The Art of Persuasion: The Written Word — Letters

By Robert A. Creo

This is the 15th installment of The Effective Lawyer series. This column, the first in a series of five, explores how lawyers can effectively use the written word to communicate on behalf of clients. This installment deals with letters; others will cover electronic communications, briefs, position documents and reports, and will conclude with presentations.

Writing a Letter

Back in the day, when the word millennial was mostly associated with the distant past of dinosaurs, lawyers handwrote their letters or dictated them on a tape recorder, and then they were typed by someone else. Prior to the widespread usage of the facsimile machine in the early 80s, letters were mailed or, in extremely important matters, hand-delivered. Some of the larger firms in Pittsburgh, Philadelphia and other cities employed staff whose sole job was to traverse the city to deliver mail. Prior to the fax, the expectations for the response time to letters and documents were very reasonable.

Letters were important and the mainstay of much of the daily practice. They were how we talked formally to each other, with clients "listening in" from their own copy — the carbon copy (cc) line. I remember meeting an excited young lawyer who, after being at a large firm for more than 18 months, was being permitted to send out a letter on behalf of a client under the lawyer's sole signature. Letters were significant stock-in-trade and were products, not just a way to convey information. (Note that I am distinguishing a letter from a demand package or position paper, which I will address in Installment 4.)

When word processing became common, we marveled at how easily letters could be edited and revised, sometimes even by we lawyers. Before you knew it, every lawyer had a terminal on his or her desk, and support staff — then called secretaries — were dispersed as the ratio of administrative staff to lawyer steadily decreased in both large and small practices.

To a millennial who has never seen a typewriter or stenographer pad, this practice model may seem archaic, slow and inefficient. The ways and means of lawyering before the practice of law was revolutionized by technology, however, promoted effective written communications. The multi-step process of creating and delivering documents imposed a series of checks and balances that I strongly contend resulted in greater civility both within and outside of the profession, accompanied by a higher quality of services to clients and the public.

Let's explore some of the dynamics and key missing elements of the new paradigm.

Content, Positions and Support

The core content of most letters sets forth a demand for action or response that is supported by facts, argument or authority. These usually should be raised in a few paragraphs that cut to the chase of what is at issue. Most recipients are going to engage in reactive devaluation, and, the more you give them, the more they will discount and devaluate. Your being concise will convey confidence and credibility. Paraphrasing Shakespeare, counsel that "doth protest too much" in long sentences filled with conclusions, slogans or self-serving statements may not be persuasive.

Nowadays, the letter content may not even be in a letter but in the body of an email. Technology

has eliminated the time between drafting the language and it becoming a letter. New or second thoughts have no outlet.

Errors are less likely to be caught in this one-step, autocorrect process. I remember a colleague of mine bringing me a letter that was addressed to the Horrible Judge, rather than the Honorable. If you change your mind, and the email has gone, then you are dealing with retractions or subsequent explanatory or disclaimer communications. This is less effective than getting it correct the first time.

Do include appropriate disclaimers such as "for settlement purposes only" or conditions such as limitations on counsel authority or that what is being set forth is a float or is subject to final approval by your client. If there is a threshold or other triggering event such as a governmental permit or other approval or contingency, clearly indicate this in a separate paragraph.

Always use civil and respectful language, especially in regard to any person or organization. Eliminate any personal attacks or insults. Do not demean the judiciary or other governmental bodies for delay or for acting inconsistently with your client's objectives or goals. Avoid gratuitous criticisms and other terms not material to the issues. Self-aggrandizement and boasting will be counterproductive. Threats usually do not work. After at least three years of law school, passing the bar and the crushing debt of being a new lawyer, using "or else" and intimidation won't help you or your client. If you do have a principled course of action with specific timelines, set it out in neutral and objective language.

Keep the Door Open

It is advisable to end with a comment, question or invitation that allows opposing counsel to save face or in a graceful way to make concessions or set the stage for a dialogue for an amicable resolution. Some examples of useful phrases:

If anything written above is erroneous, please provide further information or documentation so that we may review and reconsider our position …

If you are aware of any authority that is inconsistent with what we cited …

My client understands the inherent uncertainties and expense of litigation (or impasse in negotiations), so if you want to meet …

Since the court has a mandatory ADR process, perhaps …

My client is amenable to exploring alternatives to continued conflict, so …

I am available to talk on the phone or in person …

We welcome hearing other perspectives and insights on these issues and are prepared to engage in a constructive manner …

Contrary to Rambo-style and scorched-earth tactics popular in some quarters, this approach promotes professionalism and is not a sign of weakness. Fewer than one percent of civil claims go to a verdict, most criminal actions result in a plea and transactions either die a natural death or are consummated with compromise of acceptable risks. This all happens without being dependent on the perceived strength of counsel. Facts, leverage, business climate, risk tolerances and a host of other factors and dynamics impact ultimate outcomes, most of which occur without having to run the race to determine a winner.

