Visuals and Voice: The Aesthetics of Legal Writing & Persuasion Through Prose*

Nathan D. Clark
Partner Cline Williams Wright Johnson & Oldfather
Adjunct Professor University of Nebraska College of Law

Good evening, and congratulations to those of you nearing the end of your time with the Nebraska Law Review. You may find, as I have, that this time in your life is one of a kind of useful trauma, a boot camp in the more esoteric and, some might argue (but not me), less practical aspects of written legal argument. After all, the thinking goes, is the judge ever going to make her decision based on the correct italicization of a comma?

The reply, I think, is that what you will gain in your career from your hard earned and proven commitment to detail and editing is not the winning argument, or at least not always, but rather the advantage of having the wind at your back. You earn the reader's trust. You have a proven and demonstrable capacity to present your legal writing with professionalism and fluency in the technical aspects of the medium. More like the old Dutch masters grinding their own pigments to make their paints than Bob Ross. Not that you are the Rembrandt or Vermeer of legal writing, but you have gained a familiarity with every aspect of the art that affords you a degree of credibility.

*Professor Clark delivered these remarks—published here in their unedited form—during the NEBRASKA LAW REVIEW'S annual end-of-the-year banquet in the spring of 2023. To those at the start of their law school journey and considering joining the Law Review, they provide a glimpse into the future and a taste of the joys and challenges to come. To those nearing their journey's end, these words provide—through playful reminiscence—a look back on all they have endured and achieved. And to those whose law school days have long since passed, they offer a reminder of the oft forgotten joys unique to the legal profession.

There is a good chance the reader will notice this, and presume you apply that same care to your research, to your reasoning, and to your grasp of the legal principles involved. That's a presumption you can certainly upend. But it is there nonetheless and should not be undervalued. You've earned it.

There is, however, another advantage I see from your time on the Law Review. All the hours you've spent reading, editing, familiarizing yourself with the rules of citation, and then re reading, re editing, and re familiarizing yourself with the rules of citation, rinse and repeat, and especially undertaking this process *with other people's writing*, is an invaluable step you've each taken toward mastering the subject of my talk tonight: The aesthetics of compelling legal writing; the art of persuading through prose and the application of style; wielding a mastery of the written medium for your client's ends. In short, I want to make a case against the idea of legal writing as dry and technical, and for its potential as a creative medium, and for that potential as a powerful tool for advocacy.

To be clear this isn't a mastery I've achieved; and I doubt very much most of you will either. Every day you will see writing by other attorneys that teaches you something you didn't understand before. Every motion or trial you lose, and even those you win, should raise questions about how you could have presented the correctness of your client's position more skillfully. And the more confident you are in your abilities as a writer, the more certain you can be that you've overlooked your shortcomings.

That said, you've spent two volumes now nitpicking, observing how others write, doing some writing yourself, editing for clarity and impact, and being exposed to a cast of authorial characters. Consciously or not, you've likely picked up a touch of legal aesthetic

philosophy along the way. I suggest those aesthetics break down in at least a couple ways: Voice and visuals.

First, voice. By this I mean, basically, ethos. Very often, and especially in state appellate courts and in all level of federal courts, the judge will never see you or hear you. Now I don't know about you, but when I read a book, I'll have an image of the author based on nothing more than voice, since that is all I have to go off of. The judge will do the same with you. And, I think, it could matter what that image in the mind of the judge is. While your unique butterfly voice will come shining through in your tone, phrasing, and wit, the fact of the matter is there is a relatively limited cast of archetypal characters for you to choose from. Here are a few I have noticed.

Number One: The Gentleman or Gentlewoman Scholar. Pure competency and unflappable sobriety. Sentences sculpted in a sensible balance of style and clarity. Doesn't deride the other side and doesn't deign to tell the Court how obvious it is they are correct. The other side's argument, "relies on inapposite precedent" or "misses the mark" or "misconceives the appropriate legal standard." Tough but ostensibly reasonable, and most importantly, above the fray. Rarely uses ten cent words; but filled with ten cent thoughts.

This is the de facto approach of most legal writing programs and all that "noble profession" talk. The secretly loved, or not so secret, self image of many a Supreme Court Justice. At its best, typified locally by the wonderfully written opinions of former Eighth Circuit Judge Richard Arnold. More Maroonbook than Bluebook, though the writer isn't going to make a big fuss about it. No tie clips revealing class anxiety here. Just poise under pressure and an unruffled ease in complying with all the rules.

This is the writing, I think, most judges expect. It's boring, and it risks little. It's also the safe approach when you have safe facts, and in that case probably the best use of your client's money. When the facts are not so safe, and the stakes high, this voice may smack of a lack of hustle, devoid of that Larry Bird esque clutch scrappiness. Nonetheless, a trusted and familiar default position. Know it well.

