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Drafting NY Civil-Litigation Documents: Part 46—Best Practices for Persuasive Writing

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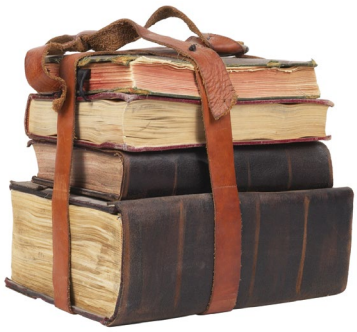

Drafting New York Civil-Litigation Documents: Part XLVI — Best Practices for Persuasive Writing

In the last issue of the *Journal*, we discussed sanctions motions.

In this issue, the *Legal Writer* concludes its 46-part series on civil-litigation documents with the best practices for writing litigation documents.

Throughout this series, you've learned about writing complaints, answers, bills of particulars, notices to admit, interrogatories, subpoenas, motions for disclosure, motions to dismiss, summary-judgment motions, motions to vacate default judgments, motions to reargue and renew, in limine motions, trial motions, post-trial motions, motions for attorney fees, and motions for sanctions. We've focused on the rules and mechanics of writing these documents. But at the heart of all these litigation documents is persuasion: Winning or losing your case will depend on whether you persuade. To write effective litigation documents, the *Legal Writer* offers some tips on persuasion.

The Story

Develop a Theme. Good lawyers are good storytellers.[1] The story you tell in your litigation document must persuade the court to grant your motion or deny your adversary's motion.[2] Because you're the author — the storyteller — you decide how to tell the story.[3]

You have a chance to win from the first sentence of your document: "First impressions are critically important . . . [Y]ou win at the beginning by hooking the reader into a story that ends in victory for your client."[4]

You hook the reader by developing a theme.[5] The best movies and books have memorable themes. Creating a good theme means persuading the reader that you (or your client) should win based on the applicable law and relevant facts. Creating a good theme means you're developing a "credible, compelling storyline that has (1) believable characters (the parties); (2) a persuasive plot (the facts and law); (3) a logical story arc (a beginning, middle, and end); and (4) a powerful ending (why your client must prevail)."[6]

Create a theme that makes a lasting impression on the court (and your adversary). Your theme must be "interesting, persuasive, easily understood, and supported by the facts and the law."[7]

In developing your theme, use emotion, such as sympathy or outrage.[8]

Use "logic, equitable principles, public policies, or some [other] combination."[9]

To persuade, weave your theme throughout your document.

Create an Introductory Paragraph. Great movies begin their themes with memorable opening scenes; great books have memorable opening lines.[10] Your litigation documents should likewise persuade from the opening paragraph: "Think of your strongest legal argument or a powerful fact that supports your claim and craft an introduction that immediately tilts the scales in your client's favor."[11] Don't wait until you've reached the middle or the end of your document to explain why you should win.

In your introductory paragraph, grab the reader's attention.

Tell the court what you want: State the relief you're seeking.[12]

Tell the court why you want it. Your introductory paragraph is meant to provide a roadmap for the reader. Tell the reader what's to come: "Use your introduction to lay out your case."[13] Use the relevant facts and law to tell the court why you want the relief you seek.

> Create a theme that makes a lasting impression on the court (and your adversary).

Remember that it's an introduction. Don't try to do everything in your introductory paragraph.[14]

Persuade on Page One. The expression "good things come to those who wait" doesn't apply to legal writing. In legal writing, you need to persuade right away, on page one. Get to the point quickly. If you wait until the middle or the end of your document to persuade, you might already have lost the case.

In your memorandum of law, persuade in your table of contents.[15] Create persuasive headings and sub-headings you'll copy in your text.

Get Organized. Telling a coherent story means you need to organize your story. Organize your thoughts in separate bite-sized paragraphs. Write your paragraphs in numerical order. Use this organizational technique in many of your litigation documents, such as

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affidavits and complaints, but don't use it in your memorandums of law.

