Cite as: John D. Schunk, *"Be the Ball": Caddyshack's Ultimate Legal Writing Tip*, 20 Perspectives: Teaching Legal Res. & Writing 112 (2012).

"Be the Ball": *Caddyshack*'s Ultimate Legal Writing Tip

"At some level, everyone knows or should know that the 'ball' of legal writing is one's intended audience."

By John D. Schunk

John D. Schunk teaches legal writing at Santa Clara University School of Law in California.

> *"I'm going to give you a little advice. There's a force in the universe that makes things happen; all you have to do is get in touch with it. Stop thinking ... let things happen ... and be ... the ball."*
>
> —Ty Webb speaking to Danny Noonan in *Caddyshack*

Popular movies often contain bits of wisdom woven into the dialogue. For some people, the *Godfather* movies overflow with advice.[1] While not as popular as *The Godfather I* or *II*, many people will recognize portions of the dialogue from *Caddyshack*.

The quoted dialogue above comes from the character Ty Webb, played by Chevy Chase, as he is trying to help a young caddy, Danny Noonan, improve his golf putting. Essentially, Ty Webb is advising Danny Noonan to stop thinking so much about all the technical swing advice he has received and, instead, to focus on imagining himself as being the golf ball as a way of improving.

This general idea from *Caddyshack* can help students and lawyers improve their legal writing. If they can identify what is the "force in the [legal writing] universe that makes all things happen," essentially what is the "ball" of legal writing, then everything else will make sense.

What is the "ball" of legal writing?

At some level, everyone knows or should know that the "ball" of legal writing is one's intended audience. Understanding one's audience is the "force in the universe that makes all things happen."

Even the United States government knows this. When offering advice on writing in plain English or plain language, federal agencies always identify knowing your audience as the most important step in writing effectively. Among government agencies, the Securities and Exchange Commission probably published this advice first in 1998. "Knowing your audience is the most important step in assuring that your document is understandable to your current or prospective investors."[2] More generally, the United States government also has issued plain language guidelines. These guidelines begin by urging writers to think about their audience.[3] "The first rule of plain language is: *write for your audience*. Use language your audience knows and feels comfortable with. Take your audience's current level of knowledge into account. ... Make sure you know who your audience is–don't guess or assume."[4] The guidelines explain and emphasize the importance of this point. "The best way to grab and hold someone's attention is to figure out who they are and what they want to know. Put yourself in their shoes; it will give you a new perspective."[5]

[1] For examples of this, go to the Facebook page "Everything I need to know in life I learned from the Godfather," *available* at http://www.facebook.com/group.php?gid=2218436465#!/group.php?gid=2218436465&v=info.

[2] A Plain English Handbook: *How to create clear SEC disclosure documents* 9 (August 1998), *available* at http://www.sec.gov/pdf/handbook.pdf.

[3] Federal Plain Language Guidelines 6 (March 2011), *available* at http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf.

[4] Id.

[5] *Id.* at 7.

The point about being able to place yourself in the shoes of your audience was recently identified and emphasized in a speech by Supreme Court Justice Antonin Scalia. At the end of a speech about legal writing, he tried to describe what makes someone a writing genius. "I think there is writing genius as well, which consists primarily, I think, of the ability to place one's self in the shoes of one's audience–to assume only what they assume, to anticipate what they anticipate, to explain what they need explained, to think what they must be thinking, to feel what they must be feeling."[6]

Identifying and understanding your audience is not a new idea. The famous attorney John W. Davis articulated this idea in a speech in 1940.[7] In introducing his ten rules for arguing an appeal, he began by comparing a fish with a fisherman:

> "[S]upposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly casting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fisherman talk about, if the fish could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end."[8]

Smart business people know this idea,[9] but based on this foundational idea, Davis identified his first rule for appellate attorneys seeking to persuade a court to accept their argument. "At the head of the list I place, where it belongs, the cardinal rule of all, namely: (1) Change places (in your imagination of course) with the Court."[10] This advice, if followed, helps you draft a better appellate brief. "If the places were reversed and you sat were they do, think what it is you would want first to know about the case."[11] This approach shapes the entire presentation of a good legal argument.

Do Legal Writing Teachers Help Students Learn about the Fish or Act as Fishermen?

The ideas expressed so far probably seem obvious or mundane to many, but they serve as a basis to critique how one should teach or might improve the teaching of legal writing.

