

Persuasive legal writing

Ideas to strengthen
the lawyer's connection
to the judge



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By Daniel U. Smith

Law school teaches legal research and reasoning, but it usually fails to teach writing that is persuasive. Because most law-school professors speak and write in an academic style, we law students absorb that

academic style – unaware that the academic style will cripple our ability to write motions and briefs that persuade judges.

To cure this problem, consider the following suggestions for a persuasive legal writing style – marked by brevity, simplicity, clarity and honesty.

Obstacles to persuasion

Let us first recognize the obstacles that exist to persuading a busy judge. These obstacles intensify the

need for developing a persuasive writing style.

- Our subject is complex – applying complex law to complex facts. The cure for this complexity is simplicity in our writing (to the extent the subject allows).

- Judges are busy. One law and motion judge has said that the number of matters on his daily calendar limited his time to read a motion or opposition to seven minutes. Appellate judges, on average, write 10 opinions of their own each month and concur (or dissent) in 20 more. With oral argument consuming two working days per month, the judges have 20 working days in which to master 90 briefs per month, plus related legal research and investigation of the record.

- Judges are generalists, and so may need a quick education on the law applicable to our case.

- Persuasion by written communication depends on the fragile relationship between writers and readers. One study shows that judges are interrupted in their chambers every nine minutes. Judges may read briefs on the weekend, where the competing demands on their time are obvious. Hence, any burden [that] writers create may cause readers to lose their way, or even give up. As E.B. White wrote in *Elements of Style*, “[T]he reader [is] in serious trouble most of the time, floundering in a swamp, and . . . it [is] the duty of anyone attempting to write English to drain this swamp quickly and get the reader up on dry ground, or at least to throw a rope.”

And Justice Antonin Scalia wrote in *Making Your Case* that if your brief is too long, he will simply stop reading it. The

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lesson is that lawyers need to write in a style that strengthens the writer's fragile connection to the reader.

• Finally, lawyers' credibility is low. At some point most judges have learned to be suspicious of lawyers' claims. As a result, our credibility is low not because of any sin we committed, but because of the sins of those who went before us. Hence, lawyers need to write in a style that removes the writer's assertions from the presentation and instead simply reveals the law and the facts for what they are.

The goal

Writing is persuasive when it makes the reader's job easy. As Jacques Barzun wrote, the "ethics of writing" are that "the reader's part . . . must never become a strain." (Simple and Direct, A Rhetoric for Writers (1994) p. 7.)

Another text on writing explains: "[T]he reader has a problem to solve, a decision to make, a ruling to hand down, an inquiry to conduct, . . . in short, a job to do. . . . [T]he prime literary virtue is *ease of parsing* . . . because . . . writing is an instrument for delivering information with maximum efficiency and in such a way as to *place the smallest possible burden upon the reader*, who has other more important burdens to bear." (F. Thomas & M. Turner, Clear and Simple as the Truth (1994) p. 81 (emphasis added).)

By making the reader's job easier, showing you have mastered the written word the implication is that you are also the master of the law and the facts.

The four style qualities.

Four style qualities make writing persuasive.

• Brevity

The first quality for persuasive writing is brevity. As Scalia and Garner write in Making Your Case, the Art of Persuading Judges (2008) p. 59, "The overarching objective of a brief is to *make the court's job easier*. Every other consideration is subordinate. What achieves that objective? Brevity. Brevity is the key precept taught in Elements of Style: "Omit needless words."

Brevity is achieved in two ways first, by eliminating what is unnecessary,

redundant or implicit; second, by writing as concisely as possible.

As an example of what is unnecessary, recall *Palsgraf v. Long Island R. Co.* (N.Y. 1928) 162 N.E. 99, where a passenger's package of fireworks exploded, throwing down the scales that injured Mrs. Palsgraf. Justice Cardozo wrote in the introductory paragraph, "Two men ran forward to catch [the moving train.] One of the men reached the platform of the car without mishap, though the train was already moving." Why does the reader need to know about the man who was *not* carrying the fireworks? Such unnecessary information should be deleted.

To write as concisely as possible, shed the cumbersome constructions learned in law school and adopt plain English. As Strunk and White wrote: "Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences . . . This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell." (The Elements of Style, p 23.) For example, instead of writing: "There is ample evidence to support the fact that . . .," write: "Substantial evidence shows . . ." Instead of writing: "The medical expert was of the opinion that . . .," write: "The medical expert opined . . ."

