

What is persuasive legal writing?

Effective writing which underlies and supports competent advocacy.

Advocacy - pleadings and other litigation documents

Argument - facta, arguments, submissions

Negotiation - persuasive use of language

Applying general principles of effective legal writing:

Research, plan, outline, organize, draft, test, revise

Persuasive language

Suited to audience and purpose

Avoiding wordiness and cutting unnecessary information

Avoiding negatives, passive voice, nominalizations

Using figures of speech

Words to avoid; words describing status

Persuasive style

Answer the question "What do I want to tell the judge?"

Generating rhetorical prose: Developing a theme

Framing a statement of facts: Telling a story

Persuasive logic

Order: Analogy and synthesis for organization

Inductive and deductive reasoning

Old information, new arguments; New information, new arguments

Exercises:

1. Individually rewrite the litigation example by Milt Policzer
2. Developing a theme
3. Group A: revise amended Statement of Claim
Group B: revise amended Statement of Defence
4. Prepare a brief report on assigned text: "What we can learn about persuasive writing from _____ that is applicable in the Canadian environment." Report will be circulated to other students.

Due date:

Writing Style

Build a persuasive sentence

Bearing in mind the need to avoid complicated sentence structures, you can follow some other patterns to make sentences persuasive. To place information effectively in sentences follow the architecture of emphasis devised by **Clearlines**, a Chicago consulting firm:

Use short consistent topics as subjects, usually characters. Change a long subject into a sentence of its own. Use a passive verb if it will give you shorter subject. Start the sentence with one of your cast of characters, and then go where the sentence takes you. Don't open a sentence with a long citation, but if you must, don't make it the subject.

Put old, familiar information first and newer, less familiar information last in the sentence.

Put shorter, less complex units of information first and longer, more complex units last.

Reserve the very end of your sentence for the most crucial, the most important, ideas - those you want your reader to focus on.

Use the position of emphasis to your best advantage. The beginning or the end of a sentence or paragraph or section are the positions of emphasis.

Put favourable information in the main clause and unfavourable information in a subordinate clause.

Know when to use the active voice and the passive voice. Use the passive voice when you want to de-emphasize who it is that did the act, when you want to emphasize the act instead of the actor and when you don't know who did the act.

Use short sentences to emphasize favourable information and long sentences to dilute the effect of unfavourable information.

Make assertions in the affirmative, and not the negative form.

If you want to emphasize the parallel nature of two or more pieces of information, present it in parallel constructions.

To emphasize the differences in two pieces of information, use antithesis - when you parallel grammatical constructions but present one piece of information in the affirmative and the other in the negative.

To err is human, to forgive, divine.

Pope

Let us never negotiate out of fear. But let us never fear to negotiate.

John F. Kennedy

Vocabulary issues

Consider special problems of language use in persuasion and negotiation:

Use vigorous verbs to emphasize a point of action; use colorless verbs to de-emphasize a point of action.

Use adjectives, adverbs and other modifiers to characterize; do not use adjectives, adverbs or modifiers to intensify.

Do not use slang, vernacular, cliches, jargon or exaggeration.

Do use of figures of speech, esp. metaphor.

Learn acceptable technical words and words to avoid.

Examples of technical words which are acceptable if the audience is lawyers or judges but are better replaced with modern, English words:

amicus curiae	laches
caveat emptor	nunc pro tunc
de facto	per curiam
de jure	pro forma
estoppel	proximate cause
ex parte	quantum meruit
in rem	res judicata

Consider these words that give different emotional impact to the same act:

say	allege	assert	affirm	declare
claim	maintain	aver	argue	

And these different words to refer to a client:

Ron Marshall	Mr. Marshall	Ron
the young man	the defendant	the suspect
the accused	the man charged with murder	
the man charged with murder of the three-year old girl		

Wordy

takes the position	claims
question at issue	issue
in excess of	exceeding
with respect to	concerning
with certain knowledge	knowing
by the clear language of	under
purports to rely	relies
has no bearing on this case	is irrelevant

appears to have no relevance	is irrelevant
decline to accept	decline
refuse to grant	deny
subject to exemption	exempt
at the time	when
incur the cost	pay
in the event	if
is indebted to	owes

Redundant

true facts
brief overview
binding contract
short synopsis
excess verbiage
mandatory requirement
narrow down
suddenly without warning
expressly mandated
actively engaged
short in height
later in time
consensus of opinion
patently obvious

Use concrete words and not abstractions

abstractions:
water diversion
circumstances
character
specific information
operative entities
aspect
requested relief

Negatives

Mr. Wood did not conduct any tests himself.