Start each paragraph with a topic or transition sentence. A topic sentence introduces what you're going to discuss in your paragraph. Every sentence in each paragraph must relate to and amplify your topic sentence. A transition sentence links the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept.

Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Be overt, not covert: "The best way to ensure that a trial judge will understand your case is to make the organization . . . obvious. Make your organizational plan overt."[16] Use headings to organize your document. Use subheadings. Headings and subheadings "bring the judge's attention back into focus."[17] *Example:*

I. Carly Dean fails to state a cause of action against Pretty Properties for breach of contract because Dean does not allege that Pretty Property breached any contract.
II. Dean fails to state a cause of action against Pretty Properties for interfering with its contract.
    A. Dean's allegations do not rise to the level of "wrongful means": Dean does not allege that Pretty Properties used physical violence, fraud, or misrepresentation.
    B. Dean fails to allege that Pretty Properties was solely motivated by malice.

Organize your legal argument. Start with your strongest points — those on which you're most likely to win. If two points are equally strong, go first with the point that'll win the largest relief. Alter that pattern to arrange your points logically, to order the elements or factors listed in a statute or seminal case, or to begin with a threshold argument, like the statute of limitations, before discussing the merits.

Your legal arguments must flow logically.

Don't use the kitchen-sink approach: Limit your contentions to those that have a reasonable likelihood of success.

Organize your argument using the CRARC method.[18] CRARC stands for Conclusion, Rule, Application, Rebuttal and Refutation, and Conclusion. Use CRARC as a roadmap to structure an argument. CRARC guides you to begin an argument with a persuasive conclusion statement instead of a neutral issue statement. It also directs you to craft a rebuttal that acknowledges the potential weaknesses of your client's case and preemptively refutes the other side's contentions. Anticipating a rebuttal will give you credibility without undercutting an argument. A properly CRARCed argument section addresses the strongest arguments first, followed by weaker arguments and public-policy arguments. This is the best method for persuasive writing. It draws the court's attention right away to the arguments with which it might agree.

Tone It Down. Tone helps determine whether readers will accept what you write. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don't bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. Avoid excessive capitalization. Once you've found the right tone, keep it consistent. Your tone should be confident, formal, persuasive, and understated, not angry, colloquial, harsh, or pushy.

Less Is More. Make your document readable. Draft lots of short sentences. Short sentences are powerful.[19] Long sentences are hard to digest.

Create short paragraphs. A paragraph should rarely be longer than six sentences. It shouldn't exceed one thought and two-thirds of a double-spaced page or 250 words, whichever is less. Intersperse short sentences with a few long sentences, but make sure your long sentences aren't confusing. Complicated and convoluted sentences will confuse your reader. They suggest that you can't explain your case easily. They might even suggest that you don't understand your own case.

Varying sentence and paragraph length makes your writing spicy and more readable. When in doubt, shorter is better.

> To persuade, you'll need to personalize your client.

Leave white space on the page. The white space is the space in the margins and between words, sentences, and paragraphs. The more words you put on a page, the greater your chances of losing. Your goal is to make sure that the judge reads your document.

Just because you might have a 25-page limit doesn't mean you should exhaust your limit to make your point. Make your point and stop. As one scholar pointed out, "In the Book of Genesis, God created the world in 400 words . . . . [This] writing[] get[s] to the point."[20]

Put Some Emotion Into It. The facts of your case will dictate whether you should use emotional facts, without writing emotionally, to persuade. A story infused with emotion will "impact the outcome of a case."[21]

Use the right amount of emotion for your case. Use more emotion if your client lost a leg than if your client suffered a black eye. If you're moving to dismiss on the basis of subject-matter jurisdiction, it's probably best not to use emotion to persuade.

If you use emotion to persuade, don't overdo it. Relying on too much emotion to persuade, instead of relying on the law, will make you lose credibility.

