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Write to Win in Court

Gerald Lebovits

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BY GERALD LEBOVITS

Write to Win in Court

Mastering the art of written advocacy is critical for lawyers. They must write to win. Written briefs are the first and best opportunity to persuade the court. Sometimes they're the only way to persuade the court. Courts often allot little or no time for oral advocacy. Even if oral argument takes place, the judge or law clerks might not recall the argument when they decide the case. But they'll have the briefs to help them.

Lawyers write persuasive briefs by making them easy to understand. They should write for the decision maker, not for their client or their adversary. They should consider the reader's needs. Judges are busy professionals: They need to be educated, they want to rule correctly, and they have no time to waste. Lawyers must make every word count by ensuring that their briefs are organized and concise. Good briefs follow the twin pillars of persuasion: They make the court want to rule in the lawyer's favor, and they make it easy for the court to do so.

Good writing enhances a lawyer's credibility. It shows that the lawyer took the case seriously, and so should the court. It helps the court trust the lawyer. A court that finds the lawyer trustworthy is more likely to rule for the client.

Poorly written briefs create bad impressions, not only about the lawyer's forensic skills, but also about the client's case. Poor writing means losing. Poorly written briefs are long and boring and lack coherence. Well-written briefs are clear, effective, and focused. Poor brief writing misses arguments and doesn't apply law to fact. Good brief writing is a martial art.

Here're ten pointers to guide lawyers in persuading the court through written advocacy.

1. Argue the Issues

For briefs to persuade, lawyers should stress issues, not citations. An issue is an independent ground on which the relief sought can be granted if the reader agrees with the argument on that issue and disagrees with everything else. Lawyers should discard trivial issues. Unless the lawyer must preserve the record for appeal, the lawyer should winnow the argument to no more than three or four issues. Otherwise, the weaker issues will dilute the stronger. Lawyers should present their issues by strength, starting with the argument most likely to succeed. If they're unsure which argument is the strongest, they should pick the argument with the biggest relief for their clients. There are two exceptions to that rule: The first is when lawyers have a dispositive threshold issue — jurisdiction or statute of limitations. The threshold issue should become the first argument. The second is that lawyers must follow the order established by a statute or the factors articulated in a leading case..

After lawyers have explained their argument, they should address the other side's position to contradict it. They should begin with their argument, though, to show that they're right because they're right, not merely because the other side is wrong. Lawyers submitting opposition or response papers shouldn't copy or mirror the way the other side ordered the issues. They should tell the court which issues they oppose but order them the way it works for their clients. Briefs should be written to persuade the court. Briefs aren't meant to be law-journal articles, which give objective, neutral, and fuzzy exposés of the law, not hard-hitting reasons why one side should win and the other should lose.

> For briefs to persuade, lawyers should stress issues, not citations.

2. Be Clear

Lawyers must explain their points so that judges can understand them on their first read. Confusing briefs will frustrate judges, who might simply give up and rely on the other side's brief. To get their points across, lawyers shouldn't assume that their readers agree with them. They should assume that their readers know nothing about the case. They shouldn't write in a conclusory way. They must show; they mustn't tell. They show by describing people, places, and things. They must use concrete nouns and vigorous verbs, prefer verbs to nouns, and limit adjectives and adverbs. They don't say that the man was "very tall" but that the man was seven feet in height. Painting a picture reduces reader resistance.

Lawyers should state clearly and repeatedly what relief they seek. Clarity is more important than con-

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cision. Good briefs should never let two sentences pass without letting the reader know which side the lawyer represents, using emotional, policy-driven arguments without arguing emotionally. Lawyers should write directly, not indirectly. ("Justice is an important concept." *Becomes:* "This Court should reverse the conviction.") Lawyers should always mention and apply the motion standard, the burden of proof, and, on appeal, the appellate standard of review. Doing so tells the court how to evaluate the arguments.

