



The Art of Persuasion: The Written Word — Briefs

By Robert A. Creo

This is the 17th installment in the Effective Lawyer series. This column, third in a cohort of five, explores how lawyers use the written word to communicate persuasively to courts, arbitrators and other decision makers. Up next will be positions, proposals and reports, followed by presentations to clients, attorneys and the public.

Looking My Way

Since 1979, I have read thousands of briefs and written arguments in my capacity as an arbitrator, as well as summary judgment and evidentiary motions and memorandum or pretrial statements filed with courts and/or submitted to me in preparation for a mediation session. For the purpose of simplicity, this column refers to all of these documents as briefs since they all have the common goal of persuading a third party of your desired outcomes.

A review of the literature, discussions with judges and my own experience lead me to conclude that there are common principles and pitfalls involved in writing persuasive documents. Judges Nora Barry Fischer, Mark R. Hornak and Lisa Pupo Lenihan, all of the U.S. District Court for the Western District of Pennsylvania, were kind enough to provide their comments via a series of emails. We are all grateful to them for taking the time to respond and for sharing their insights.

Who Reads It?

Be cognizant of each person who is going to read your brief. There are always audiences with different and even opposing agendas and perspectives. I recommend starting with a short checklist that you can annotate so that you can ensure that all mandatory points are included to address targeted readers. The usual cast of characters consists of the following:

- Deciders: judges, arbitrators and board hearing officers
- Decider helpers: tribunal clerks and staff
- Opponents: opposing counsel and representatives, including potential future opponents
- Co-parties: parties and participants generally aligned with your interests

- Clients: yours, others', clients with similar issues
- Public: Is the brief a matter of public record?

The goal of the brief is to persuade the decider to rule in favor of your client, so your written words should snowball to this desired effect. It is legitimate, however, to insert into the document specific portions or arguments for the benefit of other audiences. Sometimes lawyers include statements or positions solely for the benefit of their clients to show them that they are fighting on all fronts or because they are unable to persuade them of dead ends.

The brief should provide a roadmap or a template from which the decider can lift whole portions of the document into the findings, rationales or conclusions.

CONTENT

Briefs that hone in on the true judicial issues are more persuasive than ones that throw everything up against the proverbial wall in the hope that something will stick.

The Ask

Judge Fischer noted that among the court's biggest gripes are orders that are poorly drafted and incomplete. She speculated that these may be the unintentional result of using a form or having an associate or paralegal draft the order. She recommends that orders be drafted first and then the brief should aim to get that relief. Judge Hornak contends that the best advocacy directly tells the decider exactly what "order" the advocate wants entered and why the law and facts entitle his or her client to it. Here is an example of an effective ask:

On behalf of my client, I am asking that the court enter a protective order to bar the discovery of my client's psychological records, for three reasons. First, there is no claim in this case for damages that turns on any such information. Second, all of the counseling sessions involving client also involved his spouse, and are therefore subject to her invocation of a privilege, and she need not waive

it, as she is not a party in this case.

Third, the treatment provider will charge over \$1,000 for the preparation of such records and, on balance, that is a cost my client should not be required to bear, especially as to a matter that is simply not material to this case.

Judge Hornak commented that in this example he immediately knows what the fight is about and what the parameters of his decisions are.

Shotguns v. Snipers

A shotgun approach risks the contagious effect of having bad apples taint attractive ones. I believe that the more sophisticated and experienced the deciders are, the shorter your argument should be. Put your best argument first to hook the reader before going down the line. As you move lower in the pecking order, the number of words should be fewer, like an inverse pyramid. At times you may gloss over or abbreviate a tentatively losing contention since you may hope to develop better facts or hope for a change in the law, or to avoid laying it out in detail to make the argument crisper and more precise. Judge Lenihan advises that lawyers should focus on their best arguments and not include the kitchen sink.

Opposing Contentions

Do not ignore the strengths of the opposition, including precedent that squares with some elements of the case. These must be acknowledged and addressed head-on with your best shot, even if you are limited to “macro” contentions, such as contending that “on balance” the facts, law, equities, public policy, fairness, justice or context support your desired outcome. I have seen good arguments framed along the lines that a strict, technical application of the statute, regulation or precedent yields unexpected and unintended results, and that the tribunal has inherent discretion to interpret any “bad law” in a manner favorable to a just outcome. You cannot, however, make extreme, unreasonable or dismissive assertions that have no credibility, and use



language that has no support in fact, law or equity.

