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Persuasive Writing for Lawyers

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PERSUASIVE WRITING FOR LAWYERS

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INTRODUCTION

Writing to win is writing to persuade. Readers, especially judges, must believe that you, as a lawyer, seek the correct result and that you have the arguments to support it. Your job is to help them.

Judges are busy. They can spare but limited time to consider your case. Judges must be able to extract the gist of your case quickly. You must write effectively by transmitting only necessary information favoring your position. The way to persuade is to assert your position with accurate, credible, simple, short, and strong arguments supported by good storytelling and citations to authority, all written in clear, concise, precise, and plain English. To persuade you must make it easy for the court to rule for your client and to want to rule for your client.

This article offers some pointers on how to persuade thorough preparation, organization, honesty, brevity, and editing.

BE PREPARED

To tell a persuasive story, you need to know the background, the characters, the conflict, and the issues. Spending the time to learn the facts, research the law, outline your arguments, and structure your brief is time well spent. So is starting early and setting time aside to write without distractions.

Before all else, learn the facts. Gather information from your client, read the relevant documents, and talk to necessary witnesses. Ask questions. Do not stop until you understand the key details. Avoid surprises.

Then consult your local rules and all applicable rules of procedure. They will determine your page limit, deadlines, format, and content. Knowing the rules from the start will save headaches later.

Then frame the facts into legal issues and narrow your legal research. You do not need to know everything about the law before you start. It is enough to know everything by

the time you are done. Once you are confident that the court has the jurisdiction to address your client's claim or defense, identify the arguments that will give your client the remedy it seeks. Select only the strongest, best-supported arguments. Discard weak issues. What you include is as important as what you exclude. Focus on a few strong arguments, not many weak ones.

Arrange your issues in order of strength; lead with your best points first. If two issues are equally strong, lead with the argument that will give your client the greatest relief. Two exceptions: First, consider the logic of your issues. Trace the elements of a statute or the factors of a test. If a statute or the leading case established an order in which you should articulate the factors, follow that order. Second, begin with a threshold issue, such as service of process, jurisdiction, or the statute of limitations, if you have one.

Develop a case theory, or theme. It should be an emotional message, communicated in an understated, unemotional way. The theory should summarize your case. The theory should, if accepted, secure your remedy. Weave your theory into every part of your brief.

Include your case theory in the statement of facts by phrasing it persuasively. You are not writing a law-review article or historical treatise with a neutral view of the facts. You are writing to make sure that the reader agrees with the facts as you tell them. Include your theory in every opening paragraph after each heading and subheading. Weave it in to your presentation of the law and your facts.

Outline your brief before you start writing. To do so, come up with point headings. Well-written point headings provide a quick summary of your argument and answer each question presented. There should be one point for each ground on which relief can be granted if the court agrees with that point but disagrees with all else.

A point heading is comprised of a conclusion or an action that the writer advocates the court to take, together with the reasoning that justifies that outcome. An effective point heading, when combined with subheadings, will concisely cite the applicable law, describe how the law applies to the facts at issue, and arrive at a conclusion. It will avoid hypotheticals and abstractions. It will be argumentative.

Reading the headings in order shows your theory of the case with logical reasoning, and the remedy you seek, clearly and without gaps in logic. Include subheadings to break up complex issues.

Create a table of contents. The table of contents presents the point headings and subheadings. For most judges it is the first page, after the questions presented, they will read. An effective table of contents signals an approachable document.

The table of contents with point headings sets out your brief's roadmap. It lets you maintain focus and keep your goals in sight throughout the drafting process.

BE ORGANIZED

Your reader must understand your brief. An organized brief is easy to read. It is methodical. It cuts to the chase. If you prepare before you start writing, the organization flows naturally.

Start your brief with an introductory statement or summary of argument. Identify the nature of the case, your claim, your theory of the case, and the remedy you seek. This statement should be concise but serve as an overview of your position and the outcome you intend. Judges want to understand the big picture before they read the details. They want the conclusion first so that they know they have the jurisdiction to grant your proposed remedy and so that what they read later has context.

