Persuading the Judge Through Writing: 15 Ways to Win

Gerald Lebovits
Dear Colleagues and Friends:

As I begin the 2008-2009 year as your President, I am reminded of the words of the poet, T.S. Elliot, that “what we call the beginning is often the end. And to make an end is to make a beginning. The end is where we start from.”

The Bronx County Bar Association is celebrating its 106th Anniversary and I will be inducted as the 89th President on September 24, 2008. I am honored to be your President. I know that with this extraordinary privilege comes extreme responsibility, and I promise you that I am fully committed to not only continuing the great work of our Association, but to also fostering our growth. I understand that I am part of a team, one that includes all of you. The baton is being passed to me now. As your teammate and team leader, I am ready to accept it and carry it strongly. Having watched the 2008 Summer Olympics and seen the greatest athletes in the world recently compete, I am inspired. I will begin this year from where others ended, and, as I proceed forward, I am filled with tremendous spirit for our Association to “go for the gold.”

As I begin my first lap, I salute those members who, at the Installation Dinner, will celebrate their 50th year of admission to the bar, including Harold Weisman and Roy Josephson, who have so generously volunteered much of their time over many years for our benefit. Also, on this night, for the first time in the Bronx Bar’s history, three members will be honored for their 60th year of being admitted, two of whom are Past Presidents - Emmanuel and Muriel Kessler. Indeed, I would be remiss if I did not give special recognition and thanks to Muriel Kessler, who helped to pave the way for me and other women to become lawyers, business owners and bar association leaders.

With excitement and energy, I proudly accept this position from former President Kevin Quaranta. As I take off from where he ended, I congratulate Kevin on all his accomplishments and extend my gratitude for his continual support as Chairperson of the Board. I also promise to continue his good work. Kevin leaves the Bronx Bar as a part of his legacy, the Leadership Council, formed to address our Association’s most difficult challenges, network with other bar leaders, interact with the Judiciary, investigate problems caused by members being located in four separate courthouses, and better serve our membership, now and in the future. This committee will continue this year with Christopher DiLorenzo and Kevin Quaranta as co-chairs and Justice Denis Boyle as consultant.

I am also proud to be continuing with this important publication, which was given life two years ago by then President and now Managing Editor, Joyce Hartsfield. With the very able assistance of our editorial staff, as well as those of you who contribute, we will continue to provide significant information and developments in all areas of the law. This Summer, we were successful in securing advertising support, and we must give thanks to all of the advertisers for helping to keep The Advocate alive. We hope to obtain more advertising and welcome all of you to submit articles and other important information for future publication.

I am also fortunate to be working with many other loyal and dedicated champions of the Bronx County Bar. Past President, Hugh Campbell, Chair of the evening CLE Committee, has been organizing a four-part, 12 credit Trial Practice series, while Robert Shaw, Past President and Chair of the Civil Courts Committee, together with Corey Sokoler and Steve Baker, as co-chairs of the lunchtime CLE series, have planned informative one credit lunch hour courses for the Fall in the areas of criminal and civil law. The Matrimonial Committee, co-chaired by Sergio Villaverde and Veronica Mandel, meets monthly and, among other work, is planning an exciting seminar in Las Vegas, Nevada. The Criminal Courts Committee, co-chaired by Marvin Ray Raskin and Christopher DiLorenzo, also meets monthly and is presently conducting another survey
PERSUADING THE JUDGE THROUGH WRITING: FIFTEEN WAYS TO WIN
By
Gerald Lebovits

An advocate’s goal in addressing a trial or appellate judge is to win. Honestly, but win nonetheless. The way to win is to persuade the judge that your argument is more compelling than your adversary’s argument. Advocates seek to persuade through written and oral advocacy. Persuasion in oral advocacy comes from oral argument in which an advocate engages in a conversation with the court by answering the judge’s questions and presenting the client’s position. Persuasion in written advocacy comes from a written brief or memorandum to the court.

Successful persuasion in written advocacy requires the advocate to articulate clearly what the client wants. Once the court is able to decide the advocate’s request — that is, that the court has jurisdiction — the advocate must convince the court that the client’s position is the strongest in the current situation and as a guiding precedent for future situations. An advocate accomplishes this by drawing law and fact. A persuasive advocate has the same goals regardless whether the effort is made through written or oral advocacy, but the techniques and style vary.

Written advocacy is crucial to persuade. A brief consists of numerous parts that give the court the necessary background, the facts of the particular case, and the relevant law. Although the tone of an advocate’s brief is to convince the judge, the advocate’s goal is to inform the judge of the pivotal issues of the case and articulate a position in a straightforward, concise, and definitive way. A judge is persuaded when an advocate presents an articulate position.

To persuade, an advocate must inform. Judges are unfamiliar with the details of their cases until they hear argument. They rely on the advocate to provide the background. An advocate’s brief can shape a judge’s opinion even before oral argument. As an advocate, you want to make it easy for a court to rule for your client.