The parties may not avoid the procedures called for by the statute.

The Department is barred from disallowing the exemptions provided under the statute.

Nominalization

A renewal of the lease has not been effected.

The Defendant then made the following recommendation.

In 1979 the Department commenced an audit of Westar's aircraft fuel records.

Passive Voice

The public policy underlying the collateral source rule is discussed in numerous cases.

After the verdict, another medical malpractice action was filed against the non-settling doctor.

One method by which centralized control is implemented is the "nomenklatura" system.

When might you prefer the passive voice?

In some situations, the passive voice serves a useful purpose:

- When you want to put the emphasis on the receiver of the action by making it the subject:
My client was severely injured as a result of your negligence.
- When the doer of the action is unimportant or unknown:
This conclusion is based on a careful analysis of the case law.
- When you deliberately don't want to mention the doer of the action:
The decision was made without consulting the senior partners.
- When passive voice will let you maintain a consistent topic string in your paragraph:
Jill testified that.... Jill's testimony is contradicted by John's guarantee of Smith's indebtedness.
- When passive voice allows you a short subject:

Active:

John's absolute and unconditional guarantee of Smith's mortgage and John's express promises to Chris contradict this testimony.

Passive:

This testimony is contradicted by John's absolute and unconditional guarantee of Smith's mortgage and John's express promises to Chris.

- When you want to use a tone of detached abstraction:

All people are created equal.

For example, see this comment from one of Canada's recent Ministers of Justice when speaking to the Federation of Law Societies:

My officials will of course welcome a chance to benefit from the analysis performed by your committees on issues such as these.

He might have said:

Your committees' analysis of these issues will benefit us.

Loss of agency

With the passive voice, the roles and responsibilities of people are hidden. This produces a loss of agency - you don't know who is acting. For example, you can say

A confirmation of all searches is recommended. This is done by a search by mail request at the Bank of Canada.

The next sentence is clearer as to who must do what:

We recommend that you confirm all searches. To confirm a search, you should request a search by mail at the Bank of Canada.

Sometimes the passive voice is deliberately used to dehumanize the story. For example:

Thousands of civil service jobs were cut in the last budget.

The action is there but who is the actor? Who cut the jobs? Whose budget was it? Even the people who lost their jobs can be "hidden" by changing the words.

The use of passive voice with nominalization reduces the human element in your writing and has been described as *cosmic detachment* from the issues and events. Legal writing is often criticized for the habit of reducing the human element. This should be avoided unless it is your deliberate aim.

Cumulative loss of agency

When you use nominalizations and passive voice, you hide or disguise the actor and the action. The story becomes less immediate and direct. The most indirect writing eliminates the actor and uses abstract nouns with passive and impersonal verbs like it seems or it appears.

When you choose to make your client look better, by using your writing to disguise the client's role, you should use passives and nominalizations. Writing to your own client to confess a colleague's major blunder, you might say:

It seems that the limitation date has passed by.

At times, you may choose to use the passive voice when you choose ambiguity. It may be courteous or diplomatic to do so. Sometimes, you dare not name the actor because that clarity can be embarrassing or have serious repercussions.

Writing to control center stage:

Control the actors and the story by controlling point of view. The reader of mystery novels has one query: *Who dunnit?*

You can control the story and the reader's response by your choice of active or passive verbs, hidden or key actors and clear or ambiguous words. Sometimes it will be in your client's interest to obscure the facts and the focus of responsibility. In this situation, you may want to use the style of avoidance and to be indirect: convert verbs to passive form, replace verbs with nominalizations, and eliminate actors. However, this style is not reader-friendly.

There are also times when you do not aim for clarity and precision. Sometimes it is a matter of courtesy - it may be rude to state the obvious or identify the guilty party. Weihofen says, "Naked clarity can be embarrassing. Passive voice works when you don't want to name the actor."

These are situations where the Timothy Perrin's "one unbreakable rule" applies:

Occasionally, a good writer breaks rules for an effect. That's fine provided she knows what she is doing....So that is my only unbreakable rule. You can break any rule I tell you if * you know the rule * you know you are breaking it and * you can give a good reason why.

In either of these situations (for courtesy or effect) and others, there may be justification for violating rules of grammar. If you are certain that it is necessary, go ahead.

These examples explain the conscious use of direct or indirect writing to control the reader's response. They are from *Mastering Legal Writing & Editing: How to Write Better & Faster*, by Clearlines.

