

Chapter four



PERSUASIVE WRITING

Cont'd

- Persuasion in general is an attempt to shape another's attitude about a particular matter
- Persuasion involves a balance between fervent advocacy and predictive legal analysis
 - Strong persuasive writing avoids language that too strongly promotes one's position because it could create a loss of credibility
 - On the other hand, straight-forward objectivity itself would violate an attorney's obligation of advocating on behalf of his or her client

Cont'd

- How do you strike the balance between fervent advocacy and forward objectivity?
- The techniques include:
 - Knowing your purpose and your audience
 - Word choice
 - Active verbs
 - Conclusive and affirmative statements
 - Parallelism and de-emphasis of negative information

Cont'd

- Know Your Purpose and Your Audience
 - Your purpose is to persuade and as such you should represent facts and arguments in a light most favorable to your client - even if they are objectively unfavorable to your client
 - Your audience will usually be a judge
 - If you know which judge you are writing for, you should gather information about how he ruled in the past similar cases
 - Bear in mind that judges have extremely limited in time. thus be concise, organized and avoid repetition
 - Judges they need to know what the law is, rather than what you think it should be (what is and what ought to be?)

Cont'd

- Word Choice
 - Two or more words have the same explicit meaning, but may convey quite different connotations
- Subtlety
 - It is the art of masking your strategy to a certain extent, while still guiding your reader in the direction you desire
 - If your strategy is too obvious, your reader may resist it, or your writing may lose credibility
 - it is usually more persuasive to allow your reader to believe he or she reached a proper conclusion on his own, rather than the conclusion being dictated to him

Cont'd

- Active versus Passive Verbs
 - Active verb sentence structure:
 - Actor/Subject → Action Verb → Object
 - Ex: The defendant kicked the complainant
 - It tends to connect the actor to the action
 - The advocate for the complainant should use the active verb in order to link the defendant to the action of kicking the complainant
 - Passive verb sentence structure:
 - Object → Passive Verb → Actor/Subject
 - Ex: The complainant was kicked by the defendant
 - It tends to distance the actor from the action
 - Therefore an advocate for the defendant should use the passive verb sentence structure, in order to separate the defendant from the action of kicking the complainant
 - The tone is different for in Active and Passive verb sentence structure

Cont'd

- Conclusive versus Opinion Statements
 - A conclusive statement, as opposed to an opinion statement, is more forceful, and therefore leads to stronger advocacy
 - Conclusive statements may be effective as thesis or topic sentences
 - Ex: for Opinion Statements It is my belief that the defendant is guilty
 - Rewrite the above sentences using a stronger, conclusive statement

Affirmative versus Negative Statements

- An affirmative statement of your position is one that states clearly the position you have, and the reasons why your position is correct
- A negative statement is one that only denies the correctness of your opponent's position
- Persuasive writing should involve an affirmation of your position, rather than simple denial of your opponent's position
 - Merely denying your opponent's position will make you appear defensive
 - Appearing defensive sends the signal that you do not have complete confidence in the merits of your legal position
 - Denying your opponent's position rather than stating positively your own position will lock you into your opponent's strategic framework
 - You should prefer that an adjudicator views laws and facts from within a framework favorable to your client

Cont'd

- If both are important, it is appropriate to begin by trying to convince the adjudicator that your position is correct, before addressing your opponent's argument
 - That will make your direct rebuttal even stronger, because you have already implicitly attacked your opponent's position

Parallelism & Juxtaposition

- Juxtaposition is a technique that points out two conflicting or inconsistent statements or theories
- It suggest to a reader or adjudicator that one position is inconsistent, and allow him to come to the conclusion on his own
- It is similar with subtlety in that it lets the reader to conclude by his own
 - But the way of letting the reader to conclude by his own is by pointing out two conflicting or inconsistent statements
 - Therefore a subtlety that provides conflicting or inconsistent statements as one technique of persuasive writing can be called as Juxtaposition

De-emphasis of Negative Information

- Lawyers must address information that hurts their client's position
 - Such as when the lawyer has an ethical responsibility to disclose a certain point of law or a fact this is called 'negative information'
- It is important to understand how to deal with negative information effectively, by de-emphasizing their impact on your position
- The following words and word phrases are commonly used for this purpose:
 - However...
 - Even though...
 - Despite the fact...
 - Regardless...
 - Notwithstanding...
 - Still...