The more knowledge an advocate has about the case, the easier it is to persuade the court. Advocates are expected to know the facts and legal principles of the case better than anyone else. Advocates are expected to present arguments completely and honestly. Completely means knowing the record as well the adversary’s contentions. Honestly means presenting all information accurately, even if that requires the advocate to concede some points.

Each advocate writes in a unique and personal way. Briefs vary in style, tone, and length. Although most advocates follow a similar organizational format, no one approach is uniquely correct. The persuasive advocate brainstorms all possible arguments, outlines before writing, weaves law and policy into the facts of the argument, addresses the most important issues first, and revises and edits multiple times before submitting the work to the court. Here are fifteen pointers to guide advocates in persuading the judge that their arguments should prevail.

1. **Know the Judge.** Familiarize yourself with the judge’s judicial philosophy and background before you appear. Knowing how the judge has ruled in previous cases and how the judge conducts the courtroom enables the advocate to structure advocacy in a way that appeals to the judge. One way to do this is to review the judge’s judicial opinions before drafting a brief. Some judges emphasize policy; other favor precedent. The persuasive advocate is flexible by knowing not only the judge’s preferences but also by presenting the client’s position to reflect those preferences. Be familiar with the court rules and adhere to them. Judges have procedural rules such as page limits, deadlines, and font sizes. A persuasive advocate never violates those rules.

2. **Articulate Your Position.** Be clear and straightforward in asking the court what relief you seek. Do not be cowardly. Be direct and upfront. Judges seek to resolve cases as quickly as possible. Use blunt and repetitive language to emphasize the client’s position and the relief sought. Well-articulated introductions and conclusions are powerful and effective. The introduction and conclusion should highlight the brief’s primary arguments, explain how existing law supports those arguments, and state what the brief is asking the court to do.

3. **Be Credible. Maintain integrity.** All advocates hope the judge will agree with them on every issue. The persuasive advocate knows that this is not always possible. A successful advocate knows the adversary’s position and anticipates the adversary’s arguments. Having a grasp of the other side’s position will direct the advocate to argue particular points more vehemently than others. Advocates are credible if they can distinguish which arguments should be conceded and which are meritorious.

4. **Know Your Boundaries.** A persuasive advocate knows boundaries. An advocate may never exaggerate. Avoid overstating with words like “always” and “never.” Credibility is also weakened when an advocate unfairly attacks and accuses the adversary, the court, or a court below. Persuasive advocates cautiously understated their positions. A persuasive advocate should avoid using biased modifiers and refrain from offending or misquoting adversaries, opposing counsel, or other courts. Advocates must portray the record scrupulously and accurately.

5. **Cite Accurately.** A persuasive advocate uses relevant sources carefully. An advocate’s brief can cite multiple sources, including cases, other briefs, law-review articles, and documents from the record. Regardless of the source being cited, the advocate must consult the appropriate manual and adhere to proper citation rules to
ensure that all the necessary information is given. Use pinpoint (jump) cites so the judge knows the exact page where the citation came from. The more information the advocate gives in citations, the more persuasive the argument.

(6) **Be Reasonable.** A persuasive advocate is reasonable. This means being logical and fair in arguing your position and asking relief from the court. Do not make requests that are far-fetched or unsupported by the record or legal authorities. Advocates should also stay away from adverbial excesses like “only” and “certainly.” Few things can be said with certainty.

(7) **Be Specific.** Specificity accomplishes two purposes in brief writing. It shows that the advocate has conducted thorough research. It also makes the adversary’s position more difficult to prove by creating fewer loopholes in one’s own argument. Providing nonconclusory examples is an effective way to stay detail-oriented. Thus, in describing a car accident, the stronger argument recalls the color, model, make, time of day, number of passengers, and intersection at which the accident occurred, as opposed merely to stating that “two black cars collided at some point in the afternoon.”

(8) **Be Original.** Persuasive practitioners find ways to argue their positions creatively, even when they follow a generally adhered-to format for court writing. Vary sentence length and sentence structure. Choose the best words to convey your position. Reﬁrain from using clichés and legalalese. Refer to parties by names that bolster your position. Use visuals and examples to illustrate your position. Leave lots of white space in your brief to make it easy for the judge to read your writing. The less boilerplate, the more memorable is the advocate’s work.

(9) **Be Short and Sweet.** Make your argument and move on. Write it once, all in one place. Brevity will make the brief clearer and more persuasive. Judges consider multiple cases simultaneously. The brief should get to the core of the argument quickly. Otherwise, the advocate’s writing will be lengthy and disorganized. Two concerns arise with lengthy and disorganized briefs. The judge will be forced to piece together the advocate’s arguments and position. That wastes the court’s time, and the judge might choose not to read the brief. Also, the clearer and more concise the brief is, the less the risk that the judge will overlook an argument. If the advocate’s arguments are explicitly laid out throughout the brief, the judge will not need to search through numerous pages of discussion to understand the position being advanced.

(10) **Give a Roadmap.** Give the judge a short and simple introduction at the outset to set out the argument and format of your brief. This creates a coherent and readable text. It also puts the main points of the argument at the forefront of the brief. That allows the judge to know exactly what arguments are being made before the judge begins reading specific facts and precedent. And it makes it more difficult for an adversary to misunderstand the argument presented. This abridged and straightforward roadmap will guide the structure of your brief and direct the judge through the brief in its entirety.