Then state the facts of the case. This is the most important part of the brief; judges interpret facts to determine what relief they can and will grant. Further, judges will not know the facts other than through the briefs and the admissible evidence. It is up to you and opposing counsel to present the facts — facts you and your adversary will glean from the affidavits, affirmations, exhibits, and deposition, hearing, or trial transcripts. You need to present your client's version of the facts convincingly. Use the facts section to win the court over. Tell the judge what really happened.

Engage the judge by telling a compelling story. Set the scene by describing the background. Bring the characters to life with forceful verbs and concrete nouns, not conclusory and exaggerating adjectives and adverbs. Introduce the conflict and guide the reader to the remedies that should result. Do not be conclusory. Show; do not opine. Tell a story; do not quote witness after witness.

Your story needs a logical narrative that leads directly to your desired outcome. The narrative need not be chronological, although a chronological narrative often works best. The events, the characters, and the theory must come together in a credible plot. Maintain the judge's focus by starting, developing, and ending your narrative on a high note.

Your fact statement must meet two tests. First, it should stand alone. Anyone reading your facts must understand your case without reading any other document. Assume that the judge knows nothing about your case. Mention only those facts relevant to your sought-after relief. Cull the meaningful from the mundane. You will know whether your facts are worth mentioning in your facts section by whether you will argue them later in your argument section. Second, it should be persuasive without being argumentative. Save the argument for the argument section.

Beyond those two tests, you must write the facts in a way that impresses the court that how it views the facts is the only way the facts should be viewed. Through perspective and organization, do not let two sentences go by without making it obvious, without argument, which side you represent. Make the focus of your facts statement support your client's theme.

Take the opportunity from the start of your fact section to paint your client favorably. Make the judge empathize with your client. Judges will feel comfortable resolving the case in your client's favor if they can step into your client's shoes. Humanize clients by naming them throughout your brief.

When you organize your argument section, be prepared to acknowledge and accurately state the applicable legal standard. Show the court that it can rule in your favor because your client's case satisfies the standard. At the trial-court level, the standard is the burden of proof with the correct presumptions. On appeal, the standard review depends on the type of lower-court or administrative decision, order, judgment, or decree you are appealing. If several standards apply, mention and apply them all.

Once you have identified the standard, organize to explain why the standard works to your client's advantage. Then tie the standard to the substantive sections of the brief by explaining how the standard has been satisfied. If the standard is a de novo review on the law, for example, emphasize that the trial court's adverse legal conclusions do not bind the appellate or reviewing court. Offer citations to show how the highest court in your jurisdiction has applied the standard in similar cases. Include the specifics of your case that make the standard apply and how the court should enforce it.

Introduce the questions presented or issue statements by exploring your deep issue persuasively and in no more than 75 words. The questions as you pose foretell what the judge must decide. The judge will filter your brief through the issues you present. That forces you to argue issues, not caselaw. You already developed your issues and listed them as point headings in your table of contents. You framed them to allow one possible answer: the one you want. Now develop the arguments to get that answer.

Outline and organize each issue in your argument section using the CRARC method. CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion.

In the first Conclusion section, state the issue persuasively. Begin with a strong topic sentence to introduce the issue. Summarize your argument first and then explain. This initial section must capture the judge's interest by announcing a logical syllogism that ends with your conclusion.

In the Rule section, present the rules of law that will support your conclusion. After each rule, support it with your best authority and move from the specific to the general and from the binding to the merely persuasive.

Particularly favorable cases should be discussed in detail, pointing out the similarities of the decision with the facts in your case. Explicitly stating the reasons you reference a particular authority will emphasize its importance. Otherwise, be brief with your citations; perhaps explain their relevance only in parentheticals.

Save quotations for those times when paraphrasing will fade the nuance or when you cannot explain the law in your own words more concisely or more convincingly than the authority you are quoting.

Block quotations are distracting and often go unread. In those rare cases when you need block quotations — if you are asking the court to interpret a statute or contract or to lay out a multi-part test from a seminal case — introduce them before the quoted text. That will force your reader to understand their import.

For all other references to the law, paraphrase. Each time you explain the law you have a new opportunity to advance your theory.