Let's Get Personal. Paint a picture of your client for your reader. To persuade, you'll need to personalize your client. Whether your client is a big corporation, a convicted felon, or a sweet grandmother, you need to help your reader understand and get to know

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your client. Put your client in the best possible light.

The way you refer to your client will help personalize your client. Avoid using "plaintiff" or "defendant." Personalize by using your client's name or corporate name.

Creating an "impersonal acronym" won't persuade.[22] If your client's corporate name is Beautiful Artistic Dentistry, don't use the acronym "BAD" throughout your document. Doing so would put your client in a bad light. Instead consider using "Beautiful Dentistry" to refer to your client.

Know the weakness in your own case.

Personalize your client, but depersonalize your adversary's client. If you represent Mabel James and you're suing Taylor Corporation, refer to your adversary as "the Corporation" and refer to your own client as "Mabel James."

Focus on the Facts. Your case is only as good as your facts: "Cases are won on the facts — the nitty-gritty details that the parties cull from each other during discovery."[23]

Be honest about your facts: "Don't fudge" the facts.[24] If a fact is unfavorable for your client, deal with the fact honestly. Address unfavorable facts before your adversary raises them. If you wait, your adversary will use those facts against your client. If you wait until your adversary interprets the unfavorable facts, you're one step away from losing the case.

Minimize the impact of unfavorable facts — the "bad facts" — by weaving them in with favorable facts — the good facts.[25] To deemphasize a bad fact, place it in the middle of a paragraph; weave the good facts around the bad fact. If you use this method to deemphasize, readers might not notice the bad facts: The reader will "perceive[] [the bad facts] as another part of the story."[26] *Example:*

> John was an Assistant Vice-President at Primrose Donavan Inc. John was fired from his job despite all his successes and achievements. On his way home from work on April 1, 2015, John had an accident. Even though John was drunk when he was arrested, he didn't injure anyone or damage anyone's property. Within two weeks of the accident, John found another job. John has always supported his daughter, Penelope. John spends all his free time with Penelope. John is a good father.

To deemphasize bad facts, place bad facts in the beginning of a sentence.[27] *Example:* "John drinks, but he's a good father."

To deemphasize bad facts, place them in a subordinate clause.[28] A subordinate clause — also known as a dependent clause — can't stand on its own as a sentence; a subordinate clause doesn't express a complete thought. *Example:* "Even though John was drunk when he was arrested, he neither injured Tom nor damaged Tom's car."

If possible, make unfavorable facts appear favorable for your client.

Don't exaggerate the facts.[29]

Don't omit key facts.

Analogize the facts: If you're relying on cases to support your argument, analogize your facts to the facts in those cases.

Distinguish the facts: If you're distinguishing your adversary's leading cases, distinguish your facts from the facts in those cases.

The Law

Know the Law. Don't rely on your adversary or the court to know the law. Find the law and use it to persuade. Explain the law in your own words.

Assume that your jurisdiction defines a cause of action for conversion as follows:

> Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.[30]

Create a rule that favors your client. *Example:*

> A defendant is liable for conversion when a defendant assumes and exercises ownership rights, without authority, over goods belonging to the plaintiff excluding plaintiff's ownership rights. A plaintiff may sue for the defendant's conversion of money if the money is specifically identifiable. Plaintiffs may not maintain a cause of action for conversion if their damages are merely for a breach of contract.

In this example, the law is clear, readable, and favors the plaintiff: The focus of the paragraph is whether the defendant is liable.

Don't rely for the law on headnotes, case summaries, or "statements in case syllabi."[31]

Holding Versus Dictum. When you're relying on a case for support, rely on the court's holding instead of the court's dictum, unless no usable holding supports your case. Know the difference between holding and dictum: "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"[32] Dictum might be persuasive and a prediction of how an appellate court might rule in the future, but it's not binding.

Framing Issues. In your motion, frame the issues for the court.[33] Create deep issues: "[A] deep issue is the ultimate, concrete question that a court needs to answer to decide a point your way. . . . The deep issue is the final question you pose when you can no longer usefully ask the follow-up question, 'And what does that issue turn on?'"[34]

Be Honest. Don't fudge the law.[35] Interpret the law, but don't lie about what the law provides.

