

# Let Bush and Gore Teach Persuasion

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Teaching persuasion has its challenges. Not only do you have to teach all the sections of the brief, you also need to get the students to incorporate themes, tell a story, and write with “punch.” Almost every legal writing text has sample briefs in the appendix. Although intended to be helpful, the students are unfamiliar with the cases and facts the briefs are based upon so they do not have the necessary context to appreciate the briefs. Last semester I addressed this problem by teaching persuasion using the briefs filed in the *Bush v. Gore* Supreme Court case (531 U.S. \_\_\_ (2000); briefs can be accessed at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/index.2000.html](http://supreme.lp.findlaw.com/supreme_court/briefs/index.2000.html), looking under “October 2000 term”). Because the students were already aware of the issues that gave rise

to the lawsuit, the briefs provided very fertile ground to discuss many persuasive writing concepts.

At the beginning of the spring semester I assigned both briefs to be read in their entirety. Each week as I taught a different section of the brief, I asked the students to reread that section in the parties’ briefs. Using the editing checklist in our text (*Writing and Analysis in the Law* by Shapo, Walter & Fajans), I asked the students to critique the various sections of the brief. The students did not always agree with the lawyers’ drafting. For example, in the Gore brief the questions presented were not framed to suggest an affirmative answer. We discussed the pros and cons of this approach and how the questions could be redrafted. The headings provided another example of an approach that did not meet the textbook guidelines. Both briefs included headings that did not

include relevant facts or reasons to support the legal contentions favorable to the client. Again we discussed whether the headings could be made stronger by including those relevant facts or if there may be reasons for not including them.

The briefs were best used to illustrate the various methods of persuasion the lawyers employed. I asked the students to read the introductions to both briefs and tell me which they thought was most persuasive and why. The students were split, but not always along their political ideologies. Most justified their choices because a particular brief’s theme was more evident and compelling to them. The theme for Bush’s brief was that the Florida Supreme Court was a renegade court trying to change all the rules in a haphazard fashion. To reinforce this theme the words “arbitrary, standardless, selective” appeared

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approximately 24 times in Bush's brief and the words "newly fashioned, judicially created, rewrote" were written at least 22 times. In contrast, Gore's theme was that the Florida Supreme Court was simply faithfully applying the state law. The Gore brief's use of the word "consistent" at least 16 times framed the issue entirely differently than the Bush brief. The constant repetition of these words and phrases illustrated to the students how themes should be continually reinforced throughout the brief. Even the statement of case was used to persuade, with Bush's brief including facts about the first Supreme Court review which were noticeably absent from the Gore brief.

The briefs provided many excellent examples of rhetorical devices that make a brief outstanding. For example, look at the well-developed imagery in this sentence from the Gore brief: "Nor does Article II create a 'state-constitution-free' zone in a state's law—even assuming it would be possible to pull the thread of state constitutional law out of the fabric of a state's law when administering or adjudicating questions bearing on elections for President and Vice President." (Gore brief, page 21). Bush's brief is also filled with illustrative writing including: "The unconstitutional flaws in the Florida Supreme Court's judgment immediately bore further unconstitutional fruit . . ." (Bush brief, page 2), and "Indeed, because those counts have been untethered from the minimal statutory moorings that the legislature prescribed for vote-counting . . ." (Bush brief, page 28).

You could require students to read the court decision, too. Analyzing what the court found persuasive from the parties' briefs might be very enlightening. Did the court cite the parties' briefs? Did the court criticize or affirm the parties' arguments or cited authority? How did the court frame the issues compared to the parties' categorizations? By carefully dissecting the opinion the students can begin to ascertain the effectiveness of certain arguments, rhetorical techniques, and methods of organization in briefs.

The Bush-Gore controversy may be old news now, but there will always be a

highly publicized case you can use. Many briefs are now accessible on the Internet. Do not worry about finding the "perfect" brief. Sometimes a brief with deficiencies is more helpful for the students. You can require students to edit those parts and explain to the class why they think their edits improve the brief. Even briefs that do not match up perfectly with the editing checklists reinforce the concept that there is no perfect way to write. There may be legitimate reasons, sometimes, to ignore the checklist guidelines.

In conclusion, using a "real life" familiar case made teaching the multiple facets of persuasion easier, more interesting, and hopefully more enjoyable for my students. ♦

## Advocacy Lessons from Madison Avenue

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When I graduated from college, the first job I held was as a copywriter for Young & Rubicam, an international advertising agency, in New York City. I learned many lessons about persuasion literally on Madison Avenue, and I share them with my students now.

Perhaps the most important lesson came from a deceptively simple sheet of paper the company called "Creative Strategy." Before a copywriter and art director could create an ad, the Creative Strategy form had to be filled out and approved. The very concept of such a form is news to most of my students. Even those artsy people in ad agencies, whose work seems so much like play (think Darren in the old TV show, "Bewitched"), are required to have a strategic plan before they start writing! Surely an attorney trying to persuade a judge or jury to "buy" an argument should have a strategic plan before starting to write, too.

The hardest item to complete on the Creative Strategy sheet was always the first

line. After weeks of meeting with the account managers, client representatives, and market research experts, researching the product from every possible angle, and trying to learn everything about how the product in question could solve a problem or fulfill a need the American public did not yet even know it had, I had to write the purpose of the ad in a single sentence. I wrote and rewrote and rewrote, trying to figure out the purpose of the work assignment.

I encourage my legal writing students to discipline themselves and hone their thinking in much the same way. I tell them to research, take notes on, discuss, and analyze their client's problem. And then, when they think they are ready to start writing, they should sit down and ask themselves what they are trying to do. What is the purpose of the document? If they have really developed a strategy of the case, they should be able to write out the purpose of their document in one succinct sentence.

The Creative Strategy sheet also required a succinct description of the target market for an ad. An entire department of experts provided the background research for this crucial part of the strategic plan. Any kind of persuasive writing is more effective if you know all you can about the people with whom you are trying to communicate, how they are likely to perceive what it is you are trying to say, and the lingo they use to talk about such things. I urge my legal writing students to write down who their audience is and everything they know about that audience.

At first my students think these steps are so intuitive that they do not need to bother writing them down. In class we go through the exercise collectively, and they come to realize that they have to make conscious, strategic choices to hone their sense of the purpose of their document. Likewise, they come to realize that each document potentially has multiple audiences, some of which they did not think of right away, and that they know quite a bit about those audiences to factor into their writing. They come to appreciate that a strong sense of "purpose" and "audience" sells both Brand X and their client's case. ♦