• Simplicity

Simplicity is a hallmark of persuasive writing. As President Lincoln wrote: "I was not satisfied . . . until I had put [the idea] in language plain enough . . . for any boy I knew to comprehend. This was a kind of passion with me, and it has stuck by me." (M. Meltzer, Lincoln in His own Words, p. 6 (1993).)

Simplicity requires replacing the academic style acquired in law school with plain English. This insight is as old as Aristotle, who wrote that "clearness" is secured by words "that are current and ordinary."

Though we may fear that a plain style lacks authority, the opposite is the case, as Bryan Garner explains: "If the same idea can be expressed in a simple way or in a complex way, the simple way is better and, paradoxically, it will typical-

ly lead readers to conclude that the writer is smarter." (B. Garner, A Dictionary of Modern American Usage (Dictionary) (1998) p. x.)

• Clarity

A third quality for persuasive writing is clarity. Imagine that your writing allows the reader to see "something through a perfectly clean and undistorting window; the window should not draw attention to itself, and will not unless it is obviously defective in some way." (F. Thomas & M. Turner, *supra*, p. 36.)

Clarity results from brevity and simplicity, but also requires coherent connections that reveal the relationship of successive ideas – a coherent train of thought. "Readers may understand individual sentences, but if they cannot see how that series of sentences 'hangs together,' then no matter how clear individual sentences are, readers will not feel that they add up to a cumulatively coherent passage." (J. Williams, Style: Ten Lessons in Clarity and Grace (6th ed. 1999) p. 101.)

Coherence may be achieved by a signal that highlights the significance of the coming sentences: *E.g.*, "First..., Second..., Third...,..." Or you may start a sentence with a strong change of direction, as in "But..." or "Yet..." or "In contrast,..." Immediately below a heading, link the heading to the following text, so that the reader understands how the point asserted in the heading will be supported by the following text. Introduce structural connections in the Introduction by supplying cites to explanatory sections later in the document.

• Honesty

The final persuasive quality is honesty. Honesty is both a legal and a rhetorical requirement because your credibility is at stake. If you are not honest at every point, you will lose the credibility battle, and even your valid points may be rejected.

Lapses in honesty occur in many ways: exaggeration, misstatement, omission or disregard for the standard of review. These lapses are costly: "Credibility is just as fragile for a writer as for a President. Don't inflate an inci-

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dent to make it more outlandish than it actually was. If the reader catches you in just one bogus statement that you are trying to pass off as true, everything you write thereafter will be suspect. It's too great a risk, and not worth taking." (Zinsser, *supra*, p. 78.)

Having committed yourself to brevity, simplicity, clarity and honesty; your next task is to manifest these qualities at every level of the document headings, paragraphs, sentences and the document's overall structure.

Persuasive headings

A heading is not an explanation but a snapshot — an assertion to be supported by the text to come. Here are some guidelines for achieving this effect.

- Assert a complete point, using key terms and details. Avoid neutral headings, such as "The accident." Instead, link cause and effect: "The dangerous condition caused the accident."

- Be brief — two lines or less.

Headings longer than two lines slow the reader down, blunting the heading's penetrating impact.

- Use parallel structure. When points that are logically parallel are stated in parallel terms, they gain in persuasive power.

- Follow headings with text that uses the heading's key terms and details, explaining how the text to come will support the heading's assertion.

- Format: Use bold only, start with one capital letter, and use lower case until you reach the period. Other choices initial caps; all caps; underlining are difficult to read.

Persuasive paragraphs

Here are five tips for persuasive paragraphs.

- Start the paragraph with a topic sentence, stating one point. The topic sentence is your assertion; the rest of the paragraph exists to support that assertion.

- Limit the paragraph to the one point in the topic sentence. The topic sentence is a promise to the reader and an obligation on the writer that the paragraph will cover the point stated in the topic sentence and only that point.

- Create a clear train of thought. Organize supporting information in a way that is clear to the reader.

- Use visual alternatives. Photos, charts, diagrams, lists, tables and graphs are more persuasive than a paragraph of dense prose.

- Drive your point home with a short sentence or one-sentence paragraph. *Example:* "In 1998 Johnson learned the asbestos manufacturers had concealed a fatal risk. He developed mesothelioma."