In the Analysis section, apply the law to the facts — facts mentioned in your facts section. This is the CRARC's most important part. Show the reader how the rules apply to your facts. Describe factual details by creating images with which the reader can identify. Be specific. Also, cite the record when you refer to the facts. Doing so strengthens your brief, makes it seem reliable, and helps readers find information when they search the record.

Include the language of the legal test when you apply the facts. This engages the reader in your case theory. Your goal is to get your readers to arrive to your conclusion on their own.

If your rule is well established, your statement of the law will be brief and condensed. Extensive legal analysis will be necessary only when the law is unclear or turns on novel or uncommon grounds. Do not give more rules than the court needs to decide the case. You are not in law school any longer; unnecessary rules will take points away.

Mention consistency between the policy of the applicable rules and your facts. Judges want to know that they are deciding justly, not simply deciding logically. Judges want to decide correctly and for the right reasons.

In the Rebuttal and Refutation section, state the other side's arguments fairly by setting up a straw man without repeating the rules you laid out in your Rule section. One goal in persuasion is to show that you are right because you are right more than that you are right because the other side is wrong. But the Rebuttal and Refutation section is your opportunity to weaken the other side. Failing to address unfavorable arguments is strategically wrong and sometimes unethical. Not mentioning unfavorable law or contrary arguments will not make them go away. The judge might find them, and your opponent might bring them up and use them against you. Do not assume that your reader or opponent is stupid. Distinguishing the facts of your case and explaining why a statute or case does not apply will advance your position.

Distinguish the law on which your opponent relies. Explain why your opponent's arguments are flawed or unsubstantiated. Show that your opponent's theory of the case is invalid. Do so in an order that works for your client. You do not need to follow your opponent's order. Just as you should order your lead arguments in your Rule section from your strongest to your weakest, you should order the arguments in your Rebuttal and Refutation section from your strongest to your weakest, not from your opponent's strongest to weakest.

Point out inaccuracies in your opponents' description of the facts or their interpretation of those facts. Punch holes into your opponent's case, but exclude defensive or wordy references to opposing briefs — and especially do not suggest that your opponent or the judge below is lying or stupid. Deal with issues, not your adversaries' motives and personalities. Always address the court and your opponent respectfully, although not obsequiously, even if they are unworthy of your respect.

In the final Conclusion section, state the relief you seek. You provided the legal issue in the first Conclusion section. Now bring the entire argument by tying the legal issue and your arguments to the relief. Be specific when describing how the judge should decide your case. Most times judges are forbidden to give you more than you ask for.

BE HONEST

To be persuaded, judges must believe in you, not merely in your arguments. They will believe in you if you prove your case without distractions and overpromising and if you make them feel smart, not stupid.

State the facts accurately, clearly, and completely. Do not misrepresent facts, either affirmatively or by omission. Misstatements signal a lack of knowledge of the case or, worse, a desire to avoid unfavorable aspects of your case. Prove your integrity — and make it easy for the court to find your facts —by giving record citations.

Stick to relevant, determinative facts. Do not disperse the reader's attention by reciting facts that do not advance your theory.

Avoid fallacies. A fallacy is invalid reasoning that leads to incorrect conclusions. Judges will reject untruthfulness and hold it against you and your client. Judges will be quick to spot inconsistencies or flaws in your argument. Make sure that each premise is correct. Develop your argument through a logical syllogism. Do not skip premises. Build your argument block by block.

Use pinpoint, or jump, citations to cases. If the court wants to verify the context or the rule, it should be able to do so immediately, and it will be able to do so if you use pinpoints. Do not waste the court's time by forcing it to scroll through the entire case to find the relevant part. Pinciting makes it easy for the court to confirm that the law says exactly what you say it does. Being reliable when citing the law again makes you more credible. At the trial level, attach to your brief a copy of the most relevant cases and statutes, and highlight the part you reference.

When there is adverse law, cite it and distinguish it from your case. You show candor to the court if you bring it up before your opponent does. You also eliminate the surprise factor and the opportunity for opposing counsel to diminish your credibility.

Review all your citations when you proofread. Make sure that all citations are consistent and follow the applicable uniform rules of citation. In federal court, use Bluebook citations. In New York State courts, use the Official Style Manual, nicknamed the Tanbook.

