

Good Facts, Good Law, and Good Writing All Persuade

By Kenneth F. Oettle

This is the second of a two-part series on what does and doesn't persuade. The first column identified tactics that don't work, such as adverbial intensifying (e.g., *clearly, simply, ever*) and overquoting from cases and statutes. This column discusses what does persuade.

As a reality check, I asked my informal polling group what persuades. The following answers are representative: (1) "use compelling facts, ordered clearly and rationally, that lead the reader to a moral judgment in your favor" (this answer comes very close to home base); (2) "provide good law"; (3) "tell the reader in the first three paragraphs why you should win"; (4) "use nouns and verbs" (as opposed to adverbs and adjectives, which are editorials); (5) "be concise"; (6) "sound authoritative"; and (7) "don't bad-mouth the adversary." This last item is more about what not to do, but in this age of incivility, a respectful, low-key brief is like a breath of fresh air and thus is likely to have affirmative persuasive value.

Thematic tactics

Experienced attorneys know that good facts persuade. Facts are "good" if they cause the court to want to rule for you, either (a) to "do the right thing" or (b) to comply with the law. The court will almost always want to comply with the law because that's its job and because it won't

want to get reversed. It will also want to do the right thing.

A court will think that ruling for you is the right thing if the facts show that the other side deserves to lose, usually because it harmed your client (e.g., stole trade secrets) or because it failed to protect itself (e.g., neglected to safeguard the confidentiality of alleged trade secrets). The story of who did what to whom—the factual narrative—triggers the court's response.

Not surprisingly, when you have good facts, you tend to have good law. If facts cause a judge to feel that the other side deserves to lose, you can probably find a rule of law that favors you—because the law reflects what most people consider fair.

We don't tolerate unfair regulations or unfair laws, and we would not tolerate judges who continually make unfair judgments. Nor would the judges be happy with themselves. After all, who wants to do the wrong thing?

The lesson from these observations is twofold. First, before beginning persuasive legal writing, know the facts. If you are charged with finding them, make sure you do a good job. If you are fed only a few facts and asked to summarize the law, get more facts if you can. Otherwise, you are less able to shape a story to accommodate facts that the other side will rely on, and

you are likely to overlook cases that could help and to rely on cases that can be compromised by facts you don't know.

Second, work with the facts. Find the legal test and show how your facts satisfy it. Suppose, for example, that a bidder for a public contract proposes different equipment or different materials than the bid specifications require. The proposed deviation might even work better and cost the government less, but it will invalidate the bid if the deviation is "material."

You have two ways to approach this issue: (1) show why the deviating equipment or materials are important to the contract (i.e., "material"); or (2) find cases in which similar deviations or lesser deviations were deemed material.

Younger lawyers gravitate toward the latter: "We win because I have a case." Experienced lawyers tend to work with the facts. They analyze the facts to show why the deviation is significant and thus material. The more closely one examines the facts, the less one needs to analogize with other cases because the fairness of the result becomes manifest.

Nonthematic tactics

Not only the facts and the law but also how you present them bears on persuasiveness.

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Organization persuades by delivering a clear message and by showing that you are confident and in control. This gives the reader faith in the brief and in you. Conclusion: get organized; use an outline.

Brevity persuades because it puts the reader in a good mood (it's number one on many judges' wish lists); it makes your point accessible; and it suggests that your point is strong because you evidently have no fear of getting to it. Conclusion: eliminate all bloat, whether weak argument, redundancy, or unnecessary words. Strip away packing that conceals the point and transform the reading experience from a chore to a pleasure. Trim your prose the way a guitarist trims fingernails that would otherwise scar the fingerboard—to the nub.

Like other nonthematic elements of good writing, **emphasis** helps deliver the message. It presses the point through the membrane of resistance. It drives the point home, principally through the repetition of key facts (not conclusions) and by word placement—for instance, putting important words and phrases at the beginnings and ends of sentences and paragraphs.

Precision hones the thought. By making sure that every word says exactly what you mean, you avoid ambiguity that can divert the reader from the point.

Signposts that guide the reader include headings and subheadings, transitions, internal summaries, introductions to quotations, definitions of terms of art, and background facts that the reader needs for context. Provide these, and the reader will be grateful. Always ask yourself what the reader needs to know and wants to know.

Rhythm (e.g., parallel construction) and **sound** (e.g., alliteration and assonance) enhance the reading experience, making the reader more receptive to your message and to you.

Cleanliness shows respect for the reader and your argument. It not only avoids a bad impression but makes a good one. Conclusion: eliminate typos and mistakes in grammar, usage, punctuation, and citation form.

Create vigor with an **authoritative structure**—a sequence of irrefutable statements of law and fact that lock the reader into nodding mode and a firm tone that's neither strident (*blatant*, *outrageous*) nor timid (using *seems* or *appears* to excess). Forget the faux vigor of editorials (e.g., adverbs and ad hominem), which the reader knows to be biased.

The synergy of all these tactics produces clarity, which gets the point across and gives you credibility. If you are willing to be clear, then you probably aren't hiding anything. Basically, you earn credibility by telling the truth clearly, crisply, and with conviction. The more credible you are, the more persuasive you are because courts need to rely on your presentation of facts, caselaw, and argument. ■

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