THE LEGAL WRITER
BY GERALD LEBOVITS

Persuasive Writing for Lawyers — Part II

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

Be Honest
To be persuaded, judges must believe in you, not merely in your arguments. Messengers count for as much as the message. Judges will believe in you if you prove your case without distractions and overpromising and if you make them feel smart, not stupid.

State the facts accurately, clearly, and completely. Don’t misrepresent facts, either affirmatively or by omission. Misstatements signal a lack of knowledge of the case or, worse, a desire to avoid unfavorable aspects of your case. Prove your integrity — and make it easy for the court to find your facts — by giving record citations.

Stick to relevant, determinative facts. Don’t disperse the reader’s attention by reciting facts, procedure, people, and dates that don’t advance your theory.

Avoid fallacies. A fallacy is invalid reasoning that leads to incorrect conclusions. Judges will reject untruthfulness and hold it against you and your client. Judges will be quick to spot inconsistencies or flaws in your argument. Make sure that each premise is correct. Develop your argument through a logical syllogism. Don’t skip premises. Build your argument block by block.

Use pinpoint, or jump, citations to cases. If the court wants to verify the context or the rule, it should be able to do so immediately, and it will be able to do so if you use pinpoints. Don’t waste the court’s time by forcing it to scroll through the entire case to find the relevant part. Pinpointing makes it easy for the court to confirm that the law says exactly what you say it says. Being reliable when citing the law makes you credible. At the trial level, attach to your brief a copy of the most relevant cases and statutes, and highlight the part you reference.

When there’s adverse law, cite it and distinguish it from your case. You show candor to the court if you bring it up before your opponent does. You also eliminate the surprise factor and the opportunity for opposing counsel to diminish your credibility.

Review all your citations when you proofread. Make sure that all citations are consistent and follow the applicable uniform rules of citation. In federal court, use Bluebook citations. In New York State courts, use the Official Style Manual, nicknamed the Tanbook.

Most judges hate pompous language, jargon, and legalese. Turgid writing irritates. Simple, plain English is clear. Use Anglo-Saxon English, not foreign or fancy words, unless you have no monosyllabic English equivalent. Don’t be boring; engage your reader. But make sure the court understands every word without driving it to the dictionary.

Eliminate overstatement. If you object to opposing counsel’s statements, tie them to a specific misstatement or mistake and move on. Make fair statements, and prefer understating. Judges hate exaggeration.

Avoid intensifiers like “clearly” or “obviously.” They add extra words, they irritate skeptical judges, and they hide lazy writing. Instead of writing that something is “clear,” explain why it is clear. Explain why your argument is valid; don’t just say it is. Besides, fact and law are seldom clear or obvious. When you write that something is clear, you raise the bar unnecessarily: You need to prove not only that you’re right but that you’re clearly right. Unless you’re dealing with phrases of art like “clear and convincing evidence,” you don’t need to prove that something is clear; you need to prove only that it satisfies the standard or burden of proof.

Eliminate sexist language. Sexist language is insulting. And sexist language affects credibility because it makes the judge trip on your style instead of on your content. Sexist language represents the male or female as the norm, gratuitously identifies the referent’s gender, and demeans and trivializes. Gender-neutral language avoids gender bias, it projects fairness and clarity. Don’t use “he,” “his,” or “him,” “she” or “her,” or “he/she.” Don’t alternate between the genders. Instead, make the references plural or delete the antecedent altogether. (Incorrect example: “A gourmet likes her coffee black.” Incorrect fixes: “A gourmet likes their coffee black” or “A gourmet likes his/her coffee black.” Correct: “Gourmets...

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like their coffee black” or “A gourmet
likes black coffee.”)

Comply with local rules and all
applicable rules of procedure. Learn
about the judge who’ll preside over
your case.

Be Brief
Respect the court’s time. Be concise
and succinct without sacrificing clarity.
Judges will thank you by maintaining
interest.

Careful preparation and organiza-
tion will help you focus and address
your issues. Don’t rush through your
arguments. Say what you must say to
strengthen your client’s case. Complex
ideas require several sentences or
paragraphs to express, and precision
should never be sacrificed for con-
cision. Nevertheless, don’t say more
than you need to say, and make every
word count.

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

Don’t start sentences with “In that.”
(“In that the judge recused herself . . . .”
Becomes: “The judge recused herself
because her cousin was a litigant.”)

Eliminate prepositions like “of”;
turn them into possessives instead.
(Incorrect: “The contract of Mr. Jones.”
Becomes: “Mr. Jones’s contract.”)
Prepositions also lead to nominaliza-
tions, which are wordy and conclusory,
in which writers prefer nouns to verbs.
(Incorrect: “Ms. Jones committed a vio-
lation of the law.” Becomes: “Ms. Jones
violated the law.”)

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

Avoid metadiscourse. Cut wordy
running starts and throat clearers like
“the fact is that” and “the first thing I
will argue is that.” Just say what you
have to say. Especially avoid meta-
discourse that vouches for your posi-
tion and thus raises integrity issues.