Most judges hate pompous language and legalese. Pompous language and legalese distract and irritate. Writing in simple, plain English is clear. Use Anglo-Saxon English, not foreign or fancy words, unless you have no monosyllabic English equivalent. Make sure the court understands every word without driving it to the dictionary.

Eliminate overstatement. If you object to opposing counsel's statements, tie them to a specific misstatement or mistake and move on. Make fair statements, and prefer understating. Judges hate exaggeration.

Avoid intensifiers like "clearly" or "obviously." They add extra words, they irritate skeptical judges, and they hide lazy writing. Instead of writing that something is "clear," explain why it is clear. Explain why your argument is valid; do not just say it is. Besides, fact and law are seldom clear or obvious. When you write that something is clear, you raise the bar unnecessarily. Unless you are dealing with phrases or art like "clear and convincing evidence," you do not need to prove that something is clear: You need to prove only that it satisfies the standard or burden of proof.

Eliminate sexist language. Sexist language is insulting. And sexist language affects credibility because it makes the judge focus on your style instead of on your content. Sexist language represents the male or female as the norm, gratuitously identifies the referent's gender, and demeans and trivializes. Gender-neutral language avoids gender bias projects fairness and clarity. Do not use "he," "his," or "him," "she" or "her," or "he/she." Do not alternate between the genders. Instead, make the references plural or delete the antecedent altogether. (Incorrect example: "A gourmet like her coffee black." Incorrect fixes: "A gourmet likes their coffee black" or "A gourmet likes his/her coffee black." Correct: "Gourmets like their coffee black" or "A gourmet likes black coffee.")

Comply with local rules and all applicable rules of procedure. Learn about the judge who will preside over your case.

BE BRIEF

Respect the court's time. Be concise and succinct without sacrificing clarity. Judges will thank you by maintaining interest.

Careful preparation and organization will help you focus and address your issues. Do not rush through your arguments. Say what you must say to strengthen your client's case. Complex ideas require several sentences or paragraphs to express, and precision should never be sacrificed for concision. Nevertheless, do not say more than you need to say, and make every word count.

Often, time factors and client considerations require a quickly written, general document, such as boilerplate. But the virtue of boilerplate is also its vice: It is written fast, but it considers unlike cases alike, it includes old law, it is often riddled with miscitations, and it usually goes unread.

Keep your sentences and paragraphs short without being choppy. Each sentence and paragraph should express one idea. If you chose precise words and effective transitions, you will normally keep your sentences shorter than 20 words and your paragraphs shorter than 250 words. Long sentences and paragraphs are less effective. They will lose the judge's attention and unnecessarily complicate an issue.

Use transitions to link one paragraph to the next. Transitional phrases like "in addition," "by contrast"' and "in the alternative" help make logical relationships between

your paragraphs. They also avoid the weighty conjunctive adverbs like "additionally," "along the same lines," "however," and "moreover." The best transitions, though, repeat in the first sentence of the paragraph a word or concept from the last sentence of the preceding paragraph.

Replace coordinating conjunctions with a period and start a new sentence. The coordinating conjunctions are "and," "but," "for," "so," "nor," and "yet." This will shorten your sentences and make them more concise, even though doing so might add text.

Do not start sentences with "In that." ("In that the judge recused herself . . . ." Becomes: "The judge recused herself because her cousin was a litigant.")

Eliminate prepositions like "of"; turn them into possessives instead. (Incorrect: "The contract of Mr. Jones." Becomes: "Mr. Jones's contract.") Prepositions, moreover, lead to nominalizations, which are wordy and conclusory, in which writers prefer nouns to verbs. (Incorrect: "Ms. Jones committed a violation of the law." Becomes: "Ms. Jones violated the law.")

Cut redundancies like "advance planning." Write "planning."

Avoid metadiscourse. Cut wordy running starts and throat clearers like "the fact is that" and "the first thing I will argue is that." Just say what you have to say. Especially avoid metadiscourse that vouches for your position and thus raises integrity issues. Examples: "it is black-letter law that," "it is hornbook law that," "it is well-settled that," "it is axiomatic that," "it is clear that," and "I believe that."