If your client is on the side of the angels, make him an actor and express his good actions as verbs. Example: Mr. Doe contributed over \$10,000 to the orphans' fund in 1986.

If your client has behaved in less than perfect fashion, get him offstage and retreat into passives and nominalizations. Example: The embezzlement from the orphans' fund is said to comprise a sum exceeding \$10,000.

Conversely, if your opponent is on the side of the angels, get him offstage and retreat into passives and nominalizations. Example: The contribution to the orphans' fund is said to comprise a sum exceeding \$10,000.

Finally, if your opponent has behaved in less than perfect fashion, make him an actor and express his actions as verbs. Example: Mr. Smith embezzled over \$10,000 from the orphans' fund in 1986.

Finding the theme

The more complex the problem, the broader and more encompassing the theme needs to be. And it should emphasize the crucial fact. It must be fair, aggressive, and provide for a resolution to the problem. The crucial fact is one that supports the theme broad enough to include all the issues. If that crucial fact were not true, you would lose the case

Present the law in the light most favourable to your client. If a rule favours your client, you will usually state that rule as broadly as you can, thus ensuring that the rule applies to your client's case. If the rule does not favour your client, you want to state the rule as narrowly as possible, arguing that the rule does not apply to your client's case.

Application of a Theory

1. Description of the theory to be applied
2. Presentation of the data
3. Interpretation of the data according to the theory
4. Implications of the interpretation
5. Conclusion

The second model is designed for readers who are likely to be unsympathetic to the theory or point of view or to your procedures and findings:

1. Theory to be applied
 - a. describe it
 - b. establish its validity
 - c. defend its use in this case
2. Presentation of the data
3. Interpretation of the data according to the theory
4. Implications of the interpretation
5. Review of alternative theories and their interpretation of the data (optional)
6. Conclusion

Fact patterns:

1. You represent a tire manufacturer. For eighteen consecutive months, one dealer fails to meet its sales quota. Your client also discovers that the dealer's service department falls far below the standards specified in the distribution agreement. Your client terminates the agreement, and the dealer sues for breach of contract. What is the theme of your defence?

2. A woman goes to the doctor for a routine checkup. The doctor detects a lump in the woman's breast. Later, the woman is diagnosed as having an advanced case of breast cancer. The woman comes to your partner and tells your partner that the doctor never told her about the lump. The doctor claims he did tell her and that he also told her to get a biopsy. The woman's clinical records mention nothing about a lump or biopsy. Your partner wants to argue, first, that the doctor told his client nothing, and, second, that even if the doctor had told her, the doctor has a duty to follow up. Your partner asks you for advice.

3. A Tribe sues to reclaim land. On the land sits fill material, the first of it placed there 60 years ago. The Tribe wants the land back, and as further relief has demanded that the landowner remove all fill material and restore the land to its pristine state. This would require permits from state and federal agencies. In every case where a Tribe has sued for ejection, the courts have denied laches as a defense. The courts have also refused to join the state or the US as a party to an ejection proceeding. But this is the first time a Tribe has demanded site restoration. You represent the landowner.

Expound your theory as soon as possible

The beginning of any complaint should summarize the lawsuit in a paragraph or two, explaining what the case is about, why you should win, and what you are seeking. This makes it much easier for the reader to understand what follows since, by necessity complaints are not organized in a way that makes them easy to comprehend. In particular, judges need to know what type of case is before them, what shape it is likely to take, and what relief is sought. When lawyers research cases in the library, they always read the headnotes first because they provide an overview of what will follow. Complaint writers should give their readers the same type of summaries. The worst thing that can happen is that your opponent will deny it.

Steven D. Stark

Write a good introductory paragraph. Let me turn now to possibly the most ignored but important part of a legal brief: the introductory paragraph. It is a basic principle of good writing that a reader should not confront details before the writer has provided a framework for understanding. What issues are they about to confront? How important are those issues? What conclusions can be drawn?

The opportunity to write an effective introductory paragraph occurs in two parts of your brief: 1) the statement of the case; and 2) each issue of your argument. It is your first, and maybe only, opportunity to “pull” the reader into your document, to pique your reader’s interest, to begin to persuade.

It is not easy to write a good introductory paragraph. It takes great effort, but it is time well spent. A properly written introduction makes the rest of the brief-writing task comparatively easy. If you are unable to write a cogent, succinct, encompassing introduction, you probably do not have a solid grasp of the subject matter.

The fundamental question is, “What does the reader need to know to decide the final resolution?” If the introduction offers context before detail, then the reader is able to discern the important from the unimportant.

