



# The Art of Persuasion: The Written Word — Asking Adversaries

By Robert A. Creo

**T**his is the 18th installment in the Effective Lawyer series. This column, fourth in a series on the written word, explores how you can effectively draft documents intended to convince others to accept your positions and advance the best interests of your clients.

## Challenges and Goals

How do you present written information so that it is not discounted or dismissed as positional bargaining? Generally the same drafting principles and content model are recommended for demand packages, responses, proposals, contracts and other commercial and transactional matters. Your objective is to transform the assessment of the opposing stakeholders or otherwise entice them to engage in good-faith bargaining now, not later. Although variations are expected between claims and transactions, the subject matter, the stage of the representation, the nature of the clients and other factors, the platform and tenets of effective persuasion are surprisingly similar. If you take a reductionist approach to effective written presentations and peel them to their core, what you will see is an approach that is not difficult to follow. It is effective whether you are a claimant or defendant or are engaged in contractual negotiations.

The biggest hurdle is psychological and is based on our hardwiring and the way lawyers are trained. Legal education focuses on skeptical reactions to any opposition proposal, with an eye toward identifying all issues and ferreting out potential risks to clients. We are trained in law school and as novice lawyers to start from a place of doubt, to play defense first and always to keep our eyes wide open. This is compounded by human hardwiring in our critical thinking functions, known as cognitive bias. Cognitive biases are irrational or nonrational defaults that guide or influence our judgment and decision-making. In a prior column I introduced the concept of cognitive bias as it applies to demands. See “At The Table: The First Course — Demands and Offers” (*The Pennsylvania Lawyer*, September/October 2016). That column did not address, however, the cognitive bias commonly referred to as reactive devaluation.

Reactive devaluation occurs when a suggestion is discounted solely because it originated from an antagonist. It is a nonrational evaluation of the merits of the proposal. This dynamic usually exists at a subconscious level but can easily surface in speech or as an observable reaction in facial gestures or body language. You recognize and react strongly to contentions or proposals that seek concessions from you. The more you dislike or distrust the other advocate, the stronger the reactive devaluation. Your assessment becomes more subjective as you are influenced by your perceptions of the opponent’s character, credibility or reputation. If you have had prior negative interactions with opposing counsel, the potential for reactive devaluation grows. Frequent positive interactions breed trust and cooperation; the greater the number of uncivil encounters, the greater the likelihood for reactive devaluation. Even minor slights can intensify your dislike of opposing counsel. It is, therefore, often an uphill battle to produce documents that can get others to obtain your client’s objectives. Here is a model that I contend maximizes effectiveness.

## Mechanics and Logistics

The end product may be in any number of formats; however, it should be sent by regular postal mail or delivery service, with an electronic version following the expected mail receipt date. Although the recipient is likely to forward the electronic version to the client or others, the printed copy is a good idea so that the decision-maker has your material in the manner and order in which you intend it to be read and digested. There is a growing body of evidence that people retain more from reading a printed page than a computer screen. Many people, however, prefer to process documents electronically, so it is important to send the electronic version shortly after the hard copy is scheduled to arrive. You could also ask in your cover letter for an email confirming receipt of the hard copy and indicating that the electronic version will then follow. This electronic version should be in one continuous, long document for ease of reading and forwarding.

### Content and Best Practices

The cover letter should be factual, civil and respectful. It should contain a sentence on the relationships between the parties, state appreciation for their review and consideration of the materials, list the sections or documents contained in the packet and request a target date for a response. I recommend that it also contain the “ask” or demand/response. State your position early and concisely to make it easy to understand. Do not bury it in the end; lawyers are too impatient to follow merrily along while you make each of your points. They will start reacting defensively to each point or skim the document until they see the ask. Send enough originals for the lawyer, client and any adjuster or other decision-maker. They will react more quickly, and perhaps more favorably, to your positions when everything is tied up neatly and less work is required on their part to process it. Here is a sample from a transactional matter, a claim for defective work on a residence, which should fit on one page.

#### For Settlement Purposes Counsel:

Please find attached three identical binders containing the information and documentation supporting the \$125,000 demand from Jack and Jill for the claim of defective workmanship on the recent remodeling project completed by your client, ACME Homes. The binders contain, under each of the numbered tabs:

1. Three estimates of repair costs.
2. Annotated photos of the defective workmanship.
3. Narrative statement outlining the underlying facts of the claim.
4. Copies of email correspondence and text messages to the contractor.
5. Draft complaint to be filed in the Court of Common Pleas.



6. Timeline chart setting forth the chronology of key events.

7. Brief statement by me on liability and validity of our claim and damages. *Note:* This justifies consistency of positions and resolution with fair market value, community and objective standards, transactional costs, closure and relationship.

8. Copy of *Jones* case decided by the Superior Court in 2007 in support of the claim. *Note:* One case only for each distinct point of law.

9. Draft release and settlement document.

Please confirm receipt by email to Kelly, my assistant, at Kelly@lawfirm.com, and advise if you want the entire packet sent to you in electronic format. If additional information is desired, please call me.

We will take no action for 20 days. I shall call if I do not hear from you by then.

We appreciate your continued cooperation in this matter.

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Note that it is not necessary to use harsh language threatening suit or dire consequences for not acceding to the demand or missing an artificial deadline. The order, tone and degree of formality may vary depending on the nature of the case and the relationship between counsel or clients. A few interesting photos will always be examined and may have an emotional or other impact that is more difficult to dismiss than the written word. Photos also serve as a preview of what may be seen in litigation, arbitration or mediation.

The binder approach is superior for a number of reasons. Presenting the facts, arguments and support in a detachable manner in a binder, as opposed to a single, long document, is likely to increase the odds of your points being read carefully and considered thoughtfully. The distinct presenta-

tion of each section avoids the blurring of thoughts and reactions. In other words, by having separate sections, your opponent may more readily concede some of the issues and focus his or her response on narrower grounds. It is easier to communicate that the defendant does not dispute the information in “Tabs 1, 3 and 4,” than to refer to “paragraph 3 on Page 4 under the header.” The demand binder also creates a significant platform for later submission to mediation or pre-trial requirements. It allows sections to be updated or evidentiary documents to be added easily. It may also assist the client in understanding how claims are processed and what is necessary to prove and win a case. These external and internal benefits support creating written documents and best practices that promote the effective representation of clients. ☞



Pittsburgh attorney Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including having served as a salary arbitrator for Major League Baseball, a grievance arbitrator for the National Football League and a hearing officer for the U.S. Senate Select Committee on Ethics Office of Fair

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### References and Additional Sources

Ferris Jabr, “The Reading Brain in the Digital Age: The Science of Paper versus Screens,” (*Scientific American*, April 11, 2013).

Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press, 2017).

Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail — Every Place, Every Time* (St. Martin’s Griffin, 2005).

## TAKEAWAYS

- Make it easy for them to say yes.
- Send hard copy prior to electronic version.
- Use a tone that is respectful, appreciative and nonthreatening.
- Put your ask/remedy up front.
- Include visuals if possible; they are always looked at.
- Write for the other client, not for your own.