3. Be Succinct and Concise

Lengthy briefs can be boring; judges might not read or understand them. The best lawyers keep their briefs short. They delete the obvious and don't dwell on the given. One way to ensure succinctness is to establish a theme. Themes help lawyers explain that they're right, not just because of the law, but also because if their clients lose, the bad will prosper and the good will suffer. Lawyers should include and emphasize every important and helpful authority, fact, and issue supporting their theme or which contradicts the other side's theme. They should exclude, or deemphasize, everything else. They should eliminate irrelevant dates, facts, people, places, and procedural history. They shouldn't try to fit every possible argument into their briefs. They should stick to their stronger contentions: Weaker arguments will undermine their credibility and make the lawyer seem untrustworthy. They should limit themselves to the case law that adds weight to an argument rather than to those that add bulk and impress only non-lawyers.

Lawyers should replace coordinating conjunctions with a period and start a new sentence. Doing so shortens the sentence and thus is concise, even though it might add text. Lawyers should watch out for redundancies. ("Advance planning" *becomes* "planning.") They shouldn't start a sentence with "in that." ("In that the judge's cousin was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her cousin was a litigant.") They should excise unneeded prepositions like "of" and delete the following metadiscourse, or wordy running starts: "in fact," "as a matter of fact," "the fact is that," or "given the fact that." Lawyers should forget about the wind-up and just deliver the punch.

4. Be Logical

From the presentation of facts to the argument, structure is vital. Arguments should come naturally, without interruption. Lawyers must know their goal — what their client seeks — to communicate logically. Judges should be able to travel easily from point to point to the final conclusions. Lawyers who present their arguments illogically, jumping from issue to issue, will lose the court's attention. Lawyers should start each paragraph with a topic or transition sentence. A topic sentence introduces what's going to be discussed in the paragraph. A transition sentence connects the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept. The best writing doesn't rely on conjunctive adverbs like "additionally," "along the same lines," "however," or "moreover" to segue from one sentence to the next. If the logic and movement of the ideas are clear, those transitional conjunctions won't be needed. Lawyers should end their paragraphs with a thesis sentence that summarizes and answers the topic sentence. Each sentence must relate to the next, to the one before it, to the topic sentence, and to the thesis sentence. A sentence that doesn't relate that way belongs in a different paragraph or should be ruthlessly cut.

Lawyers should avoid logical fallacies. A fallacy is an invalid way of reasoning; it leads to incorrect conclusions. For example, the post hoc fallacy assumes that because one thing happens after something else, the first caused the second. *Example:* "Every time I tell my colleagues I'm going to win a trial, I lose." The fallacy is that if the person doesn't tell colleagues they're going to win the trial, they'll win. Rather, the brief should rely on syllogisms and move the reader from the general to the particular.

5. Be Precise

Lawyers should write precise arguments supported by precise citations. Correct pinpoint citations are persuasive. They build lawyers' credibility by showing the integrity of their research and analysis. They make it easy for the reader to find the point in a lengthy case or secondary authority. Not using pinpoint citations suggests that the citation might not stand for the position the lawyer is asserting. Lawyers should cite adverse case-law precedent and statutory authority. Doing so offers an opportunity to explain why the authority is unpersuasive or not on point.

Lawyers should avoid string citing; string citations aren't useful or impressive except when necessary to understand authority or a split in authority. They should limit quotations to those written better than the they could write them and use block quotations of 50 words or more only for the essential part of seminal cases, statutes, and contracts. Instead of block quoting, lawyers should summarize the law in their own words. Readers skip block quotations. If the quotations are important enough, lawyers should first explain why they're being quoted by explaining what the reader will get from reading them. They should use ellipsis and square brackets to shorten long quotations through omissions and alterations.

Lawyers shouldn't write in generalities, using cowardly words like "generally," "typically," or "usually," unless the lawyer wants the reader to reach an exception. In that case, the lawyer should give the rule first, then the exception.

Lawyers should always cite the record. Accurate and precise references to the record add credibility to the client's claims. When writing for a New York court, lawyers should follow the citation rules in the *New York Law Reports Style Manual* (Tanbook)

(available on PDF or HTML online at www.nycourts.gov/reporter/Styman_Menu.shtml). When writing for a federal court, lawyers should use the *Bluebook*, now in its 20th edition.