William A. Babitch

Introductory paragraph in defendant’s memorandum of law:

This case involves ownership of real property that has been in the Boomer family for over half a century. The Wineema Tribe claims that under the Treaty of Point Elliot it is the beneficial owner of a substantial part of the Boomer property that borders Tilamook Creek.

The facts should tell a story

Based on the theme, the facts should develop the story. The story must be about human beings and their lives. The language must be clear, concise, vibrant. Begin with an interesting, relevant aspect of the case to capture the court's attention. If the factual story is necessarily long, begin with an brief overview. Then you can fill in dates, places, details, etc.

In 1924, John Boomer paid Lottie King George, a Wineema, \$,600 for 11 acres at the edge of the Tribe's reservation. Tilamock Creek ran for 1200 feet along the south and east of the property, and four of the 11 acres were marshland. Boomer, who was a farmer and a boat builder, raised livestock in the pasture along the creek, and at the south end, where the creek empties into the bay, he built a boat shed. During the spring runoff of 1929 or 1930, the creek rose faster than usual and threatened to carve out a portion of his land, so John Boomer and his son Art back-filled some of the marshy acreage and built a dike by hand, stacking rocks and shoveling dirt. Every year after that, when the water ran higher than usual, the Boomers fortified their dikes and sometimes built additional ones.

...

Be objective and persuasive

Reflect your theory throughout the Statement.

Breathe life into the facts by telling a revealing story about people.

Without mentioning the elements of the controlling rule or rules, focus on the facts that would satisfy or negate those elements.

Emphasize favorable facts.

Neutralize the unfavorable facts that must be reported.

Start with a punch.

Humanize your client.

Richard K. Neumann, Jr.

In stating facts in pleadings:

Facts should be alleged as facts. Use terse, short, curt, blunt sentences, all in the indicative mood. Be positive. Do not beat about the bush. Go straight to the point. If you mean to allege a particular fact, state it boldly, plainly, clearly and concisely. Avoid all "ifs", all introductory averments, all circumlocution. A pleading is not the place for fine writing, but simply for hard, downright, business-like assertion.... Then, again, it always conduces to clearness to observe the strict order of time. In any case not of the simplest, dates are of the greatest importance. The only way to tell a long or complicated story clearly and intelligently is to keep to strict chronological order.

This, then, is the first essential of good pleading -- to be clear. The next is to be brief.

The Rules repeatedly insist on the necessity of brevity. ... If anything is done improperly or unnecessarily -- and this includes unnecessary prolixity -- the court has power to give appropriate directions to the Taxing Master as to the costs thereby occasioned... Yet, as we have seen each party must state his whole case, he cannot, strictly, prove at the trial any material fact which is not alleged in his pleading. How, then, is the necessary brevity

to be attained? In two ways: I. By omitting every unnecessary allegation. II. By omitting all unnecessary detail when alleging material facts."

Every pleading must state material facts concisely in a summary form. In the first place, materials facts must be stated clearly and definitely. Be as concise as you can, provided you do not thereby become obscure. Pleadings are useless unless they state the facts with precision. The names of persons and places, if material, must be accurately given. Avoid pronouns; it often is not clear whom you mean by 'he'. Repeat 'the plaintiff' or 'the said Johnson' whenever 'he' would be ambiguous. Use relative pronouns as little as possible; when you do use them see that each has its proper antecedent. Call things by their right names, so far as you can, but in any event always allude to the same thing by the same name. Keep to the same phraseology throughout the pleading; a change of phrase suggests a change of meaning. If you are suing on a document, or relying on an Act of Parliament, do not attempt to improve on the language of either (however strong the temptation may be, especially in the latter case).

Odgers Principles of Pleading and Practice, 21st edition, pp 99-102.

Organize your facts in a way which makes them easy to understand. ...Most advocates list their facts chronologically. But if you think of any narrative in our culture -- on television, in books, or in movies -- we rarely tell stories chronologically anymore. In a complaint, help the reader by organizing the facts by subject matter. For example, in a case involving a car accident, the facts might be aggregated in sections concerning the accident, the insurance policy, or the warranty on the car.

Stephen Stark, *Power Pleading: Complain, Don't whimper*,
Michigan Bar Journal

Argument

This is persuasion through fact and logic, it is not “being argumentative”. Don’t argue your conclusions. Give the judge the facts and a theme to tie them together so she can come to her own conclusions.

Argument by conclusion:

In the present case, various diking was accomplished on the Boomer property beginning over 60 years ago. The relief requested by the plaintiff would cost the defendant a substantially greater amount of money today that it would have had the plaintiff been diligent in bringing its claim.