Pre-drafting Strategies

- Elements

- Make sure that you have a thorough understanding of the elements of the law you are dealing with
 - Breaking a statute down into its elements will help you better understand the law
 - The elements of a statute will eventually form many of the sub-issues of the outline of your argument

- The Facts

- Make sure that you have a thorough understanding of the facts you are dealing with
- Read the facts time and again
 - New facts will emerge each time you read through them

Cont'd

- The 'Devil's Advocate'
 - Try to get an idea of how your opponent will argue the case
 - Construct a rough argument of how you would, hypothetically, argue the case from your opponent's viewpoint
 - This will help you to provide counter-arguments
 - Many law firms assign an attorney to play the role of devil's advocate
 - The devil's advocate's job is to challenge all aspects of your legal position, as strongly as possible
 - You may assign a classmate to scrutinize your argument so that you may better understand its weaknesses

Persuasive Writing in Context: The Legal Brief

- Legal brief is the strongest tool to persuade a judge of your position
 - It also forms the foundation of your argument
 - Very rarely will your oral argument persuade a judge if your brief is not strong
- There are three preliminary considerations of legal brief writing
 - The Purpose of the Legal Brief
 - Knowing Your Audience
 - Theory of the case

Cont'd

- The Purpose of the Legal Brief
 - It serves two primary functions:
 - An education function
 - Educate the judge about the pertinent law by:
 - Explaining what laws are relevant to the legal issue, and
 - How they should be interpreted
 - N.B: explain what the law is, rather than what you think the law should be
 - Persuasion function
 - Establishing your theory of case and
 - Explain how that fits within the framework of applicable law

Cont'd

- Knowing Your Audience
 - Your reader will most likely be a judge, who is both a professional legal expert and a human being
 - As a professional legal expert:
 - Judges will rule in your favor when your writing represents thoroughness and clear logic
 - They will want their decisions to be upheld against the scrutiny of appellate courts
 - You should avoid using lecturing or patronizing tone

Cont'd

- As judge's time is usually quite limited, you should state your positions as clearly and concisely as possible, lest you lose the judge's attention and feel that you are wasting their time
 - Avoid verbose sentences and paragraphs
 - Avoid legalese and obscure Latin phrases (you are advocating rather than writing eloquent prose)
- Try to collect as much information about the judge's reputation and style and use that information to your advantage

Cont'd

- As a human being:
 - He will also respond to human emotion
 - Conclusions you draw through your writing should be logical and accurate
 - It should also appeal to a sense of justice and fairness
 - “the life of the law has not been logic, but experience”

Cont'd

- Developing Your Theory of the Case
 - Use the facts and the law to tell a story through your client's viewpoint appealing to a sense of justice
 - Pay close attention to how the court or judge has ruled in similar cases
 - How did the winning party on the similar case win, and why?
 - Try liken your client's story to those winning stories

Parts of the Legal Brief

- Maintain control at all times over what you are writing, in order to ensure that you are writing deliberately
 - Lack of control is evidence of lack of confidence in your position
- Manifestations of controlled writing include:
 - knowing how to organize the different parts of your brief, and
 - Understanding the purpose of each section

Cont'd

- In general, the different sections of a legal brief are:
 - The caption
 - The statement of facts
 - The issue statement
 - The arguments and
 - The prayer for relief
- The Caption
 - Gives the parties' names, the name of the court, the title of the document, and the case number
 - Spacing and centering are jurisdictional conventions

Cont'd

- The Statement of Facts
 - It contains background facts and legally significant facts
 - Presents the necessary information in a light that is favorable to your client
 - N.B. the purpose of statement of facts in the legal brief (which is subjective) and memorandum of law (which is objective) differs

Cont'd

- In a memorandum of law, the statement of facts provides only the minimum facts needed to make sense of a situation and how it applies to the law
 - They are presented in an unbiased fashion hence emotionally significant facts would not be included
- However, the statement of facts in a legal brief presents the necessary information in a light that is favorable to your client
 - In addition to background and legally significant facts, a legal brief should provide emotionally significant fact

Cont'd

- Selecting Facts

- Background facts (explanatory facts): provide a story of what happened that gave rise to the litigation
 - They should work to convey your theory of the case
 - Persuasive techniques should be used in their presentation
- Legally significant facts are any facts that are legally relevant to the case
 - Ethical rules require advocates to provide all legally significant facts, even if they are unfavorable to your client's position
 - However, an obligation to provide all relevant facts does not equate to an obligation to present them objectively
 - you should present relevant facts in a manner that supports your client's theory of the case
- Emotionally significant facts are facts which appeal to human emotions such as sympathy, loathing, a sense of fairness, justice, etc
 - Select favorable emotional facts from unfavorable ones