Persuasive sentences

Sentences become more persuasive when they are designed to create a clear train of thought.

- Start with a link to prior text when needed. If the reader will be in doubt as to the purpose of the information in the next sentence, introduce that sentence with a signal, such as "In addition," or "In contrast." Avoid long, cumbersome signals. Instead of "However" write "But." (A conjunction may start a sentence.) Instead of "Consequently" or "Therefore" write "So," "Thus," or "Hence." Instead of "Furthermore" write "Further" or "And." Instead of "Inasmuch as" write "Because." Instead of "Nevertheless" write "Yet," "Still," "Even so," or "But." Instead of "Subsequently" write "Later."

- End the sentence with the point of emphasis. Don't squander the end position with trivial information that is not your main point. *Example:* Instead of writing, "Philip Morris knew, but concealed from the public, that smoking causes cancer;" write, "Philip Morris knew smoking causes cancer but concealed that fact from the public."

- Put the subject at or near the start. The reader wants to know who or what the sentence is about. Don't burden the reader by burying the subject in the middle of the sentence or by starting with a long introductory clause. Consider the following sentence written by Prof. Larry Tribe in a U.S. Supreme Court brief:

By strangling the supply of house lots for sale in fee simple and so driv-

ing residential land prices well beyond the reach of all but a few Hawaii residents, the legislature found, the land monopoly had contributed to general inflation in the price of consumer goods and had enabled the large landowners to exact exorbitant rents on leaseholds.

The subject is "land monopoly," yet it is not mentioned until halfway through the sentence. When the sentence is revised to put the subject at or near the start, the sentence immediately makes more sense:

As the Legislature found, the land monopoly, by strangling the supply of house lots for sale in fee simple, (1) drove residential land prices well beyond the reach of all but a few Hawaii residents; (2) contributed to general inflation in the price of consumer goods; and (3) enabled large landowners to exact exorbitant rents on leaseholds.

- Use a strong subject and verb.

Avoid starting sentences with "There is..." or "It is..." or "The reason that is..." Instead, start the sentence with a person or thing taking action.

- Keep subject, verb and object close together. Delete minor information or put it in a three- to four-word introductory clause.

- Put parallel ideas in parallel structure.

- Keep the sentence short two lines.

- Punctuate for brevity and emphasis. Use a dash to highlight contrasting or supporting information. Use a colon to introduce a series that supports the sentence's point: "Plaintiff sought recovery on three theories: breach of contract, fraud and negligence."

- Make your prose vivid by citing key details. Consider a warning sign that says: "No Swimming. Dangerous Undertow." This could be made more vivid by supplying key details: "Don't Swim Here. In 2002 the undertow caused Susan Parks, Tom Sims, and Jennie Lucas to drown." Decide what are the vivid details of your case and recite them in headings and topic sentences.

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Structure of your motion or brief

When judges read your motion or brief, they usually have the same questions: What is this case about? What are the issues? What information do I need to resolve those issues? Structure your document to answer these questions.

In the Introduction, first state enough information to reveal what the case is about so that the judge will understand the issues. Then state the issues. Then summarize the information the judge will need to resolve the issues.

Then state the relevant facts, with headings that make the assertions permitted by the standard of review.

Then state the procedural history that is relevant to the issues presented.

Then discuss the issues, using a roadmap paragraph after the main heading.

Then list your supporting points from strongest to weakest. Then refute your adversary's points.

Tips from Justice Scalia and Bryan Garner:

U.S. Supreme Court Justice Antonin Scalia and legal-writing guru Bryan A. Garner offer additional tips in their guide: *Making Your Case: The Art of Persuading Judges* (Thomson/West 2008). This little volume covers argumentation, legal reasoning, briefing, and oral argument.

Principles of argumentation

Scalia and Garner offer the following tips for structuring your argument.

Where the standard of decision is in your favor, Scalia and Garner urge that we “emphasize that point at the outset of your discussion of the issue – and keep it before the court throughout.” (*Id.* at 11.) Where the standard of decision is against you, “cite a case in which an appellant met that standard and compare it to your own.” (*Id.* at 12.)

Avoid overstating your case: “Proceed methodically to show the merits of your case and the defects of your opponent’s – and let the abject weakness of the latter speak for itself.” (*Id.* at 13.)

