

CHAPTER 14

PERSUASIVE LEGAL WRITING

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A. THE PURPOSE OF PERSUASIVE LEGAL WRITING

Persuasive writing is written advocacy. Your aim in persuasive writing is to support your client's legal position and move your reader to agree with the legal conclusion that benefits your client. To be a persuasive writer, you must keep two primary principles in mind: perspective and audience.

Perspective requires you to reflect on how you view a problem or situation, and sometimes more importantly, how your client views her problem or situation. It is through assessing your perspective that you learn how or why you are focused on the view of the problem that you have. Once you have a solid command of your motivation, then you can turn to communicating that position to others.

Audience requires you to understand who you are trying to convince, and to move that audience to see the problem or situation the way you do. Your audience for persuasive writing will be a judge, a mediator, an opposing attorney, or sometimes a legislative body. The words you choose and the format of your writing will depend on your audience. While all legal audiences expect a professional tone, not all tools of persuasion are equally effective for each audience. Tailoring your writing to your particular audience is a crucial aspect of persuasion.

B. TRANSITIONING FROM OBJECTIVE TO PERSUASIVE WRITING

1. OVERVIEW

Persuasive writing differs from objective writing in three fundamental ways. First, a persuasively written document has a new purpose—argument; objective writing seeks to evaluate and predict.¹ Second, persuasive writing focuses on a different audience—a court, mediator, or op-

¹ See Chapter 8.

posing counsel; objective writing is generally addressed to a supervising attorney.² Third, information is presented differently in a persuasive document; rules are crafted favorably for the client and cases are assessed in the light most favorable to the client. Conversely, office memorandums, for example, should discuss the topic with a neutral eye and voice.

Objective analysis is fundamental to effective persuasive argument; you should consider objective analysis as the foundation for, rather than the alternative to, persuasive writing. A skilled advocate will first analyze the case objectively, gaining perspective on the opposing party's claims, then strategically craft a document that highlights her client's strengths and the opposing side's weaknesses. To accomplish this you must analyze the law not as fixed and constant but as indeterminate and malleable.³ Instead of searching for a single correct answer, look at the problem in different ways and consider different possible answers and interpretations. When you are aware of the different possibilities, you can more persuasively construct the best argument for your client.⁴ Therefore, when organizing persuasive arguments, a skilled advocate will first predict the likely outcome based on the facts and available case law; then he will work backward from that outcome to construct the most persuasive analysis in support or opposition.⁵

2. OBJECTIVE VS. PERSUASIVE PARADIGM

The large scale organization of a persuasive document does not differ dramatically from that of an objective one. For example, an office memo discussion section is generally organized to reflect the formula the reader expects, such as a CREAC⁶ approach. Similarly, a brief to a court has an argument section with a CRAC structure. The main substantive difference between the two paradigms is the omission of the "E" section—the explanation.

Consider here the different purposes of the documents—the objective memo explains the relevant law to educate the reader on the topic and support the writer's prediction; however, the trial brief seeks to persuade a busy reader toward a favorable conclusion. The objective explanation is omitted or condensed substantially and thoughtfully to more effectively support the position that favors the client.

Further, just as in objective writing, you should attack one topic at a time and use a single CRAC for each component of the argument. Also,

² See Chapter 7.

³ Kathy Stanchi, *Teaching Students to Present Law Persuasively Using Techniques from Psychology*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 112 (2011).

⁴ Julie M. Spanbauer, *Teaching First Semester Students that Objective Analysis Persuades*, 5 JOURNAL OF THE LEGAL WRITING INSTITUTE 167, 171 (1999), available at <http://www.journallegalwritinginstitute.org/archives/1999/spa.pdf> (last visited Dec. 2012).

⁵ *Id.*

⁶ See Chapter 7.

include roadmaps and point headings in a brief to the court to guide the reader or to provide the necessary overview just as you would when writing an office memo. However, when writing persuasively, consider strategy—present your best argument first and select issues thoughtfully based on the strength of the law. Anticipate and refute the opposing side's best arguments and make assertive conclusions.

