Chapter 23

WRITING PERSUASIVELY

§ 23.01. INTRODUCTION

With appellate briefs, we move from expository writing to persuasive writing. When you represent a client and argue to a court, you must do more than state the facts, explain the law and predict how a case will be resolved. You cannot merely present information to a court and rely on it to make a decision. You also must persuade the court to find in your client's favor.

Persuasion requires constructing a clear, concrete, and tightly written argument that presents your client's case in the best light. Learning to write persuasively is not a matter of mastering a grab bag of gimmicks or tricks. It also is not a matter of using exaggerated rhetoric. Lawyers and judges have seen all the tricks and flourishes too many times. If you rely on these devices, you will impress no one.

The chapters that you have read so far teach you how to write clearly and concretely, and how to construct a legal analysis. The following chapters teach you not only the mechanics of brief writing, but also how to write persuasively. You will learn that you must construct every part of the brief in a way that advances your client's position.

This chapter summarizes the methods of persuasion that the other chapters discuss. By presenting these methods in a single chapter, we offer you an overview and reinforce the thesis that persuasive methods are not simply a number of isolated techniques, but share a common theme. To reiterate, persuasive writing consists of constructing a well written, well reasoned analysis that puts your client's best foot forward.

Here is an outline of this chapter's lessons:

(1) Make your argument clear and credible.

(2) Write a well organized argument.

(3) Adopt a persuasive writing style.

(4) State your facts persuasively.

(5) Use equity and policy arguments.

(6) Use precedent persuasively.

§ 23.02. MAKE YOUR ARGUMENT CLEAR AND CREDIBLE

1. Make Your Argument As Simple As Possible

When you write a law school exam, you expect to get credit for identifying and discussing the critical issues. You also expect extra points for discussing issues that are barely arguable or exceptionally complicated, but that would be extremely artificial if raised in a "real world" legal argument. When you include complicated, artificial arguments in a brief, you cannot expect the rewards that you gained in law school. These arguments will distract the reader from the arguments with real persuasive power. They also may detract from your credibility. Stick to the arguments that have the best chance of winning.

You also can expect to hurt your case if you make your critical arguments sound unnecessarily complicated. You are more likely to persuade the reader with arguments that seem logical and simple and sound like common sense. Stick to your main arguments and write them so that they are easy to understand.

A busy judge has many cases to consider and many briefs to read. He or she does not have the time or patience to digest peripheral arguments or even major arguments that are not stated clearly. Thus, unnecessary complexity hurts your client.

Here is a simple method for rooting out complexity. Try to state your argument to a legal associate in a very few sentences. If he or she cannot follow your train of thought, revise your words and presentation and try again.

A major part of advocacy is to place your client's arguments in clear focus: What does your client want and why? Bringing the argument into focus requires striving for simplicity.

2. Write in a Persuasive But Credible Style

Some lawyers try to be persuasive by overstating their cases and by using emotionally charged verbs, adjectives, and adverbs. This tactic inevitably marks the practitioner as an amateur. Other lawyers state their cases without adding a persuasive edge of any kind. Their style also does the client a disservice. Strive for a style that is assertive, but reasoned and even a little understated.

Consider this excerpt from a brief:

> Next we have Wilmer's ludicrous explanation of the circumstances surrounding his secret taping of various people at the dental school. Instead of coming clean and admitting that he was gathering information for his malpractice case, Wilmer asks the court to swallow his tall tale about how he was merely furthering his education.

The writer has overwritten. Words like "ludicrous" and "swallow his tall tale" do not have the effect for which the writer is striving. Judges have seen too much of this hyperbole to find it persuasive.

Compare this version:

> Wilmer admits that he secretly taped various people at the dental school, but states that he was furthering his education.

Here, the writer has underwritten and does not advance the client's position. To be persuasive, strive for a style somewhere between these extremes. For example:

> Wilmer admits that he secretly taped various people at the dental school. However, he offers a curious explanation. He denies that he was gathering information for his malpractice case and instead, claims that he was furthering his education.

Here is another acceptable revision:

> Wilmer admits that he secretly taped various people at the dental school. However, he denies that he was gathering information for his malpractice case and instead, claims that he was taping for an educational purpose. He has not been terribly specific about how he would use the tapes to further his education.