Avoid unnecessary repetition. Say it once and in one place. This does not interfere with what we said about weaving your case theory throughout your brief. The theory is a theme, a message, not the same words or arguments. You build your theory in your presentation of the facts, the law, and the analysis. That is how you persuade, not by repeating the arguments, simply changing the wording.

Avoid double-identification in parenthesis. Incorrect example: "The case arises from a breach of contract (the 'contract') between Mr. and Mrs. Smith (collectively, the 'Smiths') and Mr. Brown ('Brown')." It is unnecessary and boring to say things twice. Write as you speak.

Avoid footnotes or limit them to when they are relevant. Information worth mentioning is worth mentioning in the text, not in footnotes. Never use footnotes to avoid going over the page limit. You want to call attention to what is important, not bury information in footnotes or, worse, in endnotes.

Avoid string citations except if your client's position would benefit from explaining authority or a split in authority.

Do not try to cram in as many words as you can to meet the page limit. Fewer but well-thought words will improve clarity and thus be more persuasive.

If the specifics of your case involve voluminous or abstract information like financial data, statistics, or medical records, include visual aids: charts, tables, pictures, and summaries to communicate your points. Make the court's job easy. Judges love visuals.

If you are writing an appellate brief, do not waste the courts time with undisputed fact, law, or issues. Mention that they are undisputed and move on.

REVIEW TO IMPROVE

Through the writing process, especially between drafts, continuously edit to improve content, organization, citing, sentence and paragraph structure, and word choice. When you have written a final draft, you can start proofreading to spot errors. Do not rush this process. Your final product will be greatly improved if you devote the time to turn an average product into a worthy one.

Re-read your draft, think, and make changes. Keep your reader in mind when your review for organization, clarity, tone, style, and length.

First, review to improve macro-organization. Determine whether each paragraph — the building blocks of thought — develops one point; whether the discussion of each concept is grouped all in one place; whether its position within the brief is appropriate; whether the first paragraph of each section sets the roadmap for the details that come next; whether transitions between paragraphs serve to connect the concepts; and whether the last paragraph in each section reaches the conclusion set out in the first paragraph.

Second, review to improve your small-scale organization. Review sentences within each paragraph. Determine whether the first sentence is a topic sentence or a transitional sentence that connects one paragraph to the next; whether each sentence expresses one idea only; whether transitions between sentences connect them to convey the point; whether sentences move from short to long, from simple to complex, and from old to new; and whether the last sentence answers that paragraph's thesis.

Then review your narrative. Use stylistic and grammatical devices to persuade. For example, end each sentence with your climax; the end of each sentence is the stress point. Begin each sentence with something important, too, because the beginning of each sentence is the place with the second greatest stress point. This means that you should use the middle of each sentence, paragraph, and section to bury information you must include but which you wish to de-emphasize. With this technique, you can use short sentences and paragraphs for emphasis and long sentences and paragraphs to de-emphasize and bury information.

Use punctuation for similar effect. To force the judge to dwell on your sentence, use lots of commas and semicolons. To make the judge rush through your point, eliminate your punctuation.

Rhetorical devices also play a strong role in persuasion. Rely on original metaphors without mixed metaphors or clichés; parallel structure to match nouns with nouns and verbs with verbs; and antithesis to contrast opposites concisely.

Always consider the active voice and the passive voice. The active voice describes a sentence doing something to someone or something, with a subject-verb-object combination, or who does what to whom. (Example: "The dog ate the cat." The active is always more concise and direct than the single passive voice. (Example: "The cat was eaten by the dog.") The double passive, by contrast, hides the actor. (Example: "The cat was eaten.") Prefer the active voice except when the actor is unimportant or when you want to downplay the actor's conduct.

Except for quiet understatement, prefer positive words, clauses, and sentences to negative ones. (Example: "Do this" instead of "Do not do that.") Affirmative sentences are assertive and clear. Negatives are ambiguous and leave room for misconceptions. (Example: Lender: "You owe me $100." Borrower: "I do not owe you $100." The borrower just admitted owing some money, although less than $100. The borrower should have said, "I owe you nothing.")