Don't omit unfavorable aspects of the law to help your client.

Don't ignore law unfavorable to your client. Your adversary and the

court will find it. If you hide the law, you'll never have the opportunity to use it to persuade. Bringing up, and then rebutting, unfavorable law makes you look credible. Bringing up unfavorable law helps "take away [your adversary's] thunder."[36] Besides, you're "required to advise the court of any adverse controlling authority."[37]

If you're quoting from a statute, rule, or regulation, quote verbatim. But don't quote everything from the statute, rule, or regulation. Avoid large block quotations. Using block quotations makes you look unseasoned and lazy.

Don't use a quotation "from a case to suggest the case stands for a proposition it does not."[38]

If you're quoting the law and you're altering the language, let the court know about your alterations. When you alter a quotation, make sure not to change its meaning. Also, don't create "the potential for misinterpretation, misapplication, or ambiguity."[39] Use ellipses to show that you've eliminated some of the text. Use three ellipses within a sentence if you've removed less than a sentence. Use four ellipses if you've removed a sentence or more or when you've chopped off the end of a sentence and what remains is an independent clause. Use brackets to show what you've added, deleted, or altered when it's a letter or more. *Example:*

> A defendant is liable for conversion when a defendant, without authority, "assum[es] and exercise[s] . . . the right of ownership over goods belonging to another to the exclusion of the owner's rights. . . . However, [plaintiffs may not] . . . validly maintain[] [a cause of action] where [plaintiffs'] damages are merely . . . sought for breach of contract.

Analysis. Apply the law to your facts persuasively. The outcome of your case will depend on how well you apply law to fact. Show the court "why a ruling for your client is right and just."[40] Use your theme to "tie all the pieces together."[41]

Don't forget to address any counterarguments — your adversary's main arguments.

In the Alternative. Don't assume that the court will rule for you. Have a back-up plan by creating alternative arguments — but not too many. Even if the court disagrees with your first argument, it'll have a reason to rule for you if it agrees with an alternative argument. Your alternative arguments should be as good (and as persuasive) as your main argument: "[B]ad arguments detract from good ones."[42]

Don't make "outlandish alternative arguments."[43] Don't argue anything frivolous or weak.

Make It Easy. Make it easy for the court to rule for you. If you're relying on an unreported or obscure case, attach it to your document as an exhibit.[44] Attaching it shows the court that you've got nothing to hide.

Cite Correctly. When citing to the law, do so correctly. Cite the correct reporter. Cite the correct page. Make it easy for your reader to find and re-cite your authority.

The Weakness

Know the weakness in your own case. Know what facts are unfavorable to your client. Know what aspect of the law is unfavorable for your client. Then address those weaknesses.

Address weaknesses as soon as possible. Don't wait until your adversary brings them up. If you wait until your adversary explains the law or the facts, it'll be too late.

Know when to concede. Don't concede too early or too frequently or give up an essential argument. Don't argue for the sake of arguing: "Don't vehemently stick to an unreasonable or tenuous position just for the sake of arguing — this will seriously impact credibility. Acknowledge weaknesses and address them forthrightly."[45]

The Rules

Playing by the rules could mean the difference between winning or losing. Follow court deadlines and court rules. Serve and format your papers according to the court's requirements.

Follow the individual judge's deadlines and rules. If the judge gives you a 25-page limit for your post-trial brief, stay within the page limit. If the judge tells you that your deadline is next Thursday, follow the judge's instruction. Breaking the rules means that the judges might reject your papers; at the least, you'll lose credibility. Your client will lose credibility, too.

Honesty Is the Best Practice. Judges appreciate honesty. Be honest with the facts.[46] Be honest with the law.[47]

You've learned from the last column — writing and opposing sanction motions — that lying will get you into trouble. If you lie about one thing — even if it's minor — the court will assume you've lied about other things.

