

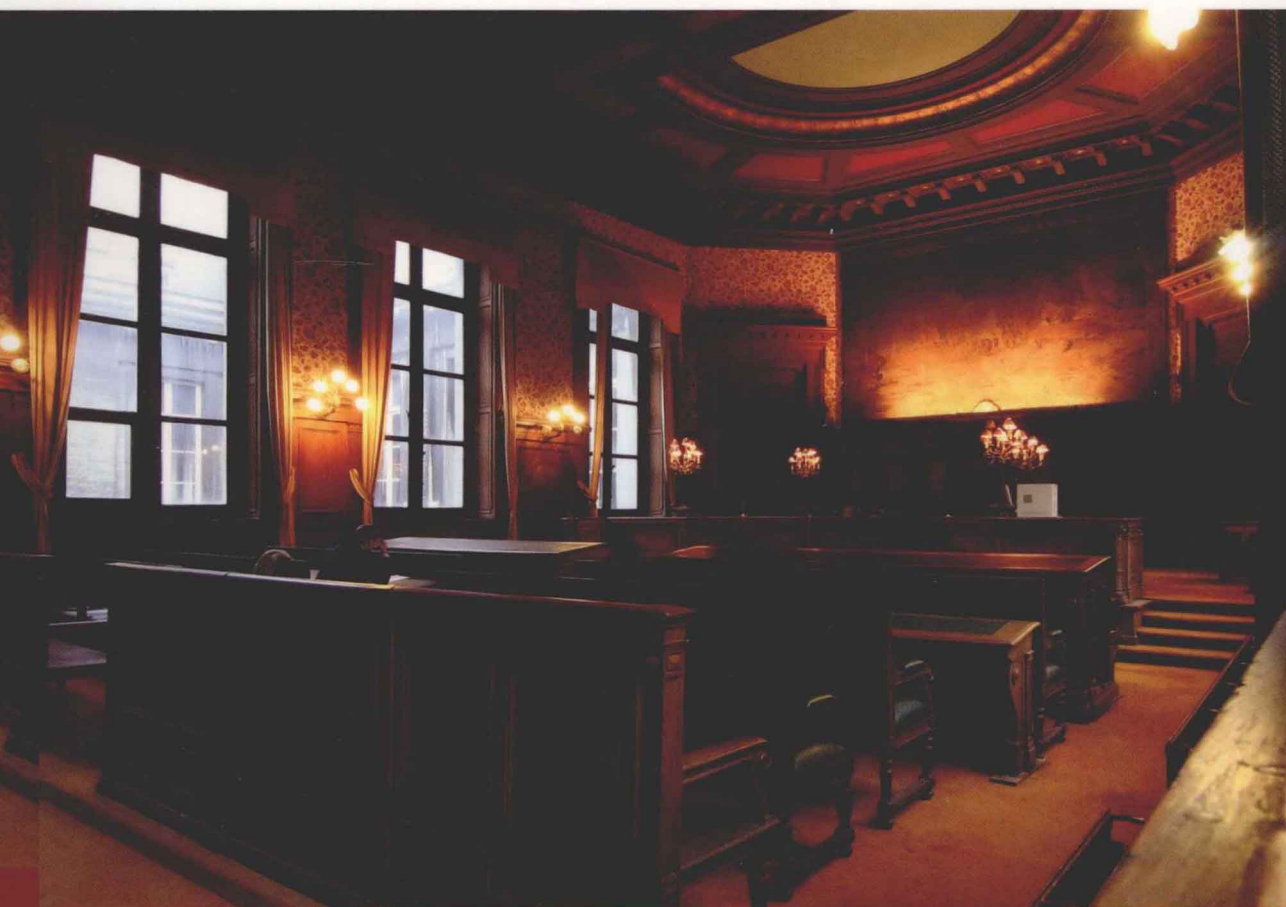
Aspen Legal Writing and Research Series

Third Edition

PERSUASIVE LEGAL WRITING

Louis J. Sirico, Jr.

Nancy L. Schultz



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Law & Business

ASPEN COURSEBOOK SERIES

Persuasive Legal Writing

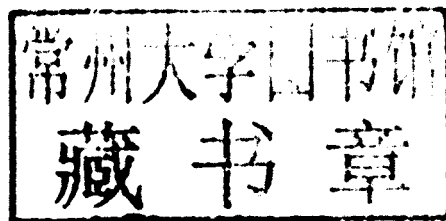
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INTRODUCTION

When new lawyers begin to practice their profession, they usually have acquired a sufficient knowledge of legal doctrine and at least a satisfactory proficiency at legal analysis. However, they often do not yet understand how to think and write like advocates.