Take a moment and review many of the popular legal writing textbooks currently on the market and see what students can learn about one type of intended audience–a judge. In preparing to write this article, I reviewed a variety of popular legal writing textbooks[12] and this is what I found. These textbooks discussed the concept of "audience," but the discussion frequently was limited to less than one page of a 500–700 page textbook. Only one textbook even made a cursory attempt to suggest what a trial judge's workload might be like and how that might affect how to draft a persuasive document.[13] One textbook tried to summarize the characteristics of a law-trained reader over six pages.[14]

Essentially, most, if not all, legal writing textbooks currently on the market serve as "fishermen" rather than educating legal writing students by letting any of the "fish" speak for themselves.

"Identifying and understanding your audience is not a new idea. The famous attorney John W. Davis articulated this idea in a speech in 1940."

6 Scribes Award for Scalia (Full Pt 2) 6:10-6:38, *available at* http://www.youtube.com/watch?v=RdZSSO3mF3s.

7 John W. Davis was the Democratic presidential nominee in 1924. He also served as Solictor General of the United States and eventually founded the law firm now known as Davis Polk & Wardell. He argued 140 cases before the United States Supreme Court.

8 John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940).

9 For example, many businesses conduct and even pay their potential customers to attend focus groups where the businesses can learn more about their "fish." *See, e.g.,* USA Today, Buick wants to know how they really feel, 3B (July 20, 2010), *available at* http://www.www.istockanalyst.com/article/viewiStockNews/articleid/4323414.

10 *See* John W. Davis, *supra* note 8 at 896.

11 *Id.*

12 The textbooks I review included the following: Veda R. Charrow, Myra K. Erhardt, and Robert P. Charrow, *Clear & Effective Legal Writing* (4th ed. 2007); Michael D. Murry and Christy H. DeSanctis, *Legal Writing and Analysis* (2009); Linda H. Edwards, *Legal Writing and Analysis* (3d ed. 2011); Helene S. Shapo, Marilyn Walter, and Elizabeth Fajan, *Writing and Analysis in the Law* (5th ed. 2008); Charles R. Calleros, *Legal Method and Writing* (6th ed. 2011); Laurel Currie Oates, and Anne Enquist, *The Legal Writing Handbook–Analysis, Research, and Writing* (5th ed. 2010).

13 *See* Oates and Enquist, *supra* note 12 at 263-64.

14 *See* Edwards, *supra* note 12 at 71-77.

"[J]udges tell us quite a bit about what they want from lawyers, and student can benefit from reading and hearing what they have to say..."

While very important, almost all current legal writing textbooks focus almost exclusively on the techniques one uses once one identifies and understands their intended audience.

Helping Students Listen to the Fish

When law students write advocacy documents, the fish they seek to catch are judges. Helping law students learn more about their intended audience can only help them when they leave their law school's required legal writing courses and have to be self-sufficient.[15] Students with a better understanding of judges will have a better chance of adapting the techniques they learned in a legal writing course to specific needs of a particular client or case in practice.

Collectively and individually, judges tell us quite a bit about what they want from lawyers, and students can benefit from reading and hearing what they have to say rather than receiving a quick summary from their legal writing teacher. Think about the available information.

Court Rules–Collectively, judges use portions of court rules to remind attorneys how to communicate effectively with their audience. For example, Federal Rule of Appellate Procedure 28(d) reminds attorneys writing appellate briefs to use names or descriptions of people rather than generic words like appellant and appellee.[16] Court rules also remind attorneys that they do not have to use the maximum number of pages allowed for a brief or memorandum of points and authorities. "Although Civil L.R. 7-4(b) limits briefs to 25 pages of text, counsel should not consider this a minimum as well as a maximum limit. Briefs with less than 25 pages of text may be excessive in length for the nature of the issue addressed."[17]

Court Decisions–Sprinkled among all the reported decisions in the United States are a few that expressly tell lawyers what not to do. Often written in the context of an appeal poorly briefed by an attorney, these decisions use the attorney's work product as a cautionary tale. Two lengthy, but relatively recent, opinions illustrating this type of communication from judges include *In re S.C.*, 41 Cal. Rptr. 3d 453 (Ct. App. 2006) and *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962 (Utah 2007). One can also find advice from judges in the footnotes to judicial opinions. Courts really don't care for a party's "name in **BOLD-FACED CAPITAL LETTERS**" or writing "numbers both as text and numerals."[18] In addition, courts really don't like the excessive use of acronyms like those often used by attorneys litigating environmental issues.[19]

