

A Series

By Susan H. Kosse

**Six Tips For
Making Briefs More Persuasive**

Recent research confirms what many of us have long suspected – members of our profession are often disappointed with the quality of writing they read.¹ In 2001, a colleague and I sent out a survey to over 200 attorneys, judges and law professors asking them to comment on what they thought of the writing skills of their colleagues. Nearly ninety-four percent of the respondents found briefs and other memoranda hindered by basic writing problems. Over half of the respondents indicated that failing to be persuasive is a major flaw in the briefs they see. The tips below address ways practitioners can serve their clients better by making their briefs more persuasive.



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- 1. When writing your question presented include applicable law, legal issue and facts while being persuasive but not conclusory. Try using under-does-when format.**

Good Example: Under the fourth amendment, does a school district's requirement of a suspicionless drug test for students participating in non-athletic activities violate the students' right to privacy when there is no established drug problem among the students being tested?

Poor Example: Do suspicionless drug searches violate the Constitution?

- 2. When writing your headings make sure they outline the argument and, if possible, refer to the law and facts.**

Poor Example: Jessica Moore will suffer irreparable harm if the injunction is not granted.

Better Example: Jessica Moore will suffer irreparable harm if she is barred from the program because athletic participation is an integral part of her self-image and the benefits of this to Jessica outweigh any possible injury to AHSAA.

- 3. When writing your analysis present the rule in the light most favorable to your client, not as objective statement.**

Example 1 - objective statement of the rule

The second element of negligent infliction of emotional distress can be satisfied either by observing the injury or by observing the victim in an unchanged condition and location shortly after the act. The actual observation element is met by observing the injury. Observing the immediate aftermath is satisfied if plaintiff views the scene without a material change in the victim's condition and location.

Example 2 - Defendant's statement of the rule

The Wyoming Supreme Court has consistently ruled that a plaintiff who does not directly witness the infliction of a serious injury or its immediate aftermath will be denied recovery for negligent infliction of emotional distress (NIED). Where a material change has occurred, even a minor one, the Court has refused to find liability, regardless of the amount of time that has elapsed between the infliction of the injury and the arrival of the plaintiff on the scene. Additionally, no liability has yet been found in cases where the plaintiff does not see the victim until after she has been transported to the hospital. The court has chosen to place these restrictions on the class of permissible plaintiffs for NIED because not doing so would allow every bystander who witnessed a serious injury to survive summary judgment and unleash a "plague of nuisance suits" upon the courts.

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4. Persuade through word choice.
Select words not only for their explicit meaning, but their implicit meaning as well.²

Example 1:

Agent Friday *found* the missing tapes while looking for party decorations.

vs.

Agent Friday *finally stumbled upon* the missing tapes while looking for party decorations.

5. Persuade By Using Forceful, Direct Statements Rather Than Couching Points As Opinions

Effective advocates use forceful, direct statements in their writing rather than statements that appear to be only opinions over which reasonable people might differ.

Example:

It has been argued that the officers violated the Defendant's Constitutional right to privacy.

vs.

The officers violated the Defendant's Constitutional right to privacy.

6. Bury Negative Information - You can minimize negative information by "burying" unfavorable information in the middle of a sentence or paragraph.³

Example:

It is true that punitive damages for negligence are not often awarded. However, Adams is entitled to punitive damages in this exceptional case because the defendant was grossly negligent in failing to repair the hole in the sidewalk even after three small children injured themselves by falling into the hole.

vs.

Adams is entitled to punitive damages for the defendant's gross negligence in this exceptional case, *even though such awards are not typically awarded in negligence actions*, because the defendant failed to repair the hole in the sidewalk even after three small children injured themselves by falling into the hole.

Endnotes

1. David T. ButleRitchie & Susan Hanley Kosse, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53:1 *The Journal of Legal Education* 80 (2003).
2. Robin S. Wellford, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT
3. *Id.* ■