Finding your PURPOSE – PERSUASIVE WRITING vs. OBJECTIVE WRITING

While the goal of objective writing is to inform and predict using a neutral point of view, with careful attention to OBJECTIVITY (as in an objective memo), persuasive writing is aimed at creating a desired outcome with a specific AUDIENCE (as in an appellate brief). In legal writing, you may prepare an objective internal memorandum to inform your partner about a specific area of the law or an unbiased assessment of a case. Even when your reader expects a prediction of the outcome of the case, this prediction should be based on objective analysis of the law that measures the strengths and weaknesses of the client’s position and balances them. On the other hand, you may be writing to persuade a trial court to rule positively on a motion, persuading an appellate court to remand a case, or persuading a fellow attorney that a settlement will be in the best interests of both your clients.

Thus, when writing persuasively, you must be clear on the PURPOSE of your persuasion, because that purpose will guide your choices throughout the WRITING PROCESS, from choosing content, strategy, and ORGANIZATION to REVISING for EMPHASIS.

Getting Started – AUDIENCE and STRUCTURE

When PREWRITING persuasively, begin with the following two steps: 1) FOCUS on your AUDIENCE and 2) STRUCTURE your argument to convince your audience.

1. FOCUS on your AUDIENCE.

Choose the strategy and content that will persuade the individual readers you are addressing. When writing a brief, ask yourself what questions this court will ask and how the law supports resolving those questions in your client’s favor. Do not assume that the exact arguments that prevailed at one level in the court system will prevail at the next level. Trial courts emphasize precedent, appellate courts emphasize legal errors, and courts that review constitutional issues may emphasize long-term effects, precedent, or public policy. So when deciding a criminal case, a trial court might be convinced by a careful comparison of your

* Adapted from Mary B. Ray and Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written (3d ed. 2000), mostly from the section on PERSUASIVE WRITING. All rights reserved. All words indicated in capital letters indicate entries in the book.
client’s facts to the facts of previous cases; but an appellate court reviewing the same case might be convinced only by arguments that the trial court erred in its reasoning.

2. **STRUCTURE your argument to convince your audience.**

Choose the STRUCTURE that is most logical and convincing to this audience. When ordering your issues, begin with the threshold issue if there is one; do not violate the reader’s sense of logical progression. But if issues are independent, then begin with your most compelling argument for a strong first impression. If one of three arguments is weaker than the others, place it between the others, so that it is not emphasized by being in either the first or the final position.

When stating and presenting each issue, begin with an affirmative statement of your position.

**The plaintiff provided adequate warning. Twice he tried to reach the defendant by telephone before leaving messages when no one answered.**

Avoid letting your opponent’s arguments dictate your structure; use the structure that best suits your position.

Within PARAGRAPHS and PARAGRAPH BLOCKS, subordinate their arguments through careful use of subordinate clauses (SUBORDINATION), subheadings, or paragraphs placed in the middle of a larger paragraph block. Retain your focus on your client’s position. Although you may need to refer to your opponent’s position in the course of your argument, do not dwell on it. Beginning with a statement of the opposition’s position would create a defensive tone and make your organization dependant on the other side’s position.

**The plaintiff gave adequate warning. She telephoned repeatedly and left messages on the defendant’s answering machine on two occasions.**

rather than

The defense argues that the plaintiff gave no warning. This is not the case, however, because the plaintiff left messages on the defendant’s answering machine on two occasions.

While the latter example is not incorrect, it de-emphasizes your client’s position.

**Drafting and Revising with Persuasion in Mind**

Revising persuasively involves using specific techniques that marry substantive concerns with decisions about syntax. None of these alone makes an obvious difference, but all of them, when working in harmony, create a masterful piece of persuasion. Each technique takes practice to master, so choose two or three from the following list and incorporate those into your writing habits.
1. **Use subjects and verbs for specific effect** – Put your main point in the main subject and verb in your sentence; conversely, de-emphasize points by putting them in dependent clauses:

   Although the defendant had not come to a full stop at the official stop sign, he had slowed to less than five miles per hour and was not accelerating at the time of the accident.  
   (Emphasizing that he had slowed and was not accelerating.)