And, your ultimate conclusion about your topic should be stated assertively. In objective writing, you phrased your prediction equivocally—“The court will probably find that. . . .” In persuasive writing, you assert a clear position of the best outcome for your client, for example, “The court should grant the plaintiff's motion because. . . .” or “Defendants violated the law when they. . . .” In sum, the goal is to persuade, rather than to predict and inform. Keeping the different goal in mind will make the transition to this new writing paradigm painless.

C. CRAC—A PERSUASIVE PARADIGM

In Chapters 5 and 8 on objective writing, you were introduced to CREAC—Conclusion, Rule, Explanation, Application, and Conclusion. The CRAC paradigm is used for persuasive writing, which stands for Conclusion, Rule, Analysis, Conclusion.⁷ The persuasive paradigm amounts to (1) presenting a thesis, (2) stating and explaining the Rule, (3) applying the Rule, and (4) wrapping up the issue in a neat package for the decision maker. This paradigm should be used in the Argument section for each issue that the legal writer needs to discuss.

The order of the components of the CRAC paradigm is important and should be maintained. Legal audiences expect to encounter a proposition or thesis at the outset of any legal presentation—whether written or verbal. They then want to know the legal authority for the proposition or thesis. Once provided legal authority, the trained legal mind urgently wants to know whether and how the rule applies to the factual situation presented. Finally, the legal reader looks for a summary of the support for the legal proposition or thesis. The CRAC formula fulfills the legally trained reader by providing the information expected and sought, without adding any unnecessary filler.

While the persuasive paradigm is the starting point, eventually the goal is to write formulaically without the formula being obvious to the reader. New persuasive writers should follow the formula closely. Each section of the CRAC should be clearly and separately identifiable. Usually, the initial and final conclusion should be about one paragraph, while the rule will generally require multiple paragraphs. The analysis section should be the longest section of the CRAC and is likely to be several par-

⁷ Others might call the paradigm IRAC or TRAC, substituting the “Issue” or “Thesis” for the initial Conclusion, but the basic structure is the same.

agraphs long. At the outset, it is important to understand the role of each part of the CRAC.

1. INITIAL CONCLUSION

Readers absorb information best if they understand its significance as soon as they receive it. The initial paragraph of the argument of each issue should state the conclusion you want the decision maker to reach on that issue and summarize the grounds for that conclusion. Ideally, the initial conclusion should combine the legal and factual basis for your conclusion and should persuade the reader through use of a theme. A more detailed discussion of theme is provided later in this chapter.

2. RULE—PERSUASIVELY ARTICULATED

As indicated above, legal readers seek a source of authority for the conclusion you wish them to reach. Providing a statement of the rule with statutory or case law support for the rule you advance is critically important. A legal argument without a legal rule is like an ice cream sandwich without the ice cream filling. In other words, it is not an ice cream sandwich at all.

Unlike the Rule in CREAC, which should be an objective and neutral statement of the rule drawn from a statute or case or a synthesis of those sources, the persuasive rule should present the rule in the light most favorable to your client or cause. The formulation of the rule can be an art in a persuasive brief-writing.

Creating a persuasive rule starts at the same place as an objective rule—researching and evaluating the law governing your client's case. However, a skilled legal writer is strategic when crafting a favorable rule and phrases it thoughtfully. A favorable rule must still be accurate; however, it is crafted to best suit the needs of the analysis to follow. Although you cannot simply omit unfavorable information if it is binding and legally relevant, you can emphasize favorable points and deemphasize those that are unfavorable or harmful to your client. For example, stating a rule narrowly restricts its perceived application; a broad rule statement has the opposite implication. Also, beginning the rule with the outcome you want for your client leads the reader toward that position. And, emphasizing the opposing side's burden of proof may shift the reader's focus to what the opposition cannot support.