These two revisions illustrate the proper tone. In the first revision, the writer draws attention to Wilmer's unbelievable explanation by terming it "curious." "Curious" adds flair, but not too much. In the second revision, the writer adds a final sentence to subtly highlight the improbability of the proffered explanation. In both, the writer juxtaposes Wilmer's explanation with what is apparently the real reason. As a result, the writer furthers the client's cause by painting the opposing litigant as untruthful and even pathetically comical.

§ 23.03. WRITE A WELL-ORGANIZED ARGUMENT

1. Structure Your Argument

An important key to persuasive writing is producing a document with a structure that is readily apparent. You want the reader to follow your argument as effortlessly as possible. Forgo stream-of-consciousness writing in favor of organization.

The key to organization is to write according to an outline and to put your conclusions first. Even if you are not the type of writer who is comfortable outlining first and then writing, you still can write first and then organize your results so that it fits an outline. That is, write the outline after you have finished and then, where necessary, reorganize according to the outline.

After you have written your first draft, make sure that you begin the discussion of each argument with a conclusion that applies the legal

argument to the facts of your case. Briefly outline your argument in the first paragraph so that the court has a "road map" of where you are going. Review your paragraphs for topic sentences. In most paragraphs, you will want the topic sentence at the beginning.

2. Put Your Best Arguments First and Develop Them More Fully

When we read a document, we usually pay more attention at the beginning. After a while, our interest wanes. In addition, as readers, we expect the important arguments to come first and to be developed in proportion to their importance. The lesson is clear. Place your most persuasive arguments first and allocate more space to them.

For example, suppose you are opposing the argument that a statute requires your client to give a neighbor an easement over her property. You have three arguments. First, the statute is unconstitutional. Second, in this case, the terms of the statute do not require granting an easement. Third, the neighbor did not follow the procedure the statute prescribes. Because courts are extremely reluctant to declare statutes unconstitutional, either your second or third argument probably gives you the best chance of winning. Decide which is your best argument and develop it fully. Then set out your second argument and give it less space. Finally, set out your argument on constitutionality and allocate it the least space.

As with all rules, there are exceptions. Sometimes you will decide to put your second best argument first, because it sets a good stage for your best argument. Then you will include your best argument. Nonetheless, in the overwhelming number of cases, you will do well to put your best argument first.

§ 23.04. ADOPT A PERSUASIVE WRITING STYLE

1. Be Concrete

When you argue for a client, you are not arguing for an abstract legal principle. You are seeking a holding that has practical consequences. In the same manner, judges are not interested in debating legal abstractions; they are interested in resolving specific disputes. The lesson: write about your case in concrete terms. In doing so you drive home the fact that your case is not an academic debate, but a conflict involving real people, particularly your client.

Consider this sentence:

The unforeseeability of the event absolved the defendants of liability.

This sentence is abstract. It could be about anyone. If you include facts about the relevant events, you make the issue concrete and compelling:

Because it was unforeseeable that a twenty-year-old trespasser would dive head first from a lifeguard chair into a shallow pool, the defendant is not liable.

Here is another example:

A reasonable adult in plaintiff's position would recognize that the attempt to execute a head-first, straight dive into the lake without prior awareness of the depth of the waters might result in severe injury from the collision of one's head on the lake bottom.

Compare this revision:

A reasonable adult like the plaintiff would know that if he dived straight down and head-first into a shallow lake without knowing its depth, he could hit his head on the lake bottom and become paralyzed.

In the revision, the changes are subtle, but telling. They make the sentence far more concrete and persuasive.

2. When You Want to Emphasize a Word or Idea, Place It at the End of the Sentence

In a sentence, the beginning and the end are the best places to put information that you want to emphasize. Use the beginning of the sentence for information already familiar to the reader, usually the subject. Also use the beginning for information that the reader expects or can understand easily. Use the end for new information that you want to emphasize.

Suppose you are arguing about which law applies to your case, Missouri law or federal law. If you are arguing in favor of applying Missouri law, you might write this sentence:

Missouri law, not federal law, governs this case.