Get to the Point and KISS (Keep It Simple, Stupid)

We live in the age of rapid communication and are immersed in a whirlpool of multitasking and internet distraction. Plan the formatting, content and language to accommodate the distracted reader. Make it as easy as practical for the decider to absorb your points in any environment. Be conscious of how your argument will look and read on an iPad or smartphone. Consider how the printed version will read on regular 8-1/2 by 11-inch paper because many busy deciders may print it that way to read while watching television, during downtime at family activities (think swim meets or crew races), or in waiting rooms, airplanes and cars. Make key points user friendly to yellow highlighters on the move.

Judge Lenihan noted, “Formatting is much more important than people realize. If something is easy to read it is more likely to be read and understood.”

Lead. Place your main points in short sentences, typically at the beginning of paragraphs or sections. When a section is completed, go back and reduce or eliminate the number of conjunctions such as “and,” “if” and “but” by making shorter sentences.

Judge Hornak noted, “Very often, the arguments I hear/read have lots and lots of warm up language that really doesn’t matter in terms of the issue to be decided, and lots of it is simply ‘old movies’ about the history of the litigation itself.”

He suggests that in briefs for summary judgment, instead of lengthy paragraphs detailing the procedural record, simply state:

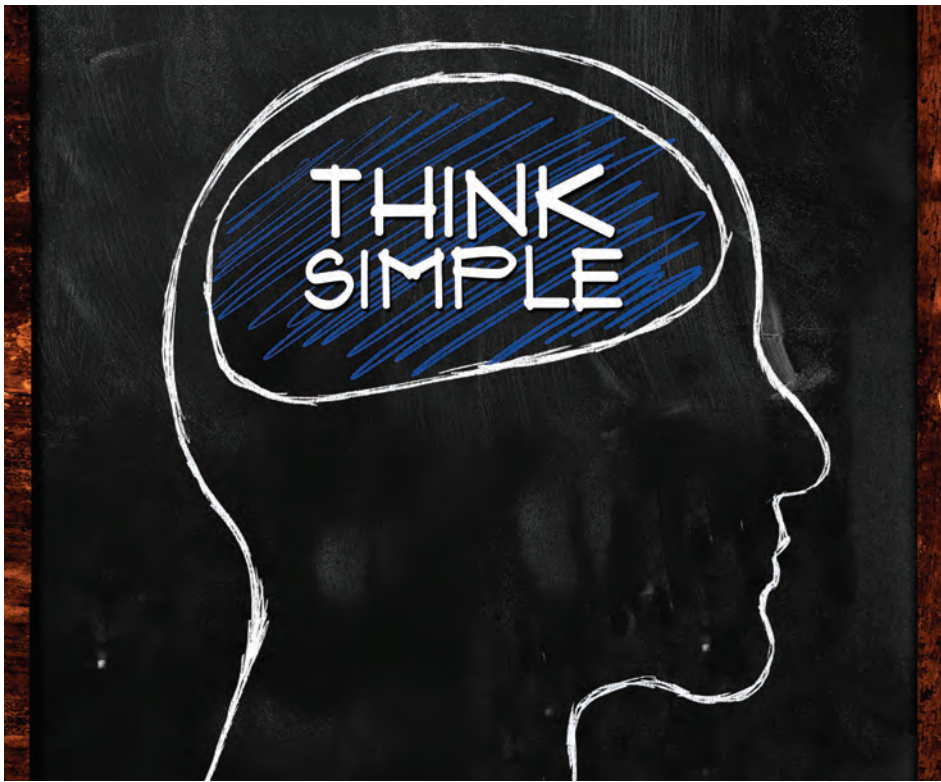
The discovery record is now complete, and it reveals that there is insufficient record evidence to allow a jury to conclude that there was a causal connection between the statements made by the plaintiff’s supervisor and plaintiff’s discharge. For that reason, the defendant is entitled to summary judgment in its favor on all claims.

Judge Hornak recommends only the shortest of “walks down memory lane.”

Words Matter

George Orwell (Eric Arthur Blair, 1903-1950), author of *1984*, *Animal Farm* and various essays, had six basic rules of writing:

1. Never use a metaphor, simile or other figure of speech that you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.



4. Never use the passive where you can use the active.

5. Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.

6. Break any of these rules sooner than say anything outright barbarous.

Do not show off your perfect SAT score, Scrabble championship or crossword puzzle excellence in a brief. If a conversational tone is convincing, use it.

Do not follow the convention of saying in detail what you are about to say, saying it again and then saying what you just wrote a few pages earlier. This may be considered by some as appropriate for jurors or laypeople, but it drives experienced deciders crazy. It makes them stop paying attention and skim or skip over the repeated portions. At times I want to scream at the brief, “Shut up, I get it, I am not stupid and I am paying attention.” To guide the reader along your own path, consider using a short outline, numbered lists, bullet points or changing the form of the information so that it is not repetitious.