To illustrate, compare the following three examples:

Example of an Objective Rule:

California Civil Code Section 3344(a) provides that the knowing use of another's photograph for commercial purposes without the person's prior consent is a violation of that person's right of publicity. Section 3344(d) provides an exception to the consent requirement contained in § 3344(a), which states that the use of a photograph in connection with "any news, public affairs, or sports broadcast or account, or any political campaign" does not require consent.

Example of a Persuasive Rule for Plaintiff:

The knowing use of another's photograph for commercial purposes without the person's consent violates California Civil Code Section 3344(a). The only exception to the statutory consent requirement is if the defendant can prove that the use of a photograph was in connection with a matter in the public interest. Cal. Civ. Code § 3344(d).

Example of a Persuasive Rule for Defendant:

The use of another's photograph does not violate California Civil Code Section 3344(a) unless it is used knowingly and for commercial purposes without the person's consent. However, no consent is required when the defendant can show that the use of the photograph was in connection with a matter of public interest. Cal. Civ. Code § 3344(d).

Further, like selecting broad or narrow holdings can extend or restrict a rule, the option you choose to introduce the law that supports your rule can enhance its persuasive value. In objective writing, the synthesized rule is frequently supported with a case illustration that discusses the details of the precedent case holding. In persuasive writing, the synthesized rule is more often supported by only the most pertinent and client-friendly portions of the authority and not by a case illustration. Instead of case illustration, the persuasive rule will frequently be supported by parenthetical explanations that provide succinct, focused information to support the rule.

Your choice to include a case illustration should be deliberate. A case illustration may be effective if you are citing to a key governing case or if it is necessary to support analogical reasoning. However, even in these instances, you probably do not need to include every detail of the case you would include in an objective memo. Instead, you should focus on only the most pertinent information, such as the key facts, holding, or reasoning.

More frequently, however, advocates will tend to use parenthetical explanations to support a statement of the rule. If you want to cite a case to support an argument but the relevance of the case is not apparent, a

parenthetical explanation offers a quick way to include a bit of information about the case so it is clear why the case supports your position. You can also provide cites plus parentheticals to provide the reader with additional examples of how the rule has operated in prior cases.

3. ANALYSIS

Your job in the analysis paragraphs is to show that applying the rule to the facts of your case compels the result that you seek. The best way to do this is to discuss and analogize the facts of helpful cases. Show how your case is similar to those cases that reach the desired result. The most common mistake that students make in the analysis portion of the CRAC is in failing to complete the analogy with a statement of the legal significance of the comparison. It is not enough to say that apples are similar to oranges because they are both round, healthy food. A complete comparison of the apple and the orange would need to indicate why the similarities between the two are legally relevant. In the case of the apple and the orange, a concluding sentence to the analysis paragraph may be something like “Therefore, because the apple and the orange are both fruits, they should make up a sizable portion of the average person’s daily diet.”

You can also demonstrate the applicability of a legal rule by distinguishing facts of cases that came out the wrong way from your client’s perspective. For example, assume that you have a very clear rule from a statute that prohibits littering in public parks. The rule has been applied in numerous cases to prohibit people from leaving garbage in the parks after picnics and parties. You have a client who has been cited under the anti-littering law for dumping compost in a flower bed in the public park. Your client was trying to beautify the park by adding his compost to the flower bed. You would distinguish the facts of your case from the facts of cases where litterers were successfully prosecuted. You might say something like the following in a brief to the court.⁸

In *Brown* and in *Choi*, people left non-biodegradable garbage on the park surface, causing the park to diminish in appearance. *Brown v. Parks Dept.*, 458 Fict. Supp. 2d 749, 752 (E.D. Cal. 2010); *Choi v. Pufall*, 87 Fict.R.D. 915, 918 (N.D. Cal. 2000). Further in those two cases, park rangers were forced to clean up the messes that were left by the partygoers. *Brown*, 458 Fict. Supp. 2d at 753; *Choi*, 87 Fict.R.D. at 919. Here, Mr. D’Elia attempted to enhance the atmosphere in the park by leaving a biodegradable substance that would merge with the flower bed and create a more beautiful park. No park ranger was called upon to clean up his mess, and in fact, park rangers have stated that the flower beds where Mr. D’Elia laid the compost are thriving. *Decl. Ranger Jones* at ¶ 7 (Oct. 30, 2012). Therefore, the rationales for applying the littering laws articulated in *Brown* and *Choi*, namely, to control park appearance and to conserve park ranger time, do not apply to Mr. D’Elia’s case.