Examples: “it is black-letter law that,”
“it is hornbook law that,” “it is wel-
settled that,” “it is axiomatic that,” and
“I believe that.”

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

ing arguments, simply by changing

the wording.

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

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

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

Don’t try to cram in as many words
as you can to meet the page limit.
Fewer but well-thought-out words will
improve clarity and thus be more per-
suasive.

If the specifics of your case involve
voluminous or abstract information
like financial data, statistics, or medi-
cal records, include visual aids: charts,
tables, pictures, and summaries to
communicate your points. Make the
court’s job easy. Judges love visuals.

Don’t waste the court’s time with
undisputed fact, law, or issues. Mention
that they’re undisputed and move on.
Review to Improve

Through the writing process, especially between drafts, continuously edit to improve content, organization, citing, sentence and paragraph structure, and word choice. When you’ve written a final draft, you can start proofreading to spot errors. Don’t rush this process. Your final product will be greatly improved if you devote the time to turn an average product into a worthy one.

Re-read your draft, think, and make changes. Keep your reader in mind when you review for organization, clarity, tone, style, and length.

First, review to improve macro-organization. Paragraphs are the building blocks of thought. Determine whether each paragraph develops one point; whether the discussion of each concept is grouped all in one place; whether its position within the brief is appropriate; whether the first paragraph of each section sets the roadmap for the details that come next; whether transitions between paragraphs connect the concepts; and whether the last paragraph in each section reaches the conclusion set out in the first paragraph.

Second, review to improve your small-scale organization. Review sentences within each paragraph. Determine whether the first sentence is a topic sentence or a transitional sentence that connects one paragraph to the next; whether each sentence expresses one idea only; whether transitions between sentences connect them to convey the point; whether sentences move from short to long, from simple to complex, and from old to new; and whether the last sentence answers that paragraph’s thesis.

Then review your narrative. Use stylistic and grammatical devices to persuade. For example, end each sentence with your climax; the end of each sentence is the stress point. Begin each sentence with something important, too, because the beginning of each sentence is the second greatest stress point. This means you should use the middle of each sentence, paragraph, and section to bury information you must include but which you wish to de-emphasize. With this technique, you can use short sentences and paragraphs for emphasis and long sentences and paragraphs to de-emphasize and bury information.

Use punctuation for similar effect. To force the judge to dwell on your sentence, use lots of commas and semicolons. To make the judge rush through your point, eliminate your punctuation.

Rhetorical devices also play a strong role in persuasion. They can push a judge’s buttons to rule for your client. Rely on original metaphors (without mixed metaphors or clichés); parallel structure to match nouns with nouns and verbs with verbs; and antithesis to contrast opposites concisely.

Always consider the active voice and the passive voice. The active voice describes a sentence where someone does something to someone or something, with a subject-verb-object combination, or who does what to whom. (Example: “The robber shot the victim.”) The active is always more concise and direct than the single passive voice. (Example: “The victim was shot by the robber.”) The double passive, by contrast, hides the actor. (Example: “The victim was shot.”) Prefer the active voice except when the actor is unimportant or when you want to downplay the actor’s conduct.

Except for quiet understatement, prefer positive words, clauses, and sentences to negative ones. (Example: “Do this” instead of “Do not do that.”) Affirmative sentences are assertive and clear. Negatives are ambiguous and leave room for misconceptions. (Example: Lender: “You owe me $100.” Borrower: “I do not owe you $100.” The borrower just admitted owing some money, although less than $100. The borrower should have said, “I owe you nothing.”)

Write even negatives in the positive. (Incorrect example: “The nonmonied spouse must not be prevented from . . . .”) Becomes: “The nonmonied spouse must be allowed to . . . .”) Avoid these words: “barely,” “deni-
about font, type size, margins, alignment, and headings. Your firm might also have its own rules. Follow them as well. When the choice is yours, single space while double-spacing between paragraphs. Add one space between sentences, not two. Include page numbers. Try Century font, not Times New Roman. Use right-ragged, not full, justification. Use 12–14 type size, nothing smaller or larger. Most important, include plenty of white space to enhance readability.

Don’t use bold, italics, quotation marks, or underlining to emphasize or to show sarcasm. These false devices dilute content and irritate readers. Prefer italics to underlining to make the text cleaner. Prefer English words, but use italics for foreign words and phrases not commonly used in English when you must use them. Set headings, subheadings, and titles in boldface, large, or italicized type in your argument section to distinguish captions from text.

Last, include a table of authorities with correct formatting for dot leaders; don’t use the tab bar to format with correct formatting for dot leaders from text. When you must use them. Set headings, subheadings, and titles in boldface, large, or italicized type in your argument section to distinguish captions from text.

Conclusion
Persuade by writing with your reader in mind. The better you get at persuading through writing, the higher your chances of winning.

Further Readings:


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