The Words

Watch your language. Words have power: "[W]ords can win — or lose — the case."[48] Make sure you use the right words to say what you want to say. Limit your adjectives and adverbs.

Here's a list of things you should eliminate from your litigation documents:

- **Adverbial Excesses.** Eliminate "absolutely," "apparently," "certainly," "clearly," "completely," "indisputably," "obviously," "really," "truly," and "unmistakably" from your documents.[49] If it were clear, you wouldn't be in court. If it were indisputable, you wouldn't have an adversary to dispute your version of the facts and law.
- **Clichés.** Eliminate: "all things considered," "at first blush," "clean slate," "exercise in futility," "fall on deaf ears," "foregone conclusion," "it goes without saying," "last-ditch effort," "leave no stone unturned," "lock, stock, and barrel," "making a mountain out of a molehill," "nip in the bud," "none the wiser," "pros and cons," "search far and wide," "step up to the plate," "tip of the iceberg," "wait and see," "wheels of justice," "when the going gets tough," and "writing on a clean slate."
- **Colloquialisms.** Colloquialisms are expressions that aren't used in

formal speech or writing. *Examples:* "gonna" and "ain't nothin."

- **Conjunctive Adverbs.** The best writing doesn't rely excessively on conjunctive adverbs like "additionally," "along the same lines," "furthermore," "however," "in addition," "in conclusion," "lastly," "moreover," and "therefore." If the logic and movement of your ideas are clear, your reader will connect thoughts without needing artificial transitional devices that impose superficial logic.
- **Contractions.** Don't use contractions in your litigation documents.[50] *Examples:* "can't," "don't," "it's," "won't." Contractions might be appropriate in a magazine or newspaper article, but they have no place in your legal documents.
- **Elegant Variation.** Repeat the same word instead of using a synonym. If you create a synonym, you'll confuse your reader. If your case is about a contract, refer to it as a "contract." Don't use "agreement," "understanding," or "covenant" to refer to the same contract.[51]
- **Equivocations.** Eliminate doubtful, timid, and slippery equivocations, phrases, and words: "at least as far as I'm concerned," "generally," "probably," "more or less," and "seemingly."
- **Euphemisms.** Eliminate euphemisms. A euphemism is a word or phrase that replaces a negative, offensive, or uncomfortable word or phrase. Some euphemisms for dying: "passed away," "passed on," "checked out," "kicked the bucket," "bit the dust," "bought the farm," "cashed in their chips," and "croaked."
- **Expletives.** "Expletive" means "filled out" in Latin. Avoid: "there are," "there is," "there were," "there was," "there to be," "it is," and "it was." *Example:* "There are three issues in this case." *Becomes:* "This case has three issues." *Exceptions:* Use expletives for emphasis; for rhythm; to climax (end with emphasis); or to go from short to long or from old to new. *Emphasis examples:* "It was a machete that killed Jimmy." Here, the author emphasizes the object that killed Jimmy, not that Jimmy was killed. "It was Judge Garner who wrote the opinion." Here, the author emphasizes Judge Garner's authorship even though it would have been more concise to write "Judge Garner wrote the opinion." *Rhythm example:* "To everything there is a season." This example would have been different had the author written "To everything is a season." *Climax example:* "There is a prejudice against sentences that begin with expletives" is better than "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists."
- **Jargon.** Jargon is terminology that relates to a specific profession or group. Don't use words or phrases only you or another lawyer might know. *Examples:* "In the instant case" or "in the case at bar" *becomes* "here" or "in this case." Or, better, discuss your case without resorting to "here" or "in this case."
- **Legalese.** Eliminate all legalisms. *Incorrect:* "Enclosed herewith is my brief." *Correct:* "Enclosed is my brief." *Incorrect:* "The defendant has a prior conviction." *Correct:* "The defendant has a conviction." Eliminate these words: "aforementioned," "aforesaid," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "per" (and "as per"), "said," "same," "such," "thenceforth," "thereafter," "therein," "thereby," "to wit," "whatsoever," "whereas," "wherein," and "whereby." If you wouldn't say it, don't write it. Write "earlier" or "before," not "prior to." Write "after" or "later," not "subsequent to."
- **Metadiscourse.** Metadiscourse is discourse about discourse. It's throat clearing. Get to the point without a running start that occupies space but adds nothing. Eliminate: "After due consideration," "as a matter of fact," "bear in mind that," "for all intents and purposes," "it appears to be the case that," "it can be said with certainty that," "it goes without saying that," "it is clear that," "it is important (or helpful or interesting) to remember (or note) that," "it is significant that," "it is submitted that," "it should be emphasized that," "it should not be forgotten that," "the fact of the matter is," "the point I am trying to make is that," "it is well settled," and "it is hornbook law."
- **Mixed Metaphors.** Mixed metaphors combine two commonly used metaphors to create a nonsensical image: "He tried to nip it in the bud but made a mountain out of a molehill."
- **Negatives.** Watch out for negative words: "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." *Example:* "Good lawyers don't write in the negative." *Becomes:* "Good lawyers write in the positive." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Don't use "but," "hardly," or "scarcely" with "not." Use "but" instead of "but however," "but nevertheless," "but that," "but yet," and "not but." Eliminate negative prefixes and suffixes: "dis-," "ex-," "il-," "im-," "ir-," "-less," "mis-," "non-," "-out," and "un-." Use negatives only for negative emphasis: Abigail: "How are you?" Bob: "Not bad."
- **Nominalizations.** A nominalization is a verb turned into a noun. Nominalizations are wordy. They hide. They're abstract. Don't bury your verbs. Most buried verbs end with these suffixes: "-tion," "-sion," "-ment," "-ence," "-ance," and "-ity." Change weak nouns to powerful verbs: "allega-

