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Persuasive Writing for Lawyers—Part I

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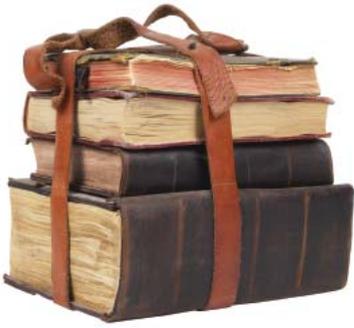
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Persuasive Writing for Lawyers — Part I

Winning writing is persuasive writing. For you to persuade, readers, especially judges, must believe that you, as a lawyer, seek the correct result and that you have the arguments, fact, and law to support it. Your job is to help them.

Judges are busy, skeptical professionals. 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, confident, 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 column offers some suggestions on how to persuade through 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. Use good time-management techniques.

Before all else, learn the facts. Gather information from your client, read the relevant documents, and talk to necessary witnesses. Ask questions.

Don't stop until you understand the key details. Avoid surprises.

Then consult your local rules and all applicable rules of procedure. They'll 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 don't need to know everything about the law before you start. It's enough to know everything by the time you're done. Trying to know everything leads to procrastinating. Like the vice of scapegoating, procrastinating is the enemy of doing it right and getting it done.

Once you're confident that the court has the jurisdiction to address your client's claim or defense, identify the arguments that'll give your client the remedy it seeks. Select only your 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'll 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, com-

municated in a simple, 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.

Work your case theory into your statement of facts by phrasing your case theory persuasively. You're not writing a law-review article or historical treatise with a neutral view of the facts. You're 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 into 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 it can grant relief, even if it disagrees with all else.

A point heading comprises a conclusion or an action that the writer wants the court to take, together with the reasoning that justifies that outcome. An effective point heading, when combined with subheadings that break up complex issues, will concisely cite the applicable law, describe how the law applies to the facts at issue, and arrive at a conclusion. It'll avoid hypotheticals and abstractions. It'll be argumentative.

Reading the headings in order shows your theory of the case with logical reasoning, and the remedy

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you seek, clearly and without gaps in logic.

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

Select only your strongest, best-supported arguments.

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's 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 it should serve as an overview of your position and the outcome you intend. Judges want to understand the big picture before they read the details. Persuasive writing in this sense is an inverted pyramid. Judges want the conclusion first so that they know whether they have the jurisdiction to grant your proposed remedy. Giving the conclusion first also gives judges context for what they read later.

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. Judges won't know the facts other than through the briefs and the admissible evidence. It's 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. Don't be conclusory. Show; do not opine. Tell a story; don't 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'll know which facts are worth mentioning in your facts section by whether you'll argue them later in your argument section. Second, your facts section 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 you present the facts is the only way the facts should be viewed. Through perspective and organization, don't 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 com-

fortable 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're appealing. If several standards apply, mention and apply them all.

Once you've 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 don't 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 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've already developed your issues and listed them as point headings in your table of contents. You've 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, the Legal Writer's patent-pending improvement over the IRAC 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 support your conclusion. After each rule, support it with your best authority. Move from the specific to the general and from the binding to the merely persuasive.

Discuss in detail particularly favorable or unfavorable cases, pointing out the similarities and differences 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; explain their relevance only in parentheses. It's the novice who devotes paragraph after paragraph to discussing cases, as if cases were more important than the rules for which the cases are cited.

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

Block quotations are distracting and often go unread. In those rare cases when you need block quotations — if you're asking the court to interpret a statute or contract or if you need to lay out a multi-part test from a seminal case — introduce them before the quoted text. That'll 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 at 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 when it turns on novel or

Deal with issues, not your adversaries' motives and personalities.

uncommon grounds. Don't give more rules than the court needs to decide the case. You're not in law school any more.

Mention consistency between the policy of the applicable rules and your facts. Judges want to know that they're 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're right because you are right more than that you're 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 in advance is strategically wrong and sometimes unethical. Not mentioning unfavorable law or contrary arguments won't make them go away. The judge might find them, and your opponent might bring them up and use them against you. Don't assume that your reader or opponent is stupid. Distinguishing the facts of your case and explaining why a statute or case doesn't 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 don't 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 opponent's description of the facts or interpretation of those facts. Punch holes into your opponent's case, but exclude defensive or wordy references to opposing briefs — and especially don't 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're unworthy of your respect. Judges love civility and professionalism because they can reach a decision without being distracted by hostility.

In the final Conclusion section, state the relief you seek. You provided the legal issue in the first Conclusion section. Now press the entire argument forward by tying the legal issue and your arguments to the relief you seek. Be specific when describing how the judge should decide your case. Most times judges are forbidden to give you more than you ask for. You can't be too direct in stating what you want for your client.

The Legal Writer continues in the next issue of the *Journal* with three more ways to persuade: honesty, brevity, and revision. ■

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