6. Be Simple

Simple arguments are winning arguments. Most sentences should be short and declarative. Sentences with more than 25 words are hard to digest. Each sentence should contain one thought and rarely more than 15 words, with some variety. A paragraph should rarely be longer than 250 words or two-thirds of a double-spaced page and one large thought. What's stated simply is easy to understand. Briefs are no exception to that rule. Lawyers should use plain English; no Latin or foreign words. They should replace Latin terms with English equivalents. For example, "Ergo" *becomes* "therefore." They should eliminate all legalisms. ("Enclosed herewith is my brief." *Becomes:* "Enclosed is my brief.") They should limit adverbs like "absolutely," "clearly," or "obviously." They incite people to disagree with you and suggest that those who disagree with you are stupid.

Writing shouldn't be pompous. Lawyers should prefer simple, short, Anglo-Saxon words to complex and long words: "Ameliorate" *becomes* "improve" or "get better." They should keep it simple but still formal; writing is planned, formal speech. They shouldn't use abbreviations: "i.e.," "e.g.," "re," "etc.," and "N.B." They shouldn't use contractions like "aren't," "couldn't," or "you're" in formal brief writing. (But they should use contractions in emails and State Bar Journal Legal Writer Columns.) They should define as acronyms terms and nouns they will use again. Example: Department of Housing Preservation and Development (DHPD).

Writing must be grammatical and simple. Lawyers shouldn't confound their reader by using nominalizations — converting verbs to nouns. ("They gave a description of the motion." *Becomes:* "They described the motion.") They shouldn't confuse by using the passive voice or the double passive voice. (Double passive voice: "The brief was written." Passive voice: "The brief was written by the lawyer." *Becomes:* "The lawyer wrote the brief.") They should refer to the parties by name, legal relationship, or how they were called in first instance so that the judges needn't check the title of the action or proceeding to know whom the lawyers are writing about. Subjects should go next to their predicates. ("The motion of the petitioner seeking summary judgment should be granted." *Becomes:* "This Court should grant petitioner's motion for summary judgment.") Modifiers should go next to the word or phrase they modify. ("I threw the lawyer down the stairs a motion" *Becomes:* "I threw the motion down the stairs to the lawyer.") Briefs should be easy to follow: Lawyers shouldn't write fiction novels with complicated plots or drive readers to a dictionary.

7. Be Organized

Lawyers may start the process of writing a brief by outlining their argument section using the Legal Writer's patent-pending CRARC method, an IRAC-variant that stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section, lawyers should state the issue in persuasive terms. In the Rule section, they should state their points from the strongest to the weakest. After each rule, they should cite the authority from the strongest to the weakest and from the most binding down. Toward the end of the Rule section, the lawyer may include policy. In the Analysis section, lawyers should apply the law to the facts of the case. In the Rebuttal and Refutation section, they should state the other side's position honestly and refute it persuasively. Discussing the other side's factual and legal arguments builds credibility because it shows the court they're not trying to hide anything. Doing so also offers the opportunity to demolish the other side's position. In the second Conclusion section, lawyers should state the relief they seek on the issues they argued in the first Conclusion section.

CRARC allows lawyers to present their arguments in the shape of a funnel or an inverted pyramid. Arguments should go from general (the conclusion) to specific (the details). Getting to the point fast gives judges the conclusion in case they don't read further. Being organized is important in written advocacy because lawyers shouldn't repeat themselves. They should say it once, all in one place.

Lawyers should use headings and subheadings that summarize essential factual and legal argument. They should use roman numerals for their point headings (I., II., III.) and letters for subheadings (A., B., C.). Headings and subheadings should each be one sentence long. They must be concise, descriptive, and short. The point headings in a brief should answer the Questions Presented. Lawyers shouldn't use too many headings; they'll break up the text too much. But too few headings will make the document disorganized. To see whether there're enough headings, lawyers should read their table of contents, which should be composed of all the headings word-for-word from the text of their argument: The argument should reveal itself in the table of contents.