Number Two: The Hapless and Disheveled Genius. This writer wants the reader to understand that she is too focused on what matters to be bothered with what doesn't. Think Columbo, or for those of you under 40, maybe Sam Bankman Fried, pre scandal. Tousled hair, unironed and wrinkled clothes, mind like a vice. In the legal context, heavy on the ctrl+v direct from Westlaw. Dumb quotes unconverted to smart quotes. Parallel citations optional. Introductory signals an afterthought, if there at all.

In my experience, the disheveled geniuses are the most likely to confront arguments they consider ludicrous with open exasperation. Frustration boils close to the surface, and in oral argument these attorneys are masters of the turn of phrase or hand gesture that says "give me a break" or "do any of us have time for this nonsense?" As someone who has peeked behind the curtain of how judges view nonsense, I think this approach may be among the more effective calculations an advocate can make, in the right context and with the right trier.

Disheveled geniuses don't put much stock in that great mythology of the litigator: framing. There is an endless supply of lawyerly folk wisdom about what gut impulses to play to; what judges are really motivated by; how to conjure and control the submerged currents that guide our rudders whether we know it or not. The disheveled genius thinks

all this is, for the most part, though perhaps not entirely, baloney. Or at the very least so marginal as to not be worth the time to convey in writing. Stick to the point. Framing is for juries.

In short, this advocate makes it a point to advertise her priorities: substance over form. There is also an aspect of "country dumb" to this approach. The writer hopes the opposing party will mistake their impatience with formality for a lack of attention to detail. Au contraire, though French is probably not how they would say it. Some details are important, but only some.

This voice is most often found on the plaintiff's side of the "v", and counts on you to let your guard down. This probably isn't a natural fit for those who meticulously edited 247 footnotes on informal publications from administrative agencies, or whatever you've been doing for the last couple of years. But don't discount the wisdom of simplicity, efficiency, and likeability, that this writer commands.

Number Three: The Client's Champion or *The Pitbull.* In this attorney's view, litigation is trial by combat, and he is the client's representative combatant. Words are weapons; sentences are thrusts and parries; paragraphs an orchestrated plan of attack. The opponent's position is "incoherent" or "a naked attempt to fabricate a fact issue" or "ignores the law." No compunction whatsoever about what I sometimes call "motion fatigue." I've often felt there are diminishing returns on motions stacked upon motions; the pitbull couldn't care less. His client is being victimized, and he isn't going to stand for it. These attorneys are a real pain in the neck to negotiate with.

The gamble here is that the judge is outraged by the other side's antics, rather than annoyed by your tone. On the right issues, in the right posture, and with the right judge, this can be used to great effect. It is apparent that the received wisdom among some lawyers is that this approach works especially well where the issue has a political dimension they think will resonate with the Court. I'm skeptical that's true very often, but certainly the ability to *fight* for your client has utility, when wielded with calculation and caution.

I find this voice most frequently in federal court, which is by nature more impersonal than state court. Judges hear from attorneys all around the country, many of whom will never practice before him again, and the vast majority of civil cases are disposed of entirely through written submission. Some perceive less reputational risk in naked pugilism in that forum. In any event, if you thrive on conflict, love close games, and have no special place in your heart for quiet evenings with a book and a cup of something warm, this may be your calling.

Recall, these are archetypes, and a partial list. And one I just made up, so perhaps of no value whatsoever. My point is that despite the fact that you're writing on behalf of your client the idea that you are a silent conduit of your client's position is far from reality. Both for the sake of your client and your professional reputation, you *will* have to choose how you present yourself to the reader. There are no neutral options. These examples are ingredients for your advocacy soup; not isms to which you owe any loyalty. Choose deliberately, mix and match, and have fun.

The next topic to discuss is one of deep, abiding importance to the legal profession and, let's face it, our collective lives as a nation. I'm speaking of course about font, line spacing, and justification. In short, the visual presentation of your writing.

Now, maybe it just doesn't matter. Maybe this is not detail, but trivia and navel gazing. But the neurotic twitch, a hair's breadth from an aneurysm, that you can conjure up in the eyelids of an attorney by switching from full justification to left justification, indicates otherwise. I mean, let's face it, when the first proofs come back for an edition of the Law Review, or when you print off that draft brief the next morning and look at it on your desk before diving in, there's a peculiar satisfaction you get simply by looking at it. You savor the appearance of its completeness. Or maybe it's just me.

Look at how the paragraphs sit, the form of them as neat units of rule statements and crystalline reasoning, not too tall or too short, each opening sentence of each paragraph steppingstones pointing to an inevitable conclusion favoring your client. Eyes pulled down the page with just the right amount of white space to pace the gray matter.