tion" becomes "allege"; "conclusion" becomes "conclude"; "consideration" becomes "consider"; "installation" becomes "install"; "intention" becomes "intend"; "motion" becomes "moves"; "objection" becomes "object"; "preparation" becomes "prepare"; "provision" becomes "provide"; "requirement" becomes "require"; "resistance" becomes "resist"; and "violation" becomes "violate."[52]

- **"Of."** "Of" signals that you're wordy. Eliminate "of" by creating possessives or by inverting or rearranging the sentence. *Possessive example:* "The foregoing constitutes the decision and order of the court." *Becomes:* "This opinion is the court's decision and order." *Rearranging and inverting examples:* "I am a fan of the Doors." *Becomes:* "I am a Doors fan." "He's a justice of the Supreme Court of the State of New York." *Becomes:* "He's a New York State Supreme Court justice." "You're not the boss of me." *Becomes:* "You're not my boss." If the possessive looks awkward, keep the "of." "The Fire Department of the City of New York's (FDNY) policies." *Becomes:* "The policies of the Fire Department of the City of New York (FDNY)." Delete "as of." "The attorney has not filed the motion as of yet." *Becomes:* "The attorney has not filed the motion yet." Don't use "of" prepositional phrases: "Along the line of" *becomes* "like." "As a result of" *becomes* "because." "Concerning the matter of" *becomes* "about." "During the course of" *becomes* "during." "In advance of" *becomes* "before." "In case of" *becomes* "if." "In lieu of" *becomes* "instead of." "In the event of" *becomes* "if." "On the grounds of" *becomes* "because." "Regardless of whether or not" *becomes* "regardless whether." "With the exception of" *becomes* "except." Eliminate "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," and "nature of."
- **Passive Voice.** The passive voice comes in two forms: single passives and blank passives (sometimes called double or nonagentive passives). A single passive occurs when a sentence is converted to object, verb, subject from subject, verb, object. The double passive hides the subject. Single passive: "The motion was filed by Martin." Double passive: "The motion was filed." Prefer the active voice: "Martin filed the motion." The active voice lets readers know who did what to whom, in that order. The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest. People think in the active voice, not the passive.
- **Slang.** Eliminate slang from formal legal writing. Slang is made up of informal words or expressions not standard in the speaker's dialect or language and which are used for humorous effect. Use "absent minded" instead of "out to lunch," "drag" or "take" instead of "schlep," "marijuana" instead of "weed," "police" instead of "Five-O," "stolen goods" instead of "loot" or "stash."