8. Presentation

Presentation always counts. Most courts have rules on how legal documents should be drafted and what they must include. Cheating on small procedural rules involving page or word limit, table of contents, fonts, paper color, or spacing makes the brief unpersuasive. It suggests that if the lawyers are willing to cheat on small rules, they might lie about the record or neglect to cite controlling authority. Lawyers should also create briefs pleasant to the eyes. They should keep plenty of readable, white space on every page. Margins should measure at least one inch, up to 1.25 inches, on the bottoms, sides, and top. All paragraphs should be indented one tab from the margin. Documents, typed in

Word, should seperate sentences with one, not two, spaces.

Unless court rules require otherwise, lawyers should choose one font — perhaps Century, 11-point type — and stick to it. They should italicize case names; italics are easier to read than underlining. Lawyers should never bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. They should number each page (but suppress the first page) and paragraph in an affirmation or affidavit. Lawyers should make their briefs visually appealing. For trial briefs, they should attach the leading cases they cited and highlight the relevant text in the attachment. They can also attach maps, charts, diagrams, photographs, and tables. Exhibits convey information more effectively than text.

9. Be Ethical

Lawyers win through civility and professionalism. Being ethical in written advocacy means being fair and accurate. Lawyers who engage in personal attacks distract the court from the important issues. Lawyers shouldn't use terms like "absurd," "disingenuous," or "preposterous." These words suggest a hidden weakness. They should never exaggerate or overstate. Understating shows integrity and persuades; understating stresses content, not the writing or the writer. Ethics also demands gender neutrality in writing. Non-gender-neutral writing is discrimination in print, and gender-neutral writing allows the reader to focus on content, not style, and thus doesn't distract from the message. (*Not:* "A perfectionist likes her briefs to be perfect." *Also not:* "A perfectionist likes their briefs to be perfect." *Also not:* "A perfectionist likes his or her briefs to be perfect." *Correct:* "A perfectionist likes perfect briefs." (Making the antecedent neutral.) *Also correct:* "Perfectionists like their briefs to be perfect." (Making the subject plural.))

Lawyers win by stating the facts accurately and then by providing strong explanations and evidence to prove their conclusions. Lawyers shouldn't obsess over accuracy. Obsessing leads to adding irrelevant details, brings about writer's block, and causes documents to be submitted late. Lawyers shouldn't mislead by misrepresenting legal authority, misquoting, or mischaracterizing the record. They should adopt a tone of deference and respect toward the court by using words like "should" rather than "must."

10. Review the Brief

Writing a persuasive brief takes time and effort. Lawyers shouldn't believe they're done after their first draft. Editing is essential to writing. A lawyer's work won't be taken seriously if it has grammar, punctuation, or spelling errors. Typos distract from the substance of the writing and make lawyers appear unprofessional. The solution is to proofread. Lawyers should review their arguments to make them efficient; they should take out anything unnecessary and rewrite anything unclear. Lawyers should also watch out for negatives words like "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." For example, "Good lawyers do not write in the negative." *Becomes:* "Good lawyers write in the positive."

Lawyers should ask a competent editor unfamiliar with the case to read the brief to make sure that the brief is easily understood by the only person who counts - the reader. Lawyers can also set the brief aside for a few days, if they have time, and then reread it. That'll give them a new perspective and help them catch mistakes. Lawyers, who should start writing early but edit late, should also keep their research available and updated and throw nothing away until the case is over to avoid redoing research and wasting time. Lawyers should keep a back-up copy of their briefs to avoid the panic of losing work.

. . .

Persuading the court through writing is hard, but a well-written brief puts lawyers a step ahead of their adversary in the martial art that's persuasive brief writing. When writing a brief, lawyers should always keep their readers in mind. They should put themselves in their shoes and ask themselves what would persuade them. Never should they underestimate the importance of effective analysis — both to the client and, in our adversary system, to the administration of justice. ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools.

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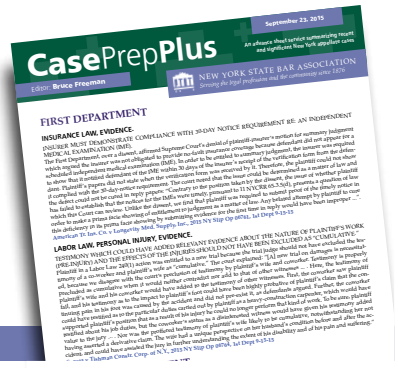
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