Survey Data–Judges also tell lawyers what they want them to do through survey data. Occasionally, someone asks judges some questions about what they like and don't like. Their answers can help shape how lawyers write their documents. One can see this in articles like *Common Knowledge About Appellate Briefs: True or False?*,[20] *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*,[21] and *How Judges, Practitioners, and Legal*

[15] After all, "the ultimate goal [of a legal writing program] should be to make each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem." ABA Section of Legal Educ. & Admissions to the Bar, *Sourcebook on Legal Writing Programs* 8 (1997). The second edition of the Sourcebook phrases it a little differently. In the end, the students "should be able to analyze, research and write about a legal issue presented to them, and they should also be able to continue the process of learning about the law without the surpport of the LRW classroom and professor." BA Section of Legal Educ. & Admissions to the Bar, *Sourcebook on Legal Writing Programs* 11–12 (2d ed. 2006).

[16] *See* Fed. R. App. P. 28(d). "(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as 'the employee,' 'the injured person,' 'the taxpayer,' 'the ship,' 'the stevedore.'"

[17] Commentary to Civil Local Rule 7-4(b) for the United States District Court for the Northern District of California, *available at* http://www.cand.uscourts.gov/localrules.

[18] *United States v. Snider*, 976 F.2d 1249, 1250 n.1 (9th Cir. 1992).

[19] *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 839 n.1 (9th Cir. 2007) (mocking the tendency of environmental lawyers to use acronyms like NEPA, ROD, BLM, FEIS, CBM, RMP, APDs, and SEIS rather than ordinary English).

[20] David Lewis, *Common Knowledge about Appellate Briefs: True or False?*, 6 J. App. Prac. & Process 331 (2004).

[21] Charles A. Bird and Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141 (2002).

Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study.[22]

Articles–Occasionally, some judges write books or articles giving advice to legal writers. While books are long, one could include short articles in assigned readings for students.[23] Some of them contain a great deal of humor.[24]

Blog Postings–More recently, judges also share information through writings posted on the Internet. For example, those seeking brief writing tips from a variety of judges could visit the blog *How Appealing*.[25] It makes available a series of e-mail interviews with judges called *20 Questions for the Appellate Judge*.[26] In this series of twenty-one interviews, each judge is asked and answers at least one question about how attorneys can write better briefs.

Workload Statistics–Beyond hearing directly from judges, one can learn a great deal about the audience of judges by looking at their caseload statistics. How one writes an appellate brief might be influence by understanding a judge's workload. For example, the most recent case load statistics show that each authorized judge on the Ninth Circuit[27] is responsible annually for an average of 202 appeals terminated on the merits.[28] Since appellate judges usually hear appeals in panels of three judges, the average Ninth Circuit judges has to consider the merits of 606 appeals every year. That works out to slightly over twelve appeals every week even if the judge takes only two weeks of vacation. Essentially, an attorney reasonably can expect a Ninth Circuit judge will only have a few hours to read the briefs, prepare for oral argument, participate in oral argument, and draft an opinion in his client's appeal. If you know your intended audience has so little time to devote to your client's case, how would you write and argue it? Understanding your audience at this level should help shape how one writes for it.

Legal writing textbooks might improve by including information about how judges read and evaluate legal writing, what judges find persuasive, and statistical information on judicial workloads at both the trial and appellate levels. Armed with this kind of information, students will know what will likely work well for the judicial reader. When asked to play the role of a judge, students frequently identify what some people have concluded are indicators of great legal writing: "streamlined introductions, fact sections that are more persuasive than argumentative, varied sentence structure, liberal use of examples and analogies, clean transitions between points, eye-pleasing formatting, and smooth integration of authorities."[29]

Armed with more information about their intended audience, legal writers also would be in a better position to apply Rule No. 6 from George Orwell's famous essay *Politics and the English Language*.[30] After identifying five very specific rules for improving writing,[31] he finishes with Rule No. 6—"Break any of these rules sooner than say anything outright barbarous." No one can follow Orwell's Rule 6 without a complete understanding of their audience.

"Beyond hearing directly from judges, one can learn a great deal about the audience of judges by looking at their caseload statistics."

[22] Susan Hanley Kosse and David T. ButleRichie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study,* 53 J. Legal Educ. 80 (2003).