2. **Use concrete words** – Concrete words create clearer images in the reader’s mind than abstract ones, and those clearer images are more memorable. This tool is especially useful in drafting fact situations in a brief, as you can use concrete words for facts that favor your client and abstract emphasize words for facts that you want to de-emphasize:

   **1965 black Stingray**  vs.  **vehicle**

3. **Choose the most appropriate term of address** – Choose either concrete or abstract nouns to address the parties involved, depending on whether or not your client is a sympathetic figure:

   **Mrs. Jones** and **Julia Easley** (to remind your reader of the real people involved)

   or

   **Plaintiff** and **Defendant** (if the facts are not sympathetic to your client and you are making an argument based on the impersonal logic of law)

   **Caution!** Be consistent with the kind of term you choose to use; using **Ms. Easley** for the defendant but then using **Plaintiff** for the other side might be confusing or obviously biased.

4. **Repeat key words** – Repeat words for emphasis, especially in the argument section of a brief; make sure the word you are repeating is indeed one you do want to emphasize (for example, repeating **clearly** creates a distraction, not effective emphasis):

   The defendant **abused** the privileges offered him; he **abused** the procedures designed to protect him.

   **Caution!** Remember that the effect of a repeated word grows exponentially, rather than linearly; don’t overdo it.

5. **Repeat sentence or phrase structures** – Creating a sense of rhythm and anticipation, this tool is particularly useful and subtly dramatic in conclusions and sometimes in fact sections:
At best, the City confused its argument by trying to do too much without a full explanation. At worst, the City contradicted itself by misapplying the law.

Caution! Remember that repetition can turn to boredom, so avoid overdoing it.

6. Adjust sentence length – Short sentences are emphatic. Therefore, use them for points you want to emphasize, but do not use them for unimportant points. This tool can be used in fact situations and in arguments:

Julia was uniformly described by all the witnesses who had personally known her as a strong-willed, positive and independent woman. The plaintiff himself called her “independent and abrupt.”

or

The major purpose of the trial court’s established procedures is to give the litigants a fair opportunity to address their claims and have them resolved by a court of law. That purpose was met here. The petitioners here had eight years of opportunity. In this context, their arguments on appeal are particularly specious.

Caution! Several short sentences in a row create a choppy, rather impatient or angry tone; while this can sometimes have a useful effect, three sentences is about as far as you should push the series. Any more, and the court might sense an intemperate tirade.

7. Insert information into a sentence with care – Placing a point at the beginning or end of a sentence can either set the stage for a punch line or de-emphasize the point like an afterthought, respectively:

Despite the difficulty of this test, the gravity of the situation required that it be done.

or

The minority arrived at the same conclusion, although for different reasons.

Caution! Be careful that the word at the end of the sentence is not one you want to de-emphasize, or your reader might overlook it as a signal to an upcoming point.

8. Place key phrases at the beginning or end of a paragraph or a sentence – Similarly, words at the beginning or end of a paragraph or sentence get more attention than those in the middle (you never know if the busy and often-interrupted legal reader will finish reading your document with care). Avoid starting a paragraph with dates or case names unless you have a reason to emphasize that date or name:
Evidence of this concern showed up in the defendant’s letter dated January 12, 1980, which stated…

rather than

On January 12, 1980, the defendant wrote a letter that showed evidence of this concern when it stated…

9. Use subtly, rather than overly, emotional language – Choose words precisely to fit the persuasive approach you are taking and that fall closer to the center of a continuum between extremely positive and extremely negative:

   Julia Easley was on a large and complex daily regimen of drugs, including…

rather than

   Julia Easley was drugged into a vegetative state daily.

(Write the latter only if your facts establish that as her literal state.)

   Caution! Avoid overly emotional language that will draw your reader’s attention to the emotional level of the writing itself, rather than to content of the persuasive argument (e.g., using words like blockhead or disaster can impair your credibility where your opponent can point out the silliness of the overstatement). Also, words that have emotional overtones, such as derelict or nuisance, are legal terms of art that must be used with precision, whether or not the emotional overtone is appropriate.

10. Play one persuasive technique against another – As you are applying these tools, you may find some contradictions; applying one principle means you violate another. Practice playing these techniques against each other to get just the effect you want.

11. Avoid overdoing – Any of these persuasive techniques can be overdone. If you tend to overdo, take the Marilyn Monroe approach to paring down: just as she removed the accessory that caught her eye in the mirror as she walked out the door, as you read over your last draft of a persuasive piece, take out the most obvious persuasive tool you have used. After all, it worked for Marilyn. Few would have called her overdressed.
Other Resources

For a more thorough discussion of persuasion in briefs, see:

- Mary B. Ray and Barbara Cox, Beyond the Basics: A Text for Advanced Legal Writers (2d ed. 2003).

For an overview of techniques used in advocacy, see: