



## Persuading the Judge Through Writing: How to Win

An advocate's goal in addressing a trial or appellate judge is to win. To win honestly, but to win nonetheless. The advocate wins by persuading the judge that the client's arguments are more compelling than the adversary's client's arguments. Persuasion in the law requires ethos (showing expertise and knowledge with integrity), pathos (appealing to emotion and the judge's sense of justice), and logos (offering logical reasoning and common sense). The advocate seeks to persuade through written and oral advocacy. Persuasion in oral advocacy comes from oral argument in which an advocate, during a conversation with the court, presents the client's position by addressing the judge's concerns. Persuasion in written advocacy comes from a written brief or memorandum to the court in which the advocate writes for the judge without writing like a judge.

Successful persuasion in written advocacy requires the advocate to articulate clearly and concisely 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 guiding precedent for the future. An advocate accomplishes this by arguing law, fact, and policy under the appropriate burden of proof and standard of review. A persuasive advocate has the same goals regardless whether the advocate speaks or writes, although oral and written advocacy techniques and styles vary.

Written advocacy is crucial to persuade. A brief consists of numerous parts that give the court the necessary procedural background, the facts of the particular case, and the relevant law. The tone of an advocate's brief is to convince, but the advocate's goal is to state the pivotal issues of the case and to articulate a position in a straightforward, concise, and definite 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. To shape opinion, the advocate has two objectives: To make the judge want to rule for the client and to make it easy for the judge to rule for the client.

The more knowledge an advocate has about the case, the easier it is to persuade. Judges expect the advocate to know the facts and legal principles of the case better than anyone else might. Judges expect advocates 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, stresses only important issues, addresses the most important issues first, revises repeatedly, and submits the work on time.

Here are 15 pointers to guide advocates in persuading the judge that their clients should prevail.

**Know the Judge.** Advocates must familiarize themselves with the judge's judicial philosophy and background before they submit written argument. Knowing how the judge has ruled in previous cases and how the judge conducts the courtroom enables the advocate to structure advocacy to appeal to the judge. One way to do this is to review the judge's judicial opinions before drafting a brief. Some judges emphasize policy; others favor precedent. Persuasive advocates are flexible. They know not only the judge's preferences but also present the client's position to reflect those preferences. Familiarity with the court rules and adherence to them is required. Many judges have procedural rules about page limits, deadlines, font sizes, and footnotes. Persuasive advocates never violate those rules. Persuasive advocates always treat their readers like busy, skeptical professionals.

**Articulate Positions.** Advocates must be clear and straightforward in asking the court for the relief the client seeks. They may not be cowardly. They must be direct and upfront. Judges seek to resolve cases quickly. Blunt and repetitive language emphasizes the client's position. Well-articulated introductions, transitions, signposts, and

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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. Articulating positions persuasively means writing in plain, simple English, not in Latin, legalese, or complex conditionals.

**Be Credible.** Maintain integrity. All advocates hope the judge will agree with them on every issue. The persuasive advocate knows that this isn't always possible. A successful advocate knows the adversary's position, anticipates the adversary's arguments, states the adversary's arguments fairly,

state with words like "always" and "never." Persuasive advocates cautiously, although confidently, understate all their positions. They avoid biased modifiers and don't offend or misquote adversaries, opposing counsel, or other courts. Boundaries are exceeded when an advocate unfairly attacks and accuses the adversary, the court, or a court below or comments on their motives. Advocates must also portray the record scrupulously and accurately.

**Cite Accurately.** Persuasive advocates use relevant sources carefully and then cite what they use and use what they cite. An advocate's brief can cite multiple sources, including cases, other briefs, law-review articles, and documents from the record. Regardless

**Be Specific.** Specificity accomplishes two purposes in brief writing. It shows that the advocate has researched thoroughly. It also makes the adversary's position more difficult to prove by creating fewer loopholes in one's own argument. Providing non-conclusory examples using concrete nouns and, better, vigorous verbs is an effective way to stay detail-oriented. 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."

**Be Original.** Persuasive practitioners find ways to argue their positions memorably, even when they follow a

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and rebuts the adversary's arguments without being defensive. Having a grasp of the other side's position allows the advocate to argue particular points more vehemently than others. Advocates are credible if they refute the opposing argument in their opposing papers. Advocates are credible if they can distinguish which arguments should be conceded — and when — and which are meritorious. Advocates are not credible if they overpromise but under-deliver. Advocates are not credible if they overargue, such as by maintaining that the client is innocent rather than that the prosecution didn't prove guilt beyond a reasonable doubt. Advocates are not credible if they argue emotionally rather than about emotional facts. Advocates are not credible if they use false emphatics like bold, italics, underlining, capitals, and quotations for effect and sarcasm instead of letting the argument speak for itself.