Although this sentence states your position, it does not make the best use of the end of the sentence. You will make your point more emphatically if you end with "Missouri law." Therefore, you should rewrite the sentence this way:

This case is governed not by federal law, but by Missouri law.

Although this revision forces you to use the passive voice, the loss of the active verb is far outweighed by the power of placing "Missouri law" at the end of the sentence.

The same principle applies to sentences with more than one clause. Consider this sentence:

The court barred the plaintiff's complaint as a matter of law, because the plaintiff failed to notify the bank of the forgery within the time prescribed by the statute.

Suppose you want to emphasize that the court barred the complaint as a matter of law. You would rewrite the sentence this way:

Because the plaintiff failed to notify the bank of the forgery within the time prescribed by the statute, the court barred the plaintiff's complaint as a matter of law.

By placing the main clause at the end of the sentence, you stress the idea that you want to emphasize.

3. When Appropriate, Use the Same Subject for a Series of Sentences

By using the same subject for a series of sentences, you make it clear that you are telling the story of the subject. As a result, you give your sentences unity and direction.

Consider this paragraph from the brief of a convicted criminal defendant arguing ineffectiveness of counsel:

The client and the defense counsel did not meet until one hour before the trial. As a result, there was never the personal exchange between the two parties so necessary to a strong defense. The defense counsel never had the opportunity to observe her client. Thus there was no opportunity to judge his mannerisms and overall appearance, the fact being that the defendant, being somewhat quiet and shy, would not make a strong witness at trial. When he testified at trial, he did not come across well to the jury. The tactical error of placing him on the stand could have been avoided if more time had been spent with the defendant and a personal interview had been conducted.

The argument becomes much more compelling when the defense counsel becomes the subject of every sentence and of virtually every clause:

Until one hour before the trial, the defense counsel never met with the defendant and thus never had the personal exchange so necessary to a strong defense. Because she had never had the opportunity to observe her client, she could not judge his mannerisms and overall appearance. She therefore did not know that her client was somewhat quiet and shy and, at trial, would not come across well to the jury. By placing her client on the stand, the defense counsel made a tactical error that she could have avoided by taking the time to conduct a personal interview.

The rewrite makes it clear that the writer is discussing the failings of the defense counsel and detailing what she did and failed to do. As a result, the writer is presenting a persuasive argument for ineffectiveness of counsel.

§ 23.05. STATE YOUR FACTS PERSUASIVELY

At the beginning of your brief, you will have the opportunity to present the facts from your client's perspective. Judges expect your statement of the facts to be straightforward and accurate. They dislike rhetoric here and will form a negative opinion of your credibility if you attempt to mislead

them by distorting or omitting critical facts. Therefore, you must present an objective narrative.

Nonetheless, you still must write the facts as an advocate. Here is how. Stress the facts that favor your case and de-emphasize those that hurt it. Instead of stating your own opinions about the facts, report that someone else offered those opinions. In this way, you are stating a fact — what someone else stated —not your opinion.

This excerpt from a brief furnishes a good example. The plaintiff dived into a pool with only three feet of water and suffered severe injuries. The writer represents the defendant, the manufacturer of the pool.

> The plaintiff claimed that he perceived the water depth to be six feet and not its actual depth of three feet. At trial, several experts testified that this misperception was significant to their conclusion that the plaintiff caused the accident. As Dr. Luna, one of the experts, testified, if the plaintiff believed that the water was six feet deep, "his mental and physiological processes involving visual perception and judgment of his surroundings were impaired by his ingestion of alcohol and hallucinogens."

In this example, the writer makes the essential point without rhetoric or value-laden adjectives or adverbs. She does not call the plaintiff irresponsible or label him dissolute. She does not berate the opposing lawyer for pursuing a frivolous lawsuit. The writer simply reports the plaintiff's assertion and then reports the testimony of experts hired by the defendant.

The quotation from Dr. Luna is part of a sentence objectively reporting what happened at trial. Instead of quoting an expert, the writer might have stated the opinion as her own: "If the plaintiff believed that the water was six feet deep, his mental and physiological processes involving perception and judgment of his surroundings clearly were impaired by his ingestion of alcohol and hallucinogens." However, by placing the opinion in the mouth of another person, an expert, the writer makes it far more persuasive. (In the alternative, she might have attributed the opinion to Dr. Luna and then paraphrased his words in order to make the sentence better stylistically.) As you can see, it is possible to state facts in an objective manner and still write as an advocate.