Be accurate – “never mak[e] a statement you know to be incorrect” and “never mak[e] a statement you are not certain is correct.” (*Id.* at 13-14.)

Lead with your strongest argument.

Take the most easily defensible position – advocate not that unfavorable cases be overruled but rather that they be distinguished.

Directly address any obvious points of fact or law which are not in your favor and explain why they are not dispositive. Failure to do this will result in a weak argument that “speaks poorly of your judgment and thus reduces confidence in your other points.” (*Id.* at 21.) “Fessing up at the outset . . . avoids the impression that you have tried to sweep these unfavorable factors under the rug” and “demonstrates that, reasonable person that you are, you have carefully considered these matters but don’t regard them as significant.” (*Ibid.*)

“[E]voke rather than display indignation” by “describing” the “shoddy treatment your client has received” and “dissecting . . . calmly and dispassionately” your opponent’s “feeble and misleading arguments.” (*Id.* at 34.)

Legal Reasoning

Scalia and Garner urge lawyers to analyze cases syllogistically, i.e., (1) major premise (often the rule of law); (2) minor premise (often a factual claim); and (3) conclusion. They give this example:

Major premise: Prisoners may recover for harm caused by the state’s deliberate indifference to their serious medical needs.

Minor premise: Prison guards ignored the plaintiff prisoner’s complaints of acute abdominal pain for 48 hours, causing his appendix to burst.

Conclusion: Plaintiff is entitled to recovery. (*Id.* at 42.)

Such syllogistic analysis reveals whether the dispute is over the rule of law (major premise), the facts (minor premise), or how the law applies to the facts (or all of the above).

Briefing

To facilitate the “court’s job,” lawyers need to clearly present the issues and the information that will resolve those issues. To this end, Scalia and Garner offer several useful tips.

Scalia and Garner recommend signposting arguments with topic sentences and captioned section headings. “Headings are most effective if they’re full sentences announcing not just the topic but your position on the topic.” (*Id.* at p. 108.) Scalia and Garner give the following example:

Ineffective: “I. Statute of Limitations”

Effective: “I. The statute of limitations was tolled while the plaintiff suffered from amnesia.” (*Id.* at p. 108.)

Clarity should be valued above all. This means “the same word should be used to refer to a particular key concept, even if elegance of style would avoid such repetition in favor of various synonyms.” (*Id.* at p. 107.) It also means “shunning puffed-up, legalistic language,” and writing in a “blunt, straightforward manner.” (*Ibid.*)

Scalia and Garner urge us to refute in advance the argument we anticipate from our adversary. Anticipatory refutation dispels immediately the obvious objections to your arguments that would occur to the attentive reader. By contrast, omitting anticipatory refutation allows obvious objections to linger and implies that you fear these objections. Moreover, anticipatory refutation puts your adversary on the defensive because you have stated the opposing argument in your own terms, framing the context for later discussion. (*Id.* at p. 16.) Finally, by discussing the case from your adversary’s point of view, you appear “even-handed and trustworthy.” (*Ibid.*)

For the opening brief, Scalia and Garner recommend putting anticipatory refutation in the middle to keep the central focus on your affirmative points. But in a responding brief, if an opponent has said something that seems compelling and would dispose of the case, “you must quickly demolish that position to make space for your own argument.” (*Id.* at 17.)

On the question of how a responding brief should sequence the arguments, Scalia and Garner suggest generally “placing your stronger points first and stamping your own order upon the case,”

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especially where the opposing brief is a mess. If, on the other hand, there is not much difference between your arrangement of the arguments and that of your adversary, Scalia and Garner recommend addressing the issues in the same order for the reader's benefit.

Reply briefs should not merely refute the adversary's claims, but should also put your points in the context of your affirmative arguments, thus relieving the reader of the need to consult prior briefs. Supplying the context also allows the

judge to read the Reply Brief first (as often occurs).

Scalia and Garner urge brevity. "Judges often associate the brevity of the brief with the quality of the lawyer." Brevity "requires ruthlessness in wringing out of your argument everything that doesn't substantially further your case: entire points that prove to be weak; paragraphs or sentences that are unnecessary elaboration; words and phrases that add nothing but length." (*Id.* at p. 98-99.)

Conclusion

The effort to write persuasively requires perseverance in the choice of every word, phrase, sentence, paragraph and heading. Good writing is hard work. Be assured that judges appreciate this effort, and will reward it.

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