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Persuasive Writing for Lawyers—Part II

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Persuasive Writing for Lawyers — Part II

In the second part of this two-part column, the Legal Writer continues with three more ways to persuade: honesty, brevity, and revision.

Be Honest

To be persuaded, judges must believe in you, not merely in your arguments. Messengers count for as much as the message. Judges 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. Don't 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. Don't disperse the reader's attention by reciting facts, procedure, people, and dates that don't 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. Don't 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. Don't 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 says. Being reliable when citing the law makes you 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's 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, jargon, and legalese. Turgid writing irritates. Simple, plain English is clear. Use Anglo-Saxon English, not foreign or fancy words, unless you have no monosyllabic English equivalent. Don't be boring; engage your reader. But 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; don't 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: You need to prove not only that you're right but that you're clearly right. Unless you're dealing with phrases of art like "clear and convincing evidence," you don't need to prove that something is clear; you need to prove only that it satisfies the standard or burden of proof.

> Messengers count for as much as the message.

Eliminate sexist language. Sexist language is insulting. And sexist language affects credibility because it makes the judge trip 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, it projects fairness and clarity. Don't use "he," "his," or "him," "she" or "her," or "he/she." Don't alternate between the genders. Instead, make the references plural or delete the antecedent altogether. (*Incorrect example:* "A gourmet likes her coffee black." *Incorrect fixes:* "A gourmet likes their coffee black" or "A gourmet likes his/her coffee black." *Correct:* "Gourmets

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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'll 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. Don't 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, don't say more than you need to say, and make every word count.

The surest way to be succinct is to drop loser arguments.

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's written quickly, but it considers unlike cases alike, it includes old law, it's 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 choose precise words and effective transitions, you'll normally keep your sentences shorter than 20 words and your paragraphs shorter than 250 words. Long sentences and paragraphs are less effective. They'll lose the judge's attention and complicate an issue unnecessarily. Each sentence should contain one small idea, and no more. Each paragraph should contain one large idea, and no more.

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." Starting new sentences shortens your sentences and makes them more concise, even though doing so might add text.

The surest way to be succinct is to drop loser arguments.

Don't 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 also 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.")

Discard redundancies like "advance planning" (write "planning") and "due and payable" (write "due").

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," and "I believe that."

Reject unnecessary repetition. Say it once and in one place. This doesn't interfere with the Legal Writer's advice about weaving your case theory throughout your brief. The theory is a theme, a message, not repeated words or arguments. You build your theory in your presentation of the facts, the law, and the analysis. That's how you persuade. You don't persuade by repeating arguments, simply by changing the wording.

Delete all double-identification in parentheses. *Incorrect example:* "The case arises from a breach of contract (the 'contract') between Mr. and Mrs. Smith (collectively, the 'Smiths') and Mr. Brown ('Brown')." *Incorrect example:* "The Plaintiff owes the Defendant ten dollars ($10.00)." It's unnecessary and boring to say things twice. Write as you speak.

Forgo footnotes or limit them to when they're relevant. Information worth mentioning is worth mentioning in the text, not in footnotes. Never use footnotes to avoid exceeding the page limit. You want to call attention to what is important, not to hide information in footnotes or, worse, in endnotes.

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

Don't try to cram in as many words as you can to meet the page limit. Fewer but well-thought-out 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.

Don't waste the court's time with undisputed fact, law, or issues. Mention that they're 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've written a final draft, you can start proofreading to spot errors. Don't 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 you review for organization, clarity, tone, style, and length.

First, review to improve macro-organization. Paragraphs are the building blocks of thought. Determine whether each paragraph 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 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 second greatest stress point. This means 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. They can push a judge's buttons to rule for your client. 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 where someone does something to someone or something, with a subject-verb-object combination, or who does what to whom. (*Example:* "The robber shot the victim.") The active is always more concise and direct than the single passive voice. (*Example:* "The victim was shot by the robber.") The double passive, by contrast, hides the actor. (*Example:* "The victim was shot.") 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 referring to an exception to the general rule. In that case, state the rule first, and then the exception.

Beware vague referents. Each "his," "hers," "they," "their," and "its" must refer to one group, 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 don't 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 dependent 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 about the details. Proofread to eliminate typographical errors and to correct grammar and spelling mistakes. Use your word-processing 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.

Don't use bold, italics, quotation marks, or underlining to emphasize or to show sarcasm. These false devices dilute content and irritate readers. Prefer italics to underlining 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; don't 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've 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 edit 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, *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 & Lisa Solomon, *Powerful Writing Techniques to Help You Persuade Judges and Win Clients* (American B. Ass'n CLE delivered at Los Angeles, Cal., in Oct. 2009), *available at* http://ssrn.com/abstract=1498914.

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

Gerald Lebovits is a judge at the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John's University School of Law. This two-part column is based on an unpublished article by the same title he wrote with Lucero Ramirez Hidalgo for a Continuing Legal Education program he gave for the Practising Law Institute in November 2009. Judge Lebovits's e-mail address is GLebovits@aol.com.

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