Gender-Neutral Language. Eliminate sexist language. Here are four ways to create gender-neutral language. First, make the antecedent plural. *Example:* "A law clerk can't be careless. She must be meticulous and precise." Change "a law clerk" to "law clerks" and "she" to "they" to eliminate the sexist language. *Becomes:* "Law clerks can't be careless. They must be meticulous and precise." Second, rephrase the sentence to eliminate the pronoun. *Example:* "She who can't handle the work should find another job." *Becomes*: "Anyone who can't handle the work should find another job." *Example:* "A waiter likes his customers to be generous." *Becomes:* "A waiter likes generous customers." Third, repeat the noun: "A police officer will be here soon. He'll help you." *Becomes:* "A police officer will be here soon. The officer will help you." Fourth, use the second-person pronoun: "you," "your," or "yours." *Example:* "He who can write should apply for the job." *Becomes:* "If you can write, apply for the job."

Use the Right Verb. Statutes can't speak, point out, or demonstrate anything. But statutes can "apply," "dictate," "impose," "limit," "mandate," "prohibit," "provide," and "require."[53]

Courts can't argue, believe, or feel. But courts can "conclude," "decide," "declare," "determine," "examine," "find," "hold," "modify," "reason," and "rule."[54]

Don't Be Conclusory. Show, don't tell. *Example:* "Maurice is tall." Eliminate the conclusory language: "Maurice is seven feet in height."

Mind Your Manners. You might be angry with your adversary, your adversary's client, the judge, or even your client, but you should "get over your anger and use your head."[55]

Don't attack your adversary or your adversary's client. Avoid insults: "liar," "idiot," and "stupid." When you insult your adversary and your adversary's client, you lose sight of the big picture — winning the case based on the merits of your case. When you insult your adversary and your adversary's client, the court will lose sight of the merits of your case. The court won't take you seriously. The court will eventually turn against you.[56]

Avoid inflammatory language.[57]

Avoid words like "absurd" or "ridiculous."[58]

If you're an attorney, don't attack your client.

Don't insult the judge. Many litigants believe that the way to win is to attack the judge. Some litigants attack the judge by moving to disqualify the judge. Some litigants sue the judge. If you're unhappy with the judge's ruling, bring a motion to renew, reargue, or both. In your motion to reargue, you can point out that the judge misinterpreted or misapplied the law and the facts. Be diplomatic.[59] In explaining the judge's error, you don't need to make the judge feel stupid: "There are ways to show that a court's ruling

was in left field without saying the judge is an 'uninformed moron.'"[60] If you believe the court made a mistake, appeal. The best "practice is to focus on the law, not the judge."[61]

The Editing Process

Some litigators forget that the best way to produce a polished document is to edit: "Reading an error-laden brief is like listening to someone with bad hiccups — pretty soon the reader starts timing the hiccup intervals instead of listening to what the speaker is trying to say. Proofread."[62]

Check for grammar, punctuation, and spelling. Check the accuracy of your quotations. Check the accuracy of your authorities.

Don't abuse punctuation: "Some writers put semicolons and wild mushrooms in the same category: some are nice, and some are not, and since it is hard to tell the difference, they should all be avoided."[63] Eliminate exclamation points and question marks from your writing. If you want to be emphatic, do it in front of a jury. If you want to ask questions, put a witness on the stand and question the witness.

