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October 2009

Powerful Writing Techniques to Help You Persuade Judges and Win Clients

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**Powerful Writing Techniques to Help
You Persuade Judges and Win Clients**

**Saturday, October 17, 2009
1:15 p.m. - 2:15 p.m.**

**2009 Fall Meeting and
National Solo and Small Firm Conference
October 16 - 17, 2009
Millennium Biltmore Hotel
Los Angeles, CA**

American Bar Association

General Practice, Solo and Small Firm Division

Powerful Writing Techniques to Help You Persuade Judges and Win Clients

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About the Authors

Hon. Gerald Lebovits



Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University School of Law, where he won the Dean's Teaching Award for 2007-08 and where the students elected him Adjunct Professor of the Year for 2008-09. For 18 years he was an adjunct professor at New York Law School, where he also earned Adjunct Professor of the Year honors. A faculty member of the New York State Judicial Institute, he has taught legal writing and opinion writing to judges and law clerks for 15 years. He has authored the New York State Bar Association *Journal's* Legal Writer column since 2001 and has written *Advanced Judicial Opinion Writing* (7th ed. 2004) for the New York State Unified Court System. Judge Lebovits has given CLEs for dozens of bar associations and government organizations. He graduated from the Ottawa (LL.L.), Tulane (M.C.L.), and New York University (LL.M.) law schools.

Lisa Solomon, Esq.



Lisa Solomon was one of the first lawyers to recognize and take advantage of the technological advances that make outsourcing legal

research and writing services practical and profitable for law firms of all sizes. Through Lisa Solomon, Esq. Legal Research & Writing, she assists attorneys with all their legal research and writing needs, including preparing and arguing appeals and drafting substantive motions and trial memoranda. Through Legal Research & Writing Pro, she shows other lawyers how to start and run successful practices as contract (freelance) attorneys and teaches lawyers in all practice areas how to write more persuasive briefs.

Lisa is the author of many published articles about appellate practice and procedure and has written extensively about the field of contract lawyering. Her innovative law practice has been featured in periodicals such as the *National Law Journal* and the *ABA Journal* and in a number of books about legal careers. She frequently presents continuing legal education courses in legal writing.

Lisa is a member of the Westchester Women's Bar Association (where she is co-chair of the Practice Management Committee); the Westchester County and White Plains Bar Associations; the Justice Brandeis Westchester Law Society; Scribes—The American Society of Legal Writers; and the Legal Writing Institute.

Lisa earned her J.D., *cum laude*, in 1993 from New York University School of Law and her B.A., *magna cum laude* from Brandeis University. She is admitted to the bars of New York, the United States Supreme Court, the Second Circuit, and the Southern and Eastern Districts of New York.

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Powerful Writing Techniques to Help You Persuade Judges and Win Clients

What is Copywriting, and Why Should Lawyers Care?

Copywriting involves strategically writing words that promote a person, product, business, opinion, or idea, with the ultimate intention of persuading the reader to take some form of action. Legal brief-writers also write to persuade the reader (the court) to take a specific action (rule in favor of the brief-writer's client). Because copywriters and brief writers share the same ultimate goal, studying techniques that have proved effective in the copywriting context can help lawyers write more persuasive briefs. And because lawyers in solo or small firm practices are tend to be actively involved in their firms' marketing efforts, their understanding of copywriting techniques can contribute directly the bottom line.

The Importance of Message to Market Match

One of the foundational principles of effective copywriting is the importance of message to market match. This simply means that you want to tailor the content of your message to match your audience's interests and concerns. So, in the marketing arena, you might distribute a different brochure at an estate planning seminar for retirees than

at a seminar targeted at new parents. In the legal arena, one application of this principle suggests that you should couch an emotional appeal to a jury in language different from an appeal to a court.

Some Copywriting Techniques That Will Make Your Briefs More Persuasive

Storytelling

One of the most familiar and effective copywriting techniques is to tell a compelling story. You often see this accomplished in marketing through the use of case studies. In briefs, you tell your client's story in the statement of facts.

In fiction, stories have three primary elements: character, conflict, and resolution. The story you tell in your brief will have characters and conflict: the court's ruling provides the resolution. Your goal is to tell the story so that the resolution will be almost self-evident.

You can make your statement of facts compelling by carefully selecting the details you want to call to the reader's attention, arranging the details in a maximally effective way, and using evocative language.

Carefully selecting the details doesn't mean presenting only the facts that favor your client's position. Just the opposite is true: you'll lose credibility if you omit relevant facts from your brief, and the court will give little credence to your legal

argument. Nevertheless, as lawyers familiar with appellate brief-writing know, even in a self-contained universe where all facts are established and equally available to both parties, the appellant's statement of facts and the respondent's are often quite different.

Arranging the details in a maximally effective way means giving the story of the case a narrative flow. The classic three-part structure of a story moves from order, to disorder/chaos, to re-order. In brief writing, this structure corresponds to introducing the characters (particularly your client); describing the conflict and its effect on your client; and setting forth the resolution for which you are advocating.