Despite experiences like moot court, students spend most of their academic years objectively analyzing and evaluating court opinions and other legal documents. As a result, they may prefer objective writing, because it entails less risk than advocacy: They do not have to take a position and defend it against assertive critics.

However, as many practitioners have told us, novice lawyers have difficulty switching from neutral writing to persuasive writing. For example, when writing an intra-office memo for a senior attorney, they may not be aware that they should be playing the advocate. They may be content with synthesizing and applying the relevant cases, statutes, and regulations. However, the senior attorney also wants to know if it is possible for his or her client to win. Therefore, novice lawyers also should be proposing ways to overcome the legal obstacles they have identified.

Even when writing a brief, they may fail to write as assertively as they should. They also may not recognize that all sections of the brief, including the table of contents and statement of facts, are places for attractively portraying the client and its argument.

When beginning lawyers try to write like advocates, they sometimes misunderstand what persuasive writing is. They may think that learning persuasive writing requires learning a set of gimmicks—for example, referring to your client by name and calling the other party by an abstract title like “the plaintiff” or “the appellee.”¹

Although gimmicks may sometimes help—if the reader has not already seen them one time too many—they are not the key. Novice lawyers also may think that persuasive writing requires them to adopt an overblown

1. Rule 28(d) of the Federal Rules of Appellate Procedure requires you to be clear in identifying parties:

In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

dramatic style. If so, they might have been more successful had they lived in an earlier era. They also may think that persuasive writing requires ignoring strong arguments by opposing counsel and even ignoring adverse precedent. However, ignoring the opposition means giving up the opportunity to counter important arguments, and sometimes even violates ethical rules.

In this book, we provide you with the keys to persuasive writing. They are not particularly dramatic. They consist of writing simply and clearly, and consistently putting your best foot forward, while still arguing ethically and remembering to write for your audience.

By mastering these skills, you can stand out from your peers. Anyone who has read the briefs of practicing lawyers knows that too many are badly organized and barely comprehensible. Some skirt prohibitions by distorting critical facts and ignoring damaging precedent. You can easily produce a better work product.

If you organize your work product carefully and adopt a clear English style, you will have taken the most important steps to make your writing persuasive. If you also train yourself to structure your sentences, paragraphs, and documents in a way that encourages your reader to focus on your important arguments and react positively to them, you will become a consummate advocate.

For example, suppose you represent the defendant, the Slope Corporation, an employer that is being sued for its employee's negligence. Jones, the employee, sold outdoor power equipment and used his own car to carry out his job duties, and the Slope Corporation gave him a monthly car allowance. An accident occurred while Jones was driving after regular work hours in the car that he used while working.

Slope is being sued under a respondeat superior theory. Under the theory, the injured person can sue an employer for an employee's negligence where the employee acted within the scope of employment at the time of the negligent incident. Smith, the injured person, argues that Slope is liable under respondeat superior and seeks money damages. Smith argues that Jones hit Smith while operating a car that Slope did not own, but that Jones used while working and for which Jones received a monthly allowance.

Slope argues that Jones was not acting within the scope of his employment. It argues that Smith cannot demonstrate that it is liable for its employee's actions.

In constructing your argument, you might start by writing this paragraph:

Slope Corporation argues that Smith should not be granted monetary relief because Jones was not acting within the scope of his employment when he caused the accident. The fact that Jones caused the accident using his own vehicle poses a challenging barrier to recovery. The fact that Jones was no longer engaging in his job responsibilities when the incident occurred should ensure that the plaintiff should not be awarded damages based on the employee's conduct. So the case law holds.

Although this paragraph is grammatically correct and contains the pertinent information, it is far from being a compelling piece of advocacy. You could make the paragraph far more persuasive if you revised it this way:

Because Jones caused the accident while he was off-duty, Smith cannot recover from Slope Corporation under a respondeat superior theory. As the case law holds, a court can award damages under respondeat superior only when the employee acts within the scope of employment. Here, Jones was driving his car after work hours for his own purposes. Thus, even if Smith finds that Jones's car is comparable to a corporate-owned vehicle, Slope is not liable.