⁸ Note: The cases in this example are fictitious and therefore do not have real citations. Fictitious citations are provided to help give you context for proper citing practices.

Finally, analysis can and often should include a confrontation of the other side's argument. Anticipating and rebutting counter-arguments, if done in an affirmative way, can bolster your main legal point. Valid counter-arguments should not be left unaddressed. And yet, a positive and affirmative posture is important in persuasion. Many students struggle over how to rebut potential counter-arguments without taking on a defensive posture. The best way to strike the balance is to weave counter-points into your main argument. For example, instead of starting a paragraph with a point you think that the opposing side will make, start your paragraph with your affirmative response to the point and then indicate that opposing counsel may take a contrary opinion but explain why that opinion is flawed and offer support.

4. FINAL CONCLUSION

In the final conclusion, it is the advocate's job to restate persuasively the conclusion forecast in your introductory paragraph. And, once you have recapped the main points that lead the reader to the conclusion you desire, tell the court exactly what relief you are seeking, e.g., "Therefore, Count III of the Complaint should be dismissed for lack of subject matter jurisdiction."

D. TYPES OF PERSUASIVE WRITING

Other chapters discuss some of the specific types of persuasive writing that you will be required to draft, including pretrial motions, appellate briefs, client demand letters, and mediation briefs. For the purpose of this chapter, it is important to understand that while all those types of writing can use the basic CRAC paradigm to communicate persuasive legal analysis, the format and tone of each type of writing will vary depending on the audience.

For example, a pretrial memorandum of points and authorities in support of or in opposition to a motion to a trial court will use the CRAC formula in the argument section of a brief to advance the application of a particular legal rule to the facts in the first instance. An appellate brief will also employ CRAC in the argument section, and will aim to focus the court on perceived errors by the trial court in rule selection or rule application. So, the tone of those two types of court filings may be very different even though the same CRAC formula is used to structure the argument.

A demand letter may also use the CRAC formula to provide structure for the legal argument, but again the tone will be different in a document whose audience is the opposing attorney. In that type of persuasive writing, the articulation of the initial conclusion is unlikely to require as much introduction of the issue because presumably an opposing attorney

will know the issue. In that case, the initial conclusion may become more of a purpose statement for the letter.

Regardless of the specific persuasive document you are writing, virtually all persuasive legal writing will include a persuasive statement of facts, a compelling theme, persuasive tone, and will be mindful of cultural differences in communication.

E. CRAFTING A PERSUASIVE STATEMENT OF FACTS

A statement of facts has standard components regardless of the type of document. For example, the reader will generally expect to find basic information about your client, the opposing party, and your client's problem or goal in the first paragraph of any statement of facts; the reader will also expect to find information about the time and location of events early in a statement of facts. And, the organization of the factual information should be thoughtful: facts are usually presented using a chronological or topical approach. Additionally, statements of facts in both objective and persuasive documents do not include legal conclusions or argument or references to legal authority.

The primary difference between an objective and persuasive statement of facts is in the tone. In an objective document, a skilled legal writer will present the relevant facts with a neutral tone and an objective perspective. Both favorable and unfavorable facts are presented with equal weight. Although even unfavorable facts must be included in a persuasive document if legally relevant, they are not presented with the same neutrality. The persuasive brief weaves a compelling story and attempts to deemphasize unfavorable facts.

When drafting a persuasive statement of facts, tell the factual story in a way that fits your favorable theory of the case. A skilled legal writer will be more deliberate with regard to the "lead" to the factual story—consider whether the first sentence draws the reader in and introduces your theme. A persuasive statement of facts may also contain emotionally significant factual information; this is less common in objective writing (unless those particular facts might affect the outcome of the case).