Cont'd

- Selecting an Organizational Scheme
 - There are generally two types of organizational structures in presenting the facts:
 - Chronological (usual)
 - Presenting facts in chronological order
 - Topical
 - Organizing the facts by topic
 - N.B: the statement of facts generally tells a story that reflects your theory of the case
 - Thus, it makes sense to tell the story by listing events in chronological order

Cont'd

- Creating a favorable context
 - Many times, the exact same fact can be written in different ways
 - Therefore, advocates should be aware of different contexts they create by expressing facts differently
 - The 'story' that the statement of facts tells in its entirety should create an overall favorable context for your client's case
 - One of the technique is to tell the story from your client's point of view
 - controlling which party is the actor in your statements) active-passive voice choice)

Cont'd

- The Issue Statement
 - These are questions that the court must answer
 - They are the lens in which the adjudicator will view your case
 - Try to convince the judge of the proper questions that should be asked

Cont'd

- The Format of an Issue Statement
 - The “under-does-when” format
 - “Under [the relevant law], should the court [action] when
—
 - The “whether” format, and
 - The multi-sentence format
 - It tells a brief story of the case (in a sentence of two) and then asks the question of what should be done about those facts
 - Note that you should usually use the same format throughout your issue statement

Cont'd

- The Persuasiveness of an Issue Statement
 - It should be drafted in a manner that suggests to your reader the answer you want
 - The issue statement should include reference to legally significant facts along with reference to the rule of law
 - The facts should be presented in a favorable light, and suggestive of the merits of your position
 - Example:
 - “Whether the court should grant the motion to suppress evidence when police officers entered the defendant’s home without a warrant.”
 - “Whether the court should deny the motion to suppress evidence when the police officers had reasonable cause to enter the defendant’s home and found contraband hidden inside.”

Cont'd

- The Arguments

- Although the issue statement and statement of facts have persuasive elements, the argument section is the most important part of your persuasive writing as it is the place where you will fully explain why your legal position is the correct one
- while the statement of facts and an issue statement come before the arguments in the brief, they do not necessarily have to be written before in time
 - it might be advantageous to draft your argument section first, and then draft your statement of facts and issue statement based on the conclusions you reached in the argument section
 - This is because when you draft the argument section, new and unexpected issues may come to mind, or some facts gain more weight than others and as such you may be obliged to be flexible to edit the statement of facts and the issue statement to maintain consistency with your arguments

Cont'd

- The first step is planning how to order the issues (“macro-level” organization), and then sub-issues under the broad issues (micro-level organization)
 - See the example in the text-pg:49
- Logically Ordering the Issues
 - Some issues must be established in order for other issues to have relevance
 - So, some legal issues must logically precede others. These are often referred to as “threshold” issues
 - Ex: In a civil case of breach of contract, it might be necessary to establish first that the court actually has jurisdiction, or that the statute of limitations has not run

Cont'd

- Once threshold issues have been dealt with and logic has been considered, put your best arguments first in order to take advantage of your reader's natural attention patterns, followed by weaker arguments
- A person's attention span when reading is at its peak at the very beginning, then tapers off to a low point, and then increases again when the end is near, although not to the same level as the beginning. This is called the "attention curve"
- However, if there are many strong arguments, some attorneys prefer to save one of them for the final argument, in order to leave the judge with a lasting impression of the overall strength of the brief, taking advantage of a natural final "jump" in attention given to the writing

Cont'd

- Drafting the Issue Headings
 - Issue headings and sub-headings should be positive statements that affirm, rather than negative statements
 - Ex: “The court should grant this motion because...” rather than “The court should not deny this motion because...”
 - Keep issue headings and sub-headings short and to the point
 - Maintain the conventions of your jurisdiction with regards to numbering and typeface of issue headings and sub-headings
 - If there are no applicable conventions, at least be consistent
 - The headings of your brief provide the outline or structure of the argument
 - They serve as a means to remain organized with your ideas and control over your writing
 - They act as a convenient locating device for a reader who wants to find a specific legal argument, without having to read through the entire brief
 - See examples in the text

Cont'd

- Drafting the Arguments
 - Strong advocacy is both a science and an art
 - It is a science because it requires one to maintain precise analytical ability (i.e., an appeal to logic)
 - It is an art because the analytical process must be presented in a creative and insightful fashion (i.e., an appeal to rhetoric or an emotional element)
 - Good advocates must master both of the above skills
 - Elements of an argument
 - An argument has two main elements: the assertion and the support
 - Ex: “The court should suppress the witness testimony because it is hearsay.”
 - What is the assertion? What is the support?
 - Before drafting your arguments, list out all the assertions you will make These should correspond to your issue headings and sub-headings
 - Then you should list out all the support you have for those assertions
 - Then You can decide the organizational method to present the argument to your reader such as the IRAC method