As you can see, you can improve your persuasiveness measurably by presenting your argument in an assertive way, reordering the presentation, and revising your sentences to make them more compelling. In this example, the three most effective techniques for improving persuasiveness are presenting information in an order that is easy to follow, using topic sentences (thesis sentences), and ending the sentences in an assertive way.

In this book, we teach you how to write persuasively. A glance at the table of contents will give you a general idea of the lessons we present.

We begin with a look at the big picture: a historical perspective on the key components of persuasion, a discussion of the psychology of persuasion, and an introduction to the importance of good storytelling. We then offer suggestions that work at a macro level: making your argument as simple as possible, adopting an assertive style, and organizing your writing. We also offer tips that will help with specific aspects of your document: writing effective introductions, presenting facts skillfully, and structuring your sentences and paragraphs to be persuasive.

We also discuss aspects of persuasion that are unique to legal argumentation: using authority effectively and making equity and policy arguments. We emphasize the importance of tailoring your arguments to your audience. We offer a summary of the most common pitfalls of persuasion and the most important ethical rules governing advocacy. Finally, we conclude by introducing you to rhetorical flair by presenting a collection of paragraphs that employ classical rhetorical devices and by giving you a final exercise that will give you an opportunity to apply your newly learned lessons.

As you read the book, you will discover that the lessons are fairly simple and sometimes self-evident. These characteristics are evidence that they work. If the strategies were so subtle that you did not recognize them, you would know that they would not appeal to your common sense or to that of your audience.

The difficulty with learning persuasiveness lies in learning to apply the lessons and also in knowing when to reject them. To help you, we include a large number of examples with an emphasis on revising passages to make

them more persuasive. At the end of several chapters, we also offer exercises that permit you to work on developing your advocacy skills.

A word of caution is in order. Learning to write well is not a matter of learning rules and mechanically applying them. It is not about learning a formula; it is about learning an art. The lessons in this book will help you improve your writing only if you think about why they usually make writing more persuasive and then decide whether they will help improve your particular sentence, paragraph, or document. In writing, creativity and reflection play a significant role.

Because good writing is an art, there is always room for improvement and room for disagreement. There are different ways to express the same idea effectively. For example, when you examine the many illustrations in this book, sometimes you will come across ways to make the good illustrations even more persuasive. By reflecting on the revisions that you would make, you will improve your understanding of the art of writing.

Before you begin studying these lessons on advocacy, you should give some thought to how you plan to internalize them. Although we have made an effort to limit the number of lessons, there are still quite a few, probably too many for you to make part of your writing style all at once.

Here are our suggestions. Begin by reading the chapters carefully. Working through the examples will give you experience in employing the relevant lesson. For more experience, complete the exercises. When you are drafting a brief or other major document, turn to the table of contents and use it as a checklist.

To improve your writing on a daily basis, pick the two or three lessons that you think will make the greatest improvement in your writing. Consciously apply them to your writing. When you start to apply them almost automatically, pick two or three more lessons and begin to apply them. Little by little, you can incorporate all the lessons into your writing style.

On a final introductory note, we want to say thank you to our student research assistants who were of great help in working on this edition. A big thanks to Marshall Burstein of Villanova and Dhruv Sharma and Brian Wolensky of Chapman.

Persuasive Legal Writing

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A Brief Historical Perspective

LOGOS PATHOS ETHOS

These words will be familiar to students of rhetoric, particularly those of you who have encountered Aristotle at some point in your educations. Rhetoric often carries pejorative connotations, with some considering it to be nothing more than the use of words essentially devoid of substantive meaning but designed to inflame passions and prejudices — “empty rhetoric.” Historically, however, it is simply the use of language to accomplish particular goals, especially to persuade. As noted by James Boyd White, “[t]he ancient rhetorician Gorgias (in Plato’s dialog of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state, and one could hardly imagine a more compendious statement of the art of the lawyer than that.”¹

Lawyers use rhetorical tools constantly, both orally and in writing. This chapter offers some historical context for understanding why legal persuasion is constructed in particular ways, and points out that the techniques you will learn in this book originated long ago, and have withstood the test of time, now measured in millennia.

I. RHETORICAL COMPONENTS AND RESPONSIBILITY

Aristotle is universally cited as the author of the fundamental tenets of persuasion theory. He introduced the three core attributes of persuasion mentioned at the beginning of the chapter. What are logos, pathos, and

1. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 684-85 (1985).