Choose one font and stick with it. Most experts reject Times New Roman, the default font in Word and WordPerfect: "Both the Supreme Court and the Solicitor General use Century. . . . Bookman and Century . . . are preferable to . . . Garamond . . . and Times [New Roman]."[64]

Eliminate excess. Cut out information that doesn't serve a purpose: The purpose is to persuade the court to rule for you.

Choose your words carefully: Choose words that say what you want to say.

Reorganize: Rearrange sentences; rearrange paragraphs.

Comply with court rules and deadlines.

Use every opportunity in your litigation documents to persuade. Don't wait until oral argument or trial to persuade. Persuade in the beginning, middle, and end of every document.

This concludes the series on writing litigation documents. In the next five issues of the *Journal*, the *Legal Writer* will discuss how to draft contracts. ■

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1. Adam Lamparello & Megan E. Boyd, Show, Don't Tell: Legal Writing for the Real World 19 (2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 20.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 21.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Wayne Schiess, "*Best of Wayne Schiess*," *Writing for the Trial Judge — For Motions*, 12 Scribes J. Legal Writing 131, 135 (2008–2009), *available at* http://media.wix.com/ugd/3eec74_dc7ec0483e8a41bf90e9a7dea4fbd9a7.pdf (last accessed Oct. 21, 2015).
17. *Id.* at 136.
18. *See* Gerald Lebovits, *The Legal Writer, Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 N.Y. St. B.J. 64 (July/Aug. 2010).
19. Lamparello & Boyd, *supra* note 1, at 23 (citing Ross Guberman, "Five Ways to Write Like John Roberts," *available at* www.legalwritingpro.com/articles (last visited Oct. 21, 2015)).
20. Margaret Z. Johns, Professional Writing for Lawyers 231 (1998).
21. Lamparello & Boyd, *supra* note 1, at 24.
22. *Id.* at 25.
23. *Id.* at 26.
24. Schiess, *supra* note 16, at 138.
25. Lamparello & Boyd, *supra* note 1, at 27.
26. *Id.*
27. *Id.* at 28.
28. *Id.*
29. *Id.*
30. *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 883–84, 452 N.Y.S.2d 599, 599 (1st Dep't 1982).
31. Lamparello & Boyd, *supra* note 1, at 31.
32. Pierre N. Leval, *Madison Lecture: Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1249 (2006) (quoting *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring)).
33. For more information on framing your issues, consult Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part I*, 78 N.Y. St. B.J. 64 (May 2006); Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part II*, 78 N.Y. St. B.J. 64 (June 2006).
34. Bryan A. Garner, *7 Keys to Winning & Defeating Motions on the Papers*, LawProse Seminar 1, 2–3 (July 8, 2015).
35. Schiess, *supra* note 16, at 139; Lamparello & Boyd, *supra* note 1, at 30.
36. Lamparello & Boyd, *supra* note 1, at 31.
37. Johns, *supra* note 20, at 137.
38. Lamparello & Boyd, *supra* note 1, at 31.
39. *Id.*
40. *Id.* at 33.
41. *Id.*
42. *Id.* at 25.
43. *Id.*
44. *Id.* at 31.
45. *Id.* at 34.
46. Schiess, *supra* note 16, at 138.
47. *Id.* at 139.
48. Lamparello & Boyd, *supra* note 1, at 22.
49. *Id.*
50. *Id.* at 23.
51. Johns, *supra* note 20, at 233.
52. *Id.* at 158.
53. *Id.* at 160–61.
54. *Id.*
55. *Id.* at 234.
56. *Id.*
57. Lamparello & Boyd, *supra* note 1, at 26.
58. *Id.*
59. Johns, *supra* note 20, at 234.
60. Lamparello & Boyd, *supra* note 1, at 26.
61. Johns, *supra* note 20, at 234.
62. *Id.* at 237.
63. *Id.* at 236 (quoting Richard C. Wydick, Plain English for Lawyers 95 (4th ed. 1998)).
64. Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers 5, *available at* http://www.ca7.uscourts.gov/rules/type.pdf (last visited Oct. 21, 2015) ("Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space.").