Cont'd

- The Prayer for Relief and Signature
 - It is the final section
 - It serves the purpose of requesting the court to the relief that your client wants
 - The brief must also be signed by an attorney licensed to practice in the jurisdiction
- Revising for Persuasion
 - Revise the brief for its clarity and organization and generally for persuasive techniques
 - Pay attention also to sentence structure, paragraph etc.
 - Techniques of revision include:
 - Isolate specific segments of your argument from the 'ground up'
 - Read your entire brief out loud to yourself
 - Have your peers or colleagues revise your work

CHAPTER -5



LEGAL PLEADINGS

Introduction

- Pleadings include:
 - The statement of claims
 - The statement of defense
 - The counterclaim
 - The memorandum of appeal, etc
- Pleadings serve part of the official record of a civil or criminal case
- Pleadings are oftentimes time-sensitive

Civil Pleadings

- Article 80(1) of the CPC:
 - “Pleading shall mean a statement of claim, statement of defence, counter-claim, memorandum of appeal, application or petition and any other document originating procedure or filed in reply thereto”
- Their purpose:
 - To formally initiate legal proceedings
 - To give an official record of the parties’ legal position regarding a cause of action and
 - To give notice of that legal position and initiation of the cause of action to a litigant’s opponent

Cont'd

- General requirements (80-93 of Art. cpc)
 - All pleadings must be written in “ink, printed or typewritten”
 - You should refrain from submitting any document to a court that is not printed from a word-processor
 - It must include a concise statement of the material facts on which the party relies for his or her claim or defence
 - It must be in a form as near as possible to one of the forms provided in the First Schedule of the Civil Procedure Code

Cont'd

- In response to another's pleadings, the pleader has the responsibility to raise:
 - All matters which show that a claim or counterclaim is not maintainable
 - All matters which show that a transaction is either void or voidable in point of law
 - All such grounds of defense or reply

Cont'd

- Denials of facts alleged in an opponent's pleadings must be specific
 - It is insufficient for a pleader to deny generally the grounds alleged by the opponent's statement of claim or counterclaim
 - A statement of defense must deal specifically with each allegation of fact asserted by the opponent's claim or counterclaim
 - Otherwise, the particular fact will be deemed to be admitted [Article 83]

Cont'd

- Specific requirements
 - For the Statement of Claim (a complaint) (222-233 of the cpc), it must contain:
 - The facts constituting the cause of action
 - The facts showing that the court has jurisdiction
 - The facts showing that the defendant is or claims to be interested in the subject-matter and is liable to be called upon to answer the claim
 - A prayer for relief
 - The specific relief sought by the plaintiff
 - Attaching an annex of the evidences
 - A complete list of those witnesses (if any)
 - Documentary evidences(if any)

Cont'd

- For the statement of defense (response or answer)
 - It gives notice to the court and plaintiff of the reasons why the plaintiff's position cannot be maintained
 - The statement of defense must contain:
 - Any facts showing that the claim is inadmissible for lack of jurisdiction or incapacity or any facts showing that the claim is inadmissible due to limitation;

Cont'd

- A statement of facts stating the material facts upon which the defendant relies upon for his or her defense;
- A specific denial of any fact stated in the statement of claim which is not admitted
 - The statement of defense must answer the point of substance of each and every fact asserted by the statement of claim i.e. evasive denial is not allowed
 - Facts that are not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, will be taken to be admitted (except against persons under disability)

Cont'd

- Counter claim
 - If the defendant submits a counterclaim, the plaintiff would have to prepare a statement of defence in response
 - Presumably, the counterclaim would include the same contents as the statement of claim, although the Civil Code does not explicitly express the requirements of a counterclaim

Criminal Pleadings: The Charge

- It is a formal initiation of criminal proceedings
- Informs both the court and the accused of the charges being prosecuted
- The charge must contain (108-122 of the crpc):
 - The offence with which the accused is being charged
 - The legal and material ingredients of the offence

Cont'd

- The time and place of the offence
- The law and article of the law against which the offence is said to have been committed
- The charge shall describe the offence and its circumstances
 - To enable the accused to know exactly what charge he has to answer
 - Such description shall follow as closely as may be the words of the law creating the offence