Using evocative language doesn't mean hitting the reader over the head with bombastic, overblown rhetoric, in either your marketing materials or your briefs. Sophisticated potential clients will tune you out if your prose is larded with adjectives and exclamation points (both literal and figurative). Judges, too, will reject any overt attempt to appeal to their emotions.

Sensational, inflammatory language tends to arouse skepticism and reduce your credibility. Instead, use vivid words (including powerful verbs) and "show, don't tell": set forth the facts, and let the reader come to an independent (but subtly guided) conclusion about their import.

The “Foot in the Door” Strategy

The consistency principle states that people have a strong desire to be consistent with their previous opinions, assertions, and actions. The “foot in the door” strategy is one application of this principle.

Marketers employing the “foot in the door” strategy get the reader to take to a small initial action (such as accepting a free sample or making a small purchase), then later seek a more significant action. Accepting a free sample can lead to making a small purchase; making a small purchase can lead to making a larger one.

Brief writers using this strategy get the reader to agree with an easily accepted, uncontroversial initial premise before presenting arguments favoring a more controversial, later premise. A skillful brief writer will set forth the current state of the law in a series of nearly indisputable premises before applying it, by analogy, to the facts at issue.

Some Elements of Marketing Copy and their Analogues in Legal Briefs

Just as copywriting techniques can be applied in brief writing, some structural elements commonly found in marketing copy also appear in briefs.

A fascinating similarity between copywriting and brief writing is that both rely on a principle of persuasion known as “social proof.” This principle means that people

look to what others are doing to determine whether they should take the same action. Common-law legal systems, which are built on precedent, can be seen as the most culturally significant application of the concept of social proof.

In copywriting, social proof is often provided by testimonials. Testimonials are most effective if they are provided by customers or clients who are similar to your prospects; include specific information relevant to the problems your prospects face and the solutions you provide; and accurately reflect the customer's or client's actual words.

In brief writing, social proof is provided by citation to and analysis of caselaw. Just as the most effective testimonials come from clients who are similar to your prospects, the most persuasive legal argument is built around cases whose material facts are similar to those in your case. Just as multiple, vague testimonials are not as persuasive as one or two detailed ones, string citations are not as persuasive as citations to a few factually similar cases (followed by parentheticals, where appropriate). Just as the language of testimonials should be accurate and not taken out of context, your discussion of legal authority should also be scrupulously accurate.

Another notable parallel between copywriting and brief writing is that both end with a "call to action." The purpose of copywriting (as it finds its purest expression in direct-response marketing) is to persuade the reader to take a particular action. Although your ultimate goal may be a sale (or, in the legal marketing context, a new

client engagement), your goal for a particular marketing piece may be an incremental one, such as getting prospects to register for a seminar. For this reason, it's important to be clear about what action you want the prospect to take.

Similarly, the purpose of a brief is to convince the court to rule in your client's favor. Therefore, in the conclusion, you need to explain exactly what that entails. Do you want the trial court to grant summary judgment dismissing the complaint? Are your clients seeking an injunction and, if so, what should the court order the opposing party to do (or refrain from doing)? Do you want the appellate court to affirm, reverse, or modify the order appealed from? If you want the court to modify, exactly how should the order be modified? Although an effective brief will make the court want to rule in your client's favor, the precise nature of the relief your clients seek might not always be crystal clear from all that has come before. Don't make the court guess (or—if you're cynical—trust the court to figure out) what you want it to do: be explicit, and as detailed as necessary.

Sell Your Argument to Your Readers

In *Winning on Appeal*, Judge Ruggiero Aldisert observes: "In substance . . . , to write effectively is to sell effectively. That is why I can comfortably think of judges and lawyers as salespeople, a function they do not always recognize and one that many

would probably deny. In this sense, objections notwithstanding, lawyers and judges are salespeople. Being successful means selling your argument to your readers.” Ensure you have a strong message to market match. Use copywriting techniques such as storytelling and the foot-in-the-door strategy; effectively employ social proof. And end with a clear call to action. This approach will help you successfully sell your argument to your readers, whether those readers are judges or potential clients.

ADDITIONAL RESOURCES

Books

Aldisert, Ruggerio, *Winning on Appeal: Better Briefs and Oral Argument* (2d ed., NITA 2003)

Cialdini, Robert, *Influence: Science and Practice* (Allyn & Bacon, 5th ed. 2008)

Scalia, Antonin and Garner, Bryan A., *Making Your Case: the Art of Persuading Judges* (Thomson West 2008)

Articles

Kosinski, Alex, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325

Opiari, Benjamin, *To Go Boldly Without the Bold (and Italics and Underlining and Caps)*, 16 Perspectives: Teaching Legal Research and Writing 2, p.131 (Winter 2008).
Available at
http://west.thomson.com/pdf/perspec/Winter_2008/Winter08_9.pdf

Painter, Mark P., *Legal Writing 201: 30 Suggestions to Improve Readability (or How to Write for Judges, not Like Judges)*. Available at
<http://www.plainlanguagenetwork.org/Legal/legalwriting.pdf>

Stanchi, Kathryn M., *The Science of Persuasion: An Initial Exploration*, 2006 Mich. St. L. Rev. 411 (Summer 2006)

Miscellaneous

www.Copyblogger.com

www.WebInkNow.com