§ 23.06. MAKE EQUITY AND POLICY ARGUMENTS

In most cases that go to trial and certainly in most cases on appeal, both parties have sound legal arguments. Therefore, the advocate must argue more than the law. You also need to argue the equities and social policy. To argue the equities means to argue that your client is the most sympathetic litigant and should win as a matter of justice. To argue policy means to argue that the legal holding you seek has good ramifications for society and your opponent's does not.

Here is an example. Suppose you represent a child whose mother was seriously injured in an accident. You are suing the party that caused the

accident for loss of parental consortium. In other words, you are arguing that the child should recover for losing the companionship and affection of the parent.

To argue the equities, you would enumerate the ways in which the child has suffered. You would mention activities that the child and mother used to share. You might quote the child reflecting on her loss. You thus would paint a picture of a child deserving to recover.

To argue policy, you would assert that as a general principle, the court should recognize the right of a child to sue for loss of parental consortium and should be liberal in finding that the loss has occurred in specific cases. Your policy argument might read like this:

> The importance of a child's feelings and emotions merit more than lip service. The loss of a parent is a devastating injury at least as important as a spouse's loss of consortium, which this jurisdiction recognizes. For these sorts of injuries, tort law is the appropriate avenue of redress.

Thus, while an equitable argument focuses on the particulars of a case, a policy argument generalizes. In the illustration, the policy argument states that recognizing this cause of action is desirable, that it is very similar to another tort that the jurisdiction already permits, and that its recognition is consistent with the development of tort law.

§ 23.07. USE PRECEDENT PERSUASIVELY

Judges prefer that their decisions be consistent with past decisions of their court. They also must be persuaded that their decisions are consistent with those of any higher court. Therefore, invoking favorable precedent is a powerful tool of persuasion.

The difficulty arises when the earlier case does not support your position or it is unclear whether or not the case supports it. You might argue that the earlier case was wrongly decided. However, such an argument is at cross purposes with the desire to claim consistency with existing case law. Therefore, an argument rejecting precedent should be an alternative argument of last resort. Your first argument should be that existing law supports your position or at least is consistent with it.

1. Argue That Adverse Precedent Is Consistent With Your Argument

To harmonize adverse precedent, argue that the contrary case is distinguishable from your case on its facts or that it does address the issue in your case. If possible, go one step further and argue that the policy underlying that opinion is the one you are advancing.

Return to your argument that the court should recognize a cause of action for a child's loss of parental consortium. Suppose that in another case, the same court rejected the argument. There, the court stated that because the

parent will receive compensation from the defendant, that compensation probably will give ample recovery to both parent and child. Therefore, according to the court, permitting a separate recovery for the child would be unfairly duplicative.

If, in that case, the only plaintiff was the child, and in your case, the child's claim is joined with the parent's claim, you can distinguish the cases. Argue that the previous case's holding dealt only with cases in which the actions of parent and child were not joined at trial. Argue that if the same jury is deciding the claims together, the risk of a duplicative recovery is very small. Then argue that, in both cases, the underlying goal is just compensation. Here, you are advancing this goal in a situation that will not result in overcompensation. With this argument, you distinguish the adverse precedent and also argue that you are furthering the same goal that motivated that decision.

2. Interpret Precedent Narrowly or Broadly, As Appropriate

As you have learned in law school, a holding is open to more than one interpretation. When you are dealing with precedent, select the interpretation that furthers your case. Depending on the facts of your case, this endeavor may require you to interpret the holding narrowly or broadly.

Suppose you are arguing that an adult should be able to recover for the loss of consortium of a parent. Suppose your jurisdiction has an earlier case permitting a minor child to recover for loss of parental consortium. Opposing counsel would interpret the holding narrowly to permit the cause of action only when the plaintiff is a minor child. However, you would interpret the holding broadly to permit any child to recover.

The way you deal with precedent is illustrative of the way you make a persuasive legal argument. Interpret the law and facts in a way that is both credible and in your client's best interest.