(11) **Organize and Limit Issues.** One key to persuade is to prioritize. Discussing every conceivable argument is a losing strategy. Advocates should identify the strongest and most important issues supporting their position and argue only those. They will be the issues that have the greatest possibility of success. The judge neither wishes nor has time to hear every conceivable argument. Worse, a judge who hears some frivolous arguments might lose focus and believe that all the arguments are frivolous. A practitioner should distinguish between strong arguments and weak arguments and present only the winning ones.

(12) **Analogize.** Use fact and law to articulate your position. A persuasive advocate is able to weave the facts of the particular case into existing, applicable law. This requires the advocate to be an expert of the facts and the record and to have a comprehensive view on favorable and unfavorable precedent. An advocate who has an all-encompassing understanding of the law relevant to the case can then successfully analogize and distinguish the client’s position from earlier cases. An advocate’s position can be bolstered and strengthened by both comparing and contrasting the case from other cases. Moreover, an advocate who succeeds in analogizing and distinguishing the client’s position can weaken the adversary’s position.

(13) **Have a Theme.** After all preliminary research has been done but before the advocate begins to write, the advocate should see the big picture and outline how to convey it. This allows the advocate to develop a legal theory that can serve as the brief’s overarching theme. A theme is a single idea that runs through the entire brief. The theme should be easy to understand. The theme guides the way an advocate portrays the facts. The persuasive advocate will make sure that every argument supports that theme or rebuts the adversary’s theme.

(14) **Do Not Rush.** No need to speed through brief writing. Persuasive writing takes time. It requires the advocate to schedule. A persuasive brief will have been thought out in advance and written in multiple stages. Allocate enough time to research applicable law, outline the argument, write, and edit. A brief written without the advocate’s conducting thorough research, outlining arguments, and editing is an unpersuasive and careless brief. Persuasive advocates will have uncovered material relevant to their case and their adversary’s case. Persuasive advocates start early and edit late.

(15) **Proofread.** Once you have finished writing, check for errors. Whether the errors are stylistic, typos, or grammatical, they make an advocate’s position less persuasive. A brief with errors means the advocate did not
review the brief thoroughly and carefully before presenting it to the judge. This makes a judge see that advocate as careless. Advocates careless about typos might be careless about the record. To eliminate errors, an advocate should edit and revise multiple times. Spend some time away from the brief between the writing and editing stages. Get an editor to review the brief for errors. This allows the advocate to read and revise with a fresh thought process and consequently find errors the advocate might otherwise overlook.

Written advocacy is a powerful tool in persuading the court. A persuasive advocate takes the time to draft a brief to ensure that the final draft is polished. Persuasion requires the skill and effort to move the judge’s heart and mind. The time expended aids not only the client but, in our adversary system, the administration of justice as well.

Gerald Lebovits is a Housing Court judge in Manhattan and an adjunct professor at St. John's University School of Law, where he teaches trial and appellate advocacy. The Advocate has asked Judge Lebovits to write four articles on oral and written advocacy. This is his second installment. Judge Lebovits thanks Brieana Wain, a Brooklyn Law School student, for her research help.

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**IN MEMORY OF 9/11**

[On 9/11/08, a solemn ceremony was held at the Bronx County Hall of Justice in memory of the victims of 9/11. Following are excerpts of the remarks made by our President, Lucille M. Barbato. -Ed.]

As President of the Bronx County Bar Association and on behalf of our members, I am honored and humbled to stand here before you and to be a part of this special program where we are honoring heroes.

I first must acknowledge the music provided by the students of Cardinal Hayes High School. Hearing your performance of patriotic songs, especially on this day, makes me proud to be an American. I look at your young faces, and I see goodness on a day that unfortunately reminds us that evil exists in this world. You are the promise of our future. You represent the youth of our country and make us realize how important it is to have ceremonies like this one—so that none of us ever forget what happened on September 11th, 2001, especially for your sake and the sake of all young people, because you are our future heroes.

We must never forget what happened seven years ago for another reason—we must honor our fellow citizens whose lives were taken by senseless acts of terrorism, and we must pay our respects to their families. That is the least we could do; it certainly could have been any one of us. Today we are remembering three members of our courthouse family—three court officers who died while keeping others safe and secure. To their families, we must say how sorry we are for your loss, and also thank you for allowing us to share this day with you. We all may not have known your loved ones personally, but having court officers as friends and also interacting with them often in the Bronx courthouses, we know how special your loved ones are. They will remain forever in our memories as true heroes.

Today, we will also be recognizing the recent heroic acts of one of our Bronx court officers. He reminds us that, even though we lost some sense of security as a result of being attacked on 9/11, real present-day heroes are always with us and around us, if not within each and every one of us. We should never lose our faith in the goodness of people, or else the terrorists will have already won.

May we never forget what happened on Sept. 11th, 2001, and let us always honor our heroes—past, present and future.