Revised:

To require the Boomer family to pay for restoring the site in 1989 is inequitable. If the Tribe had been diligent in bringing this action 60 years ago when John and Art Boomer built the first dikes by hand to protect their pasture land, the cost of dismantling them would not be nearly so high. Ten or twenty or thirty, or even forty years later, the cost would not have been nearly so high as it will be in 1989. But beginning in the early 1970s, the Army Corps of Engineers and the State of Washington added several new requirements before a permit could be obtained. These new requirements included costly environmental impact statements, a series of public meetings to evaluate the proposals, and the additional services of engineers, botanists, biologists, hydrologists, and lawyers. From 1971 to 1975, the average costs of obtaining a permit to alter the flow of a stream quadrupled.

Argumentation techniques

Design a compelling theory and back it up with compelling arguments.

Limit your contentions to those that have a reasonable chance of persuading the court.

Give the court a clear statement of the rule or rules on which the case turns.

Rely on an appropriate amount of authority with appropriate amounts of explanation.

Show the court how to make the decision by explaining exactly and in detail how the law governs the facts.

To the extent they advance the theory, make the facts and people involved come alive on the written page.

Show the judge how you should prevail from a policy standpoint.

Organize to emphasize the ideas that are most likely to persuade.

Make your organization obvious.

Reinforce the theory with carefully chosen wording.

Enhance your own credibility through careful rewriting and editing.

Make it easy for the judge to rule in your favor.

Richard K. Neumann, Jr.

Organize an argument in light of its purpose and audiences. Use analogy or synthesis for organizing your argument.

Analogy - comparing things to show the similarities between them

Synthesis - combining separate elements to make the whole

Use Inductive and deductive reasoning as appropriate.

Inductive - reasoning that a general rule exists because particular cases that seem to be examples of it exist

Deductive - reasoning that something must be true because it is a particular example of a general rule that is known to be true

Argumentative Pattern

1. Preliminary review of problem and evidence
2. Conclusions (cause or causes of the problem)
 - a. Corroborating evidence
 - b. Evidence against
 - c. Evidence weighed
3. Recommendations (optional)
 - a. Reasons for
 - b. Reasons against
 - c. Reasons weighed

This method is especially effective if you are going to have many different kinds of readers: managers and scientists, readers who know a great deal about the subject and readers who don't, readers who are deeply interested in what you are writing and readers who aren't.

Traditional method for organizing persuasive argument

Persuasive documents are written with the purpose of proving that a conclusion is sound or a recommendation ought to be put into effect. The ancient Greek and Roman style of argument was this:

Introduction

Narration

a simple statement of the facts of the case

Division

a summary of how the argument is organized

Confirmation

presentation of evidence that supports argument

Confutation

examination of important evidence that does not support argument, and refutation of it

Conclusion

weighing the evidence in favour against the evidence which has not been refuted and stating your conclusions

For most purposes this general form will serve you well. Here is a modern version:

Make an assertion

Give evidence that supports it

Cite the important evidence against it, and refute as much of it as you can.

Weigh the evidence in favour against the contrary evidence that you were unable to refute

Draw conclusions

In your argument:

- make sure that everything you write supports your theory
- avoid abusive, sarcastic language and ridicule
- be plain spoken but not personal, rough or mean
- don't deprecate another court's judgement
- strike first
- defend aggressively
- remember your audience
the judge is human

judges get tired - be brief and organized

judges are decent, compassionate human beings

make the story human, the cause fair and just

present the equities

- judges are not omniscient; omit no germane fact or step in reasoning; argue logical steps

Summaries, Arguments and Factums

Much law is decided on written submissions... My most frequent complaints are:

- Some lack structure. Counsel has not decided what arguments to make or emphasize. They adopt what I call a 'stream of unconsciousness style'.
- Some are unnecessarily long.
- Some have obviously not been edited or even proofread.
- Some contain too much false sentimentality or feigned outrage. Avoid crying, whining or begging. Avoid apocalyptic, exaggerated, 'flood gates' arguments.
- Some leap from precedent to precedent without linking them together, or to the arguments being made. Judges are not persuaded because a precedents exists, they are persuaded if it applies.
- Arguments often overstate one side's facts and understate the other's. Do not tie your argument to one rigid view of the facts. It invites a Judge who does not accept your facts to reject your argument, even if it stands equally well on different facts.
- They grovel. The argument is full of expressions like 'As this learned Board humbly submits that....'. My advice, 'with greatest respect to learned counsel,' is cut it out and get to the point."

Andrew Sims