In fact, a skilled advocate will even consider story elements such as character and conflict when crafting a persuasive story. To tell a good story you must understand the basic components of a good story. For example, a good drama focuses on a compelling central character (your client the protagonist); it develops the crisis faced by the protagonist, building to a climax—the resolution (what you hope to get for your client).⁹ Also, the story benefits if the main character (your client) has a nemesis (the

⁹ Foley & Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS LAW JOURNAL 459, 466 (2001).

opposing side). So, a skilled advocate will tell a story that helps the audience identify with her client, understand the client's plight, determine the client's proposed resolution is the righteous one, and thereby attempt to defeat the villain (the opposition).

Be aware of your professional obligations when creating a story. A persuasive storyteller may distort or exaggerate facts; when describing facts consistent with a theme, focused on a targeted audience, the story is certainly one-sided. A skilled advocate will hide inconsistencies that might undermine the message. Ethical rules do not preclude you from crafting the story in a light most favorable to your client. However, the facts must be presented in a manner that you believe are true. You cannot make a false statement of fact to a tribunal or offer evidence you know to be false.¹⁰

F. DEVELOPING A THEME

A skilled persuasive writer weaves a theme throughout the argument. The theme should be immediately obvious to the reader. It should act as a unifying thread throughout the document and the arguments made should relate in some way to the theme. Your theme should indicate your premise and your arguments should prove it.

The theme does not focus on your legal argument; that the law does or does not support a position is not compelling. It takes more than logic to effectively persuade your reader. The theme should make your client's cause desirable and attractive to the reader for reasons other than legal support for the position. Consider the worldview, philosophy, message, or moral to your client's story. Often a theme will go beyond a single idea and instead put two ideas in conflict, such as "the defendant valued money more than safety."

To develop a theme, consider what moves you about the client's case and what might move a judge or jury. Think about what is compelling about your client's position – not just legally, but emotionally and personally. What makes someone care about your client's cause? If you were telling a non-lawyer friend or relative about the case, what would you say the case is about? The core principles that you would articulate to a non-lawyer about the case are likely to be the building blocks for your theme.

Try to develop your theme before you begin drafting your persuasive document. This will help guide you as to which facts to conclude to make a compelling story.

¹⁰ MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3(a)(1), (3); R. 3.3(b).

G. PERSUASIVE TONE

Persuasive tone does not invite the use of many adjectives, adverbs, and hyperbole. Very often, advocates confuse persuasive tone with rhetoric and over-emphasis. To achieve persuasive tone, there are subtle devices that you can use to provide emphasis and de-emphasis, as well as to direct the focus of your reader's attention to the points that are important to your client. Some examples of these tools are topic prioritization, sentence structure, and voice.

1. TOPIC PRIORITIZATION

An objective document is generally organized based on logic alone; it does not necessarily consider which legal issue most strongly favors the client. When writing a persuasive document, a skilled advocate will prioritize the legal issues so as to effectively highlight her strongest arguments; further, she will place weaker arguments or counter-arguments in a manner that will de-emphasize them. Therefore, you should select topics based on the strength of the law, equity, or judicial priority and carefully consider where you place rebuttals to your opponent's strongest arguments so that they do not give unnecessary emphasis.

2. SENTENCE STRUCTURE

A skilled persuasive writer is thoughtful and deliberate about sentence structure. This begins with careful selection of the subject-verb unit. A reader will generally expect that a sentence will tell the story of whomever or whatever appears first in the sentence. To focus attention on a person or thing, make it the clear subject of your sentence and state it first; conversely, to deflect attention, focus on a different person or thing first. For example: "Smith and Jones, armed with handguns . . ." highlights the actors Smith and Jones and the reader will expect the sentence to be about them. Conversely, "The complainant, John Baker, alleges that . . ." focuses on the victim and the allegations that he makes.