It seems obvious to me that the visual appearance of your work product is noticed and makes an impression. Whether that impression matters one ounce to your success in a case is open to debate. But at a minimum, neat and consistent presentation affords you that wind at your back of credibility I mentioned earlier.

As the enormous value a trademark can carry on a business's balance sheet demonstrates, people read a visual shorthand when taking the measure of those things we all interact with. An example of this is professionalism, which is a stand in for a constellation of social conventions, often unarticulated, but recognized by the

enculturated. Essentially meaningless on its own, but vitally important to practicing law in its semiotic aspect. I challenge anyone to explain what "communicating ideas effectively" or "demonstrating competence" really mean in concrete terms. The point is that we all know it when we see it; or more accurately, we presume it exists in those with the proper attire, language, and other assorted signifiers. Again, this is a presumption you can overcome.

So goes, I think, the visual presentation of your writing. This is the reason only lawyers, anymore, bother to learn the correct way to format a letter in the 21st Century. A correctly formatted letter creates appearances a lawyer wishes to create: Formality, because receiving this letter is a serious event; gentility, because you are classy, and will proceed to sue the pants off the unlucky recipient, with class; formalism, to communicate that this is not just an institution, it is your institution, and you are fluent in its languages, from demand to execution of the judgment you will surely obtain.

The 21st Century version of the letter is, of course, the e mail. Although not, strictly speaking, a visual question, the choice of communication here is the salutation. Are you a "kind regards" sort? Or, kinder still, "kindest regards"? The rarer "best regards" is slightly more aloof, and so slightly more accurate, I think. And among the more quaint turns of phrase, popular in my law firm, is the lover turned lawyer, "very truly yours." I've wondered what a person who just received an intimidating epistle thinks when she learns that the lawyer is hers, and very truly so. I have to admit that I anxiously test drove a number of these salutations before settling on the purposefully anodyne, "thanks," or sometimes "yours sincerely."

All this, to me, has an element of window shutters to it. Strewn across town on all sorts of homes are window shutters, nailed to the siding and never to shutter. None of them close, none of them protect their windows from wind or hail, none of them have any function whatsoever, except to evoke the sentiments of the past. It is "as if" we lived in a simpler time, a cuter time, with breakable windows and wooden machinery. Similarly, the presentation of a letter or a quaint e mail salutation are evocative, and let the reader know a lawyer wrote this.

So what lawyerly and ancient artifacts will populate your writing to evoke the ghosts of tradition? Times New Roman? Century Schoolbook? Courier New? Or, for the truly high class, Garamond? For the record, my speech tonight is written in Constantia. I think the one thing we can all agree on is that serif is nonnegotiable. The only sans serif font that's even in the discussion is Arial, and it's best to leave that to the Nebraska district courts. Font, I think, is akin to what you communicate with choices such as tie or bowtie? Pants suit or skirt? Solid color or paisley? Anthracite or all the colors of the rainbow?

Another choice you have to make: to full justify, or not to full justify. I believe what many lawyers love about full justification is the sense of control. The shape of the paragraph is predictable. The right margin is clean and consistent. The writer has thought every argument through, knows every fact, and the paragraphs dutifully reflect his grasp of the case with their symmetry and neatness.

But, the left justifiers retort, your spacing is all which a ways, and slows down the reading. And it's a touch pretentious. This isn't a book with hyphenated line breaks mid word. In any event, as the Nebraska Supreme Court has recently concluded, a haphazard

and jagged margin is just something we'll all have to live with. All of us must now remove our fancy pants. Not to worry, Century Schoolbook is an approved font in Appellate Rule 2 103(A)(4), along with Baskerville Old Face, Palamino, and Book Antiqua.

This new hegemony of left justification in state court does cure one problem that plagues the full justifiers: the URL. It mangles the straight edge of the right margin, spilled across lines with no regard for the appearance of Apollonian perfection you've struggled to maintain. It is, without exception, the ugliest thing in your beautiful brief. Uglier even than that Westlaw citation to an unpublished decision, filled with docket numbers and asterisks. The URL goes far beyond this. Question marks juxtaposed with equal signs, underscores squeezed between a cacophony of letters and numbers, your capitalization at the mercy of whichever pimply Mountain Dew drinking genius came up with this system.

In conclusion, just as you choose your outfit in the morning, give a bit of thought to what your writing will be wearing as well. And just as your attire compliments your presentation and demeanor, so too the appearance of your writing, and the voice in which you approach your argument, will form nearly the entire stock of ingredients the reader may have to evaluate who, it is, that is speaking to them. Those intangibles might not matter, but only when they don't. As you leave law school and take your newly minted skills into the world of advocacy, I encourage you to think about, and to use, every tool at your disposal to make your case. As among the most practiced writers in a profession of writers, take the time to grind your own pigment, and the opportunity to exhibit your client's cause.