Appellate briefs differ from trial briefs in many regards, so be deliberate in how you model them. Most large firms recognize this unique skill set by having lawyers dedicated only to appeals who are experienced with the tribunal and who know what to do and what not to do to avoid the Orwellian “barbarism.”

10 DRAFTING TIPS

Format and Style

1. Follow Procedure.

If the tribunal has formatting or other rules or preferences, follow them to the letter and not the spirit. For example, if there is a specified page length, don’t reduce fonts or line spacing in your brief to make it fit.

2. Don’t Use Footnotes.

Footnotes break the flow and distract readers by forcing their eyes to leave the paragraph and go someplace else — especially annoying if this requires scrolling or using the keyboard. Either the information is important enough to put it in sentence form within the paragraph or it should be eliminated.

3. Limit Block Quotes.

Long, verbatim quotes from statutes or cases will be glossed over by the reader. Don’t beat a dead horse. Hit the key language and do not overdo adding emphasis. Judge Lenihan recommends against long block quotes since these require extra concentration to read to determine what actually applies to the specific case.

4. Proofread, Proofread, Proofread.

Minor errors, including typos, are noticed and distract the decider. Lawyers are notorious for emphasizing 100 percent accuracy, even on irrelevant or immaterial details. In a brief recently submitted to me, the date of a board meeting where the

client took the action was incorrect in a number of places. I easily confirmed the correct date from the exhibits and utilized it in my opinion, but here I am writing about it! Someone other than the drafter should read a printed version. Professionals recommend reading backwards so that typos are not missed due to the tendency of our minds to take shortcuts to reduce energy expenditure and create efficient understanding.

Traps and Other Annoyances

Here are some tips that almost all decision makers should agree with:

5. Speak Plainly.

Avoid bombastic, sarcastic or exaggerated language. The decider is a professional judge or arbitrator who has been to lots of “rodeos.” He or she is unlikely to be “outraged” or “offended” or to find the opponent’s entire case “frivolous” or “preposterous.”

Judge Lenihan said, “I do not care what you think or feel. I do not want to know what the other lawyer did or said that annoyed you. Argue the law and the facts. Leave out the hyperbole.”

6. Don’t Get Personal.

Don’t make personal attacks on counsel, clients or others involved in the case. Judge Fischer indicated that she and her clerks react poorly to snarky comments in a brief. Focusing the court’s attention away from the merits and diminishing your own character is not effective advocacy.

7. They Get It.

Avoid definitions or explanations of common legal doctrines, Latin words or other terms of art. Judge Fischer indicated that counsel should spend more time on the persuasive facts and arguments than on the legal standard. If the decider does not know it by now, you are probably in the wrong forum or in trouble, regardless of what you try to explain. Quickly state how your case factually or as a matter of law fits the legal principle.

8. Avoid Double Negatives.

During cross-examination, even very experienced advocates ask questions using double negatives. I think this is a product of the human tendency to issue a challenge, make a subtle argument or expressly chal-

lenge witness credibility. I find it annoying and, although the answer may be understood in the context of listening, it is often unclear when reading. Written communication is best understood if framed affirmatively and when it does not involve negatives, especially double negatives.

9. Quoting the Record.

If you are quoting testimony, I prefer a small indent and a verbatim “cut and paste” showing the full question and the full answer. I do not like ellipses. I am going to have to go back and read the original transcript to confirm the accuracy anyway and will usually read a few pages before and after to make certain of the context.

Judge Lenihan recommends that you make it easy for the reader to find what you are referring to in the record. She does not want to spend hours trying to find the statement in the deposition that was attached in its entirety.

10. No Spinning, No Shading.

Misleading the decider will be counterproductive. Judge Lenihan noted that the federal judges and their clerks read the cases cited by counsel. She continued, “The worst thing a lawyer can do is to state that a case says something it does not. That obviously causes a complete loss of credibility and does extreme damage to the argument.”

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Practices. Since 1996, he has been on the mediator roster for the Court of Arbitration for Sports in Lausanne, Switzerland. He is an adjunct professor at Duquesne University School of Law and served as an adjunct professor at the University of Pittsburgh School of Law for many years. He was recognized by *Best Lawyers in America* in both 2014 and 2017 as Pittsburgh Mediator of the Year. He is the principal of Happy! Effective Lawyer (www.happy.lawyer), an initiative focusing on lawyer contentment and peak performance. His website is www.robertcreo.com.



TAKEAWAYS

- Get to the point, fast.
- KISS.
- It is a narrative, not a formatting puzzle.
- Do not use footnotes. Minimize block quotes.

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