Further, the reader will expect that the action is expressed by the verb used. So, if you want to draw attention to an action, express it clearly in the verb of the sentence; to downplay an action, express a different action in the verb. For example, "Cameras recorded their withdrawal of additional cash" highlights the action of the camera recording; "withdraw" is not the action. But, "The victim was forced to withdraw \$200" focuses on the forceful withdrawal as the action.¹¹ If your client was the defendant in the case, which characterization of the action would be more persuasive for his position?

¹¹ Raymond P. Ward, *Techniques for Emphasis and De-Emphasis, For The Defense* p. 35 (Nov. 2008) available at http://raymondpward.typepad.com/files/td_0811_ward.pdf (last visited Dec. 2012).

Additionally, the reader will expect to find important information at the beginning and end of a sentence. So, place the information you want to emphasize at the beginning or end of the sentence; conversely, place information you want to downplay in the middle. Consider carefully what information you provide as your sentence's lead or as the final clause and whether it emphasizes a favorable point for your client.

3. ACTIVE VS. PASSIVE VOICE

Be thoughtful about whether to use active or passive voice. In objective writing, you may have been instructed to primarily use active voice. Active voice means your verb is active because the subject of the sentence is performing the action. Active voice tends to be preferred because it is more concise and uses more assertive verbs, which allows the reader to process the information more easily.¹²

However, in persuasive writing, the use of voice is more strategic. While active voice draws attention to the actor, passive voice deflects the action from the actor or omits the actor entirely. Use of a passive verb evades direct admission or responsibility. For example: "Smith and Jones, armed with handguns, abducted the victim, robbed him of the cash he had, and drove him to an ATM, where cameras recorded their withdrawal of additional cash." This sentence uses strong active verbs to describe the facts. Alternatively, "The victim, John Baker, alleges that he was driven to the ATM where he was forced to withdraw \$200" uses passive voice to downplay the role the defendants played.¹³

Be cautious that your use of passive voice is not misleading and does not attempt to obfuscate the failure to complete a requirement in the case. For example, assume you are filing a motion to request that the court allow you to serve notice of an action by way of publication instead of personal service. To do so, assume the rule requires a sworn affidavit by the process server who attempted but failed to serve the defendant to "set forth with particularity" what actions she took to serve process on the defendant. You file an affidavit that does not identify the process server and instead states that "attempts were made" to serve the defendant. The court may determine that the service of the affidavit is insufficient and dismiss the action.¹⁴

H. CROSS-CULTURAL CONSIDERATIONS

In many countries where the structure of the legal system is inquisitorial, rather than adversarial, the need for an attorney to engage in persuasive legal writing is diminished. Attorneys are expected to provide as-

¹² Enquist & Oates, *Just Writing* (Aspen 3d ed. 2009).

¹³ Ward, *supra*, n. 11.

¹⁴ See *Deutsche Bank Natl. Trust Co. v. Brewer*, 974 N.E. 2d 224 (Ill. App. 1st Dist. 2013).

sistance to the court, and the written expression of the assistance comes in an objective analysis, rather than by advocating to the court on behalf of a client.

It is also the case that in international tribunals, the sources of persuasive law are more far reaching than in U.S. courts. For example, the International Court of Justice Statute, which governs practice in the International Court of Justice (ICJ), gives a list of authorities that the ICJ can consider.¹⁵ The list includes not only international cases, international conventions, international treaties, and the ICJ Statute itself, but also domestic cases, treatises, and other works of learned scholars.¹⁶ Because no authority is binding on international courts, when writing persuasively to an international tribunal a writer has a great deal of freedom in terms of what authorities to rely on. This freedom makes persuasive writing at the public international level more creative, but also, in many ways, more difficult. The task of identifying the audience and finding the correct authorities and analysis to sway the audience to your client's position is more challenging.

¹⁵ Statute of the International Court of Justice art. 38, Jun. 26, 1945, 59 Stat. 1055.

¹⁶ *Id.*