Write even negatives in the positive. (Incorrect example: "The nonmonied spouse must not be prevented from . . . ." Becomes: "The nonmonied spouse must be allowed to . . . .") Avoid these words: "barely," "denial," "disapprove," "except," "hardly," "neglect to," "neither," "never," "nor," "not," "other than," "prohibit," "provided that," "scarcely," "unless," and "void."

Eliminate generalities and cowardly qualifiers like "generally," "typically," or "usually," except if to refer to an exception to the general rule. In that case, be sure to state the rule first, and then the exception.

Beware vague referents. Each "his," "hers," "they,' "their," and "its" must refer to one person or thing only. Conversely, be aware of inelegant variation, in which a writer uses different words to mean the same thing. Inelegant variation confuses, whereas repetition has power.

Put subjects next to their predicates. If some modifiers are necessary, put them next to the word or phrase they modify. But do not characterize. Characterizations weaken your message.

Then review to improve your tone and style.

Omit abbreviations and contractions except in signals and citations. Make your tone formal and professional.

Improve readability by including stylistic variety. Not every sentence should be a simple declarative sentence or structured as a dependant clause followed by an independent one. Nor should every sentence be the same length. Be creative. Once all the information you need is in the brief and everything else is out, concentrate on the style that makes your document attractive and readable.

Show the court that you care enough to review the details. Proofread to eliminate typographical errors and to correct grammar and spelling mistakes. Use your wordprocessing's program's grammar-correction function. But also review your work word for word on a hard copy.

Then improve the document's appearance. Appearance is nearly as important as content. Design has aesthetic but also pragmatic relevance. Judges appreciate design that facilitates legibility. Follow the court's rules about font, type size, margins, alignment, and headings. Your firm might also have its own rules. Follow them as well. When the choice is yours, single space while double-spacing between paragraphs. Add one space between sentences, not two. Include page numbers. Try Century font, not Times New Roman. Use right-ragged, not full, justification. Use 12-14 type size, nothing smaller or larger. Most important, include plenty of white space to enhance readability.

Do not use bold, italics, quotation marks, or underlining to emphasize or to show sarcasm. These false devices dilute content and irritate readers. Prefer italics to underlying to make the text cleaner. Prefer English words, but use italics for foreign words and phrases not commonly used in English when you must use them. Set headings, subheadings, and titles in boldface, large, or italicized type in your argument section to distinguish captions from text.

Last, include a table of authorities with correct formatting for dot leaders; do not use the tab bar to format dot leaders. Your table of authorities should contain all the authorities cited or referred to in your argument section and the page where you mention each one. Create it after you draft and proofread your entire document to avoid omitting a statute or case and to avoid mispagination.

When you have a good draft, but only after you have a good draft, give it to a good editor — a colleague who can play devil's advocate to find typographical errors, weaknesses in your arguments, and ways to improve your structure.

Know when to submit your brief. Edit late, after you have put your brief aside a few times, but submit your brief on time. Most good lawyers are perfectionists. They take pride in excelling. Briefs can always be improved. But knowing when to stop editing is as important as investing enough time to review carefully.

CONCLUSION

Persuade by writing with your reader in mind. The better you get at persuading through writing, the higher your chances of winning.

Further Readings:

Gerald Lebovits, *Persuading the Judge Through Writing: 15 Ways to Win*, 5 The Advocate (Bronx County B.J.) 5 (Fall 2008), *available at* http://ssrn.com/abstract=1303008.

Gerald Lebovits, *Write to Win*, 72 Queens Bar Bull. 11 (Dec. 2008) *available at* http://ssrn.com/abstract=1320665.

Gerald Lebovits & Martha Krisel, *Finding Your Voice as a New Attorney: Thoughts from the Employer and the Court*, 58 Nassau Lawyer 11 (Jan. 2009), *available at* http://ssrn.com/abstract=1332115.

Gerald Lebovits, *Winning Through Integrity and Professionalism*, The Advocate (Bronx County B.J.) 4 (Summer 2009), *available at* http://ssrn.com/abstract=1463718.