[23] *See, e.g.,* Jim Regnier, *Appellate Briefing: A Judicial Perspective,* 11 Persps.: Teaching Legal Res. & Writing 72 (Winter 2003); Harry Pregerson and Suzianne Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench,* 38 Sw. U. L. Rev. 221 (2008).

[24] *See, e.g.,* Alex Kozinski, *The Wrong Stuff,* 1992 BYU L. Rev. 325 (1992).

[25] http://howappealing.law.com.

[26] http://howappealing.law.com/20q.

[27] 28 U.S.C. § 44 (2006) (authorizing 28 judges for the Ninth Circuit).

[28] Office of Judges Programs, Statistics Division, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics,* March 31, 2010, Table B-5. U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2010, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B05Mar10.pdf.

[29] *Ask the Author: Interview with Ross Guberman,* SCOTUSblog (Mar. 24, 2011, 4:37 a.m.), http://www.scotusblog.com/2011/03/ask-the-author-interview-with-ross-guberman/.

[30] George Orwell, *Politics and the English Language in George Orwell: Essays* 954, 966 (Alfred A. Knopf 2002).

[31] These rules were "1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print. 2. Never use a long word where a short one will do. 3. If it is possible to cut a word out, always cut it out. 4. Never use the passive where you can use the active. 5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent." Id.

"Introducing and using more information from and about judges might change the role of the legal writing teacher a little."

Introducing and using more information from and about judges might change the role of the legal writing teacher a little. Using these types of materials in a legal writing class would require legal writing teachers to reduce their role as a "fisherman" slightly. It may also require a legal writing teacher to become more of a guide helping students hear the correct message from the "fish."

A modest change like this would reduce the methodological differences between legal writing courses and most first-year doctrinal courses in law school. The textbooks used in a typical first-year doctrinal course such as torts, contracts, criminal law, or property, contains primarily court decisions and statutes. Essentially, students learn the law by reading materials written by those individuals making the law. The teachers in these courses basically guide the students through the material to help make sure the students see and eventually understand the right concepts and rules. Most legal writing textbooks mirror the format of hornbooks or secondary sources on a particular subject. They tell the students what to do, rather than having the students work on figuring out what to do.

"Just be the ball, be the ball, be the ball. You're not being the ball Danny."

—Ty Webb critiquing Danny Noonan's putting in *Caddyshack*

At the end of the academic year, when you're grading a stack of papers and you learn that all of them did not turn out great, you might find yourself frustrated much like Ty Webb was with Danny. For whatever reason, you know you taught them certain things in class. More accurately, you know you told them certain things in class. At this point, one can engage in at least one type of self-criticism. Was I a fisherman teaching them to fish, or was I helping them learn about the fish?[32] Did I tell my students to be the ball, or did I help them learn about the ball?

In the end, for a good writer, the metaphorical ball is their intended audience, and that is the force[33] that helps anyone navigate the legal writing universe.

[32] At the same time, one doesn't want the students to end up like Luca Brasi in *The Godfather*. As many of you will remember, Tessio received Luca Brasi's bulletproof vest, delivered with a fish inside. "Sonny: What the hell is this? Clemenza: It's a Sicilian message. It means Luca Brasi sleeps with the fishes." *The Godfather* (1972).

[33] Once a student identifies and learns about this force, the student needs to trust what they have learned, much like Luke Skywalker had to do. ""Use the Force Luke, let go Luke ... Luke trust me." —Obi-Wan Kenobi to Luke Skywalker, *Star Wars: Episode IV–A New Hope* (1977).

Another **Perspective**

"For most law students, legal concepts are not only unfamiliar, but they may be antithetical to many things the students have learned before. Using popular culture is simply another effective tool to breach that barrier. If students are able to connect to the material in a way that they might not have otherwise, at the very least, it may open a door to a level of comprehension that was not there before. More pragmatically, the two greatest hurdles in the classroom are connecting to students and keeping them engaged. What better way to overcome these difficulties than to break out Hulu? The psychology certainly shows it works and the student response is usually positive. Besides, it gives me an excuse to watch movie clips while also making me a better teacher. Should we not strive to make our classrooms the optimal spot for learning? If so, we need to make the shift toward popular-culture supplements, particularly in their visual forms. When it comes to legal education, we must remember Dorothy's words: 'We're not in Kansas anymore.'"

Victoria S. Salzmann, Here's Hulu: How Popular Culture Helps Teach a New Generation of Lawyers, 42 McGeorge L. Rev. 297, 318 (2011).