Format and Length

Letters, especially if they are also going to be emailed as attachments or scanned by opposing counsel (since so many lawyers are going "all electronic"), should be limited to one page in length. Yes, I am serious, a single page. Although it is more work and takes longer to write concisely and precisely, a better product is the result. It sharpens both your thinking and your persuasive arguments.

Use single spacing and a 10- or 12-point font. Many lawyers prefer Times New Roman. Letters can be shortened by communicating nonessential or routine matters in other communications, especially short emails, alerting opposing counsel to your

representation. Documents, especially those on public record, can be sent as attachments or under a separate cover letter issued simultaneously with the letter.

Review

When lawyers were away from the office, it was common for others to note their own signatures on behalf of the lawyer or to note "dictated but not read" in the signature area. Now with the widely accepted use of electronic signatures, it is no longer necessary to print the letter to review it or sign.

Senior lawyers supervising other lawyers or those in charge of the case or client may not work from a printed copy. They are more likely to miss things in screen-only reviews, especially from smartphones or while away from their desks. We have seen the impact of distracted driving and many predict a rise of "distracted lawyering," which will weaken final results and further erode the professionalism and the public perception of lawyers.

My friend Brice from Arizona told me of his using initial drafts to vent and express his innermost feelings. He would dictate a response to opposing counsel in the heat of the moment, using profanity and insults authentically to express his feelings. He would have the secretary type the letter and often have her finish it for signature. He would review it and sign, but place it on his desk in his "not now" box. In a day or two, he would review it again and revise or start over. Sometimes he would just pick up the telephone and start the conversation with opposing counsel by stating how mad he had been that he felt like sending a nasty letter. He then addressed the issue stoically and with civility. He was an excellent advocate and well-respected in his community. Justice Sandra Day O'Connor, when she was a trial judge, frequently appointed him to significant homicide and other criminal cases.

Of course the story ends with a new assistant subbing for an absent secretary who, when Brice was away, helpfully mailed a particularly nasty letter without reading it. It was, of course, signed, dated and ready to go. Brice accepted responsibility for not explaining the house rules and practices and wrote off a very expensive dinner with opposing counsel and his wife as a necessary, even if not ordinary, business expense.

Phoning Ahead

A best practice is to create a draft and then call opposing counsel to inform him or her of the pending arrival of your letter and explain its key points. You might disclose that some of the strictness or negativity of language is for the benefit of the clients. The call-ahead approach also creates a built-in reflection period and, depending on your insights regarding the tone or response of opposing counsel, you can then revise the letter. Sometimes actually sending the letter becomes unnecessary since the issue is worked out on the telephone. The call ahead also sets the stage for subsequent discussions and resolution since opposing counsel will be less defensive than if he or she were blindsided by a document that needed to be shared with the client with the expectation of a tit-for-tat response and that likely would escalate the conflict.

Delivery

Even if you are emailing the letter or document as an attachment, it is a best practice to mail or deliver an original to opposing counsel. This ensures that it is received on high-quality paper without deficiencies due to the printer of opposing counsel, provided it is even printed since so many people do not want to "waste" ink or paper. Paper is portable, can be thrown in a briefcase and can be written on by opposing counsel. Busy counsel are more likely to pay attention to the one-page letter and physically available supporting documents than to those on screen where it may be difficult to compare longer documents side-by-side.

Research indicates that most people retain more information from the printed page than from reading from a screen. Both mailing and emailing the product is best practice. No doubt counsel will want an electronic version to forward to team members and clients. You should determine what you prefer to receive first in consideration of all of the circumstances and personalities involved in the transaction, litigation or matter. ⚖

TAKEAWAYS

- Call ahead.
- Step-It: print, proof, review, reflect and print.
- Keep to one page, use attachments/exhibits.
- Include appropriate disclaimers such as "for settlement purposes only."
- Be civil and do not use personal attacks or threats.

Pittsburgh attorney Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including having served as a salary arbitrator for Major League Baseball, a grievance arbitrator for the National Football League and a hearing officer for the U.S. Senate Select Committee on Ethics Office of Fair Employment Practices. Since 1996, he has been on the mediator roster for the Court of Arbitration for Sports in Lausanne, Switzerland. He is an adjunct professor at Duquesne University School of Law and served as an adjunct professor at the University of Pittsburgh School of Law for many years. He was recognized by *Best Lawyers in America* in both 2014 and 2017 as Pittsburgh Mediator of the Year. He is the principal of Happy! Effective Lawyer (www.happy.lawyer), an initiative focusing on lawyer contentment and peak performance. His website is www.robertcreo.com.