**Know Boundaries.** A persuasive advocate knows boundaries. An advocate may never exaggerate. The persuasive advocate doesn't over-

of the source cited, the advocate must consult the appropriate citation manual, adhere to proper citation rules, and give the necessary information. The persuasive advocate uses pinpoint (jump) cites to tell the judge the exact page where the citation came from. The more information the advocate gives in citations, the more persuasive the argument.

**Be Reasonable.** A persuasive advocate is reasonable. This means being logical and fair in arguing positions and asking for relief. The professional doesn't make requests that are far-fetched or unsupported by the record or legal authorities. The professional doesn't make frivolous claims or raise frivolous defenses. More than violating ethical rules or risking sanctions, arguing nonmeritorious positions affects meritorious positions: The judge might assume that the advocate is unreasonable and wrong about everything. The professional stresses content, not adjectives, style, and drama. The professional avoids adverbial excesses like "only" and "certainly." Few things can be said with certainty.

generally adhered-to format for court writing. For example, the less boilerplate, the more memorable. The same applies to long, boring quotations, which go unread. Writing memorably means varying sentence length and sentence structure and choosing good words — not fancy ones — to convey positions. It means avoiding metadiscourse — running starts like "the first thing I will argue is that it is well-settled that . . ." — and clichés. It means referring to parties by names that bolster positions. It means adding visuals and examples that illustrate concepts. It means leaving lots of white space in the brief to make it easy for the judge to read. The goal is to write for the ear but to make the brief pleasing to the eye.

**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 multi-task and consider multiple cases simultaneously. The brief should get to the core of the argument quickly. Otherwise, the advocate's writing will be lengthy and dis-

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organized. The judge will be forced to piece together the advocate's arguments. 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 lower the risk that the judge will overlook an argument. If the advocate's arguments are laid out explicitly throughout the brief, the judge won't need to search through numerous pages of discussion to understand the position being advanced.

**Give a Roadmap.** The advocate should give the judge a short and simple introduction at the start to set out the argument and format of the brief. This creates a coherent and readable text. It also puts the main points of the argument at the forefront. That allows the judge to know what arguments are being made before the judge begins reading the facts and precedent. It also makes it more difficult for an adversary to misunderstand and misinterpret the argument. This abridged and straightforward roadmap will guide the structure of the brief and guide the judge through the brief in its entirety.

**Organize and Limit Issues.** Persuasive advocates argue issues, not givens, history, or facts in the narrative. The persuasive advocate then gives the best argument first, supports the best argument by the best law first, and then applies the best facts first. Discussing every conceivable argument is a losing strategy. Advocates should identify the strongest and most important issues affecting their position and argue only those. These 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 persuasive practitioner will distinguish between strong arguments and weak arguments and present only the winning ones.

**Analogize.** Use fact and law to articulate positions. A persuasive

advocate weaves the facts of the particular case into existing, applicable law. This requires the advocate to be an expert on the facts and the record and to have a comprehensive view on favorable and unfavorable precedent. An advocate who has a good understanding of the law relevant to the case can successfully analogize and distinguish the client's position from earlier cases. An advocate's position can be bolstered by comparing and contrasting the case from other cases. An advocate who succeeds in analogizing and distinguishing the client's position can weaken the adversary's position.

**Have a Theme.** After some 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 and tells a story. Knowing the theme enables the advocate to emphasize law and fact that support the theme and to de-emphasize law and fact irrelevant to the theme. The persuasive advocate will make sure that every argument supports that theme or rebuts the adversary's theme.

**Don't 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 — but not too well thought out, because that will delay the writing process — and written in multiple stages. The successful advocate will allocate enough time to research applicable law, outline the argument, write,

and edit. A brief written without the advocate's conducting effective 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.

**Proofread.** The persuasive advocate must check for errors after finishing writing. Whether the errors are grammatical, stylistic, typographical, they make an advocate's position less persuasive. A brief with errors means that the advocate did not review the brief thoroughly and carefully. This makes a judge see that advocate as careless. Advocates careless about typos might be careless about the record. To eliminate errors, the advocate should edit and revise several times. The advocate should spend some time away from the brief between the writing and editing stages and get an editor to review the brief for errors. This allows the advocate to read and re-work the brief with a fresh thought process and find errors the advocate might otherwise overlook.

Written advocacy is a powerful tool in persuading the judge. 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. Judges are only as good as the advocates who appear before them. ■

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