution.<sup>13</sup>

In addition to considering how the judge might rule against her client, the defense attorney might also consider why the judge might be so inclined. In the case example, the judge might be accustomed to affording deference to police officers in these cases, and disinclined to question police decisions and to grant a defendant's motion to suppress in any case. With this in mind, the defense attorney can consider not only how she might tackle the specific rules and prior case law, but also how she might frame her argument to present her case as being distinct and worthy of the court's notice. Or perhaps the defense attorney can shift the court's focus to an overriding concern, such as the need for the court to play a meaningful role as a neutral evaluator of the facts in police encounters. Indeed, by assuming the role of judge and deciding the case, the attorney allows herself to look beyond her facts to the practical implications of the decision that may be of concern to the court.

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<sup>13</sup> As defense attorneys know well, the real challenge of a case may not be convincing the court why the client should win, but rather convincing the court why the client should not lose. At note 12, the author discussed her use of the Fourth Circuit's decision and the appellate briefs in *Digiovanni* in an advanced legal writing class. In drafting an opinion in favor of the prosecution, the defense attorney may review the *Digiovanni* opinion and note the prosecution's arguments that the court rejected, but that could have barred a court's decision in the defendant's favor. For example, as stated in *Digiovanni*, a search is lawful if the defendant gives valid consent. *Id.* at 513 (citations omitted). As such, a court's focus in a Fourth Amendment case can shift from a discussion concerning the legality of the search, to a discussion of whether the defendant voluntarily consented. In writing the opinion in the prosecution's favor, the defense attorney should come to appreciate that even if she has a strong case that police lacked reasonable suspicion, it is imperative that she address any evidence that may support a finding that the search was consensual.



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**Conclusion**

It is important that legal writers not only consider who their legal audience is, but also work actively to gauge the audience's needs in order to address them more accurately and completely in their writing. While many attorneys understand the importance of writing in anticipation of the legal audience's response, even experienced attorneys may struggle to see their case from a different perspective and to identify the challenges of their case. Thus, strategies such as those discussed in this Essay, which help writers to step outside of the attorney role and stand in the shoes of the decision-maker, are important steps toward better legal writing.