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## Advocacy Targets Human Tendencies

Readers are vulnerable to tactics that would be lost on computers

By Kenneth F. Oettle

An associate asked how brief writing differs from memo writing beyond the usual barbs and puffery, such as “Plaintiffs are trying a bold end run ...,” “Defendants woefully mischaracterize the evidence ...,” and “It has long been held.” The associate wanted to know, essentially, how to ramp up the level of advocacy in a brief. She is comfortable with the expository style of memos, but she finds briefs a challenge.

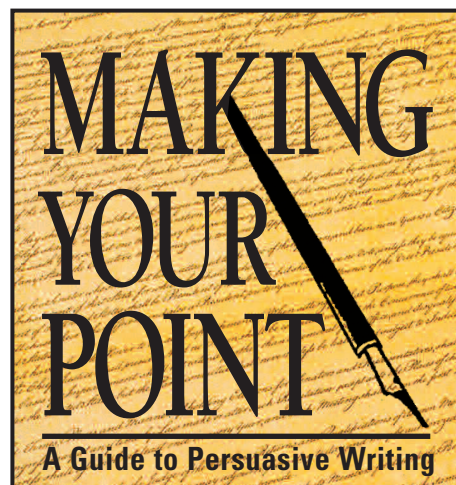
Advocacy may seem mysterious, but like swimming, it can be learned by most everyone to a reasonable degree of competence. You just have to conquer your fear of appearing overzealous; develop respect for the facts, for the power of a strong opening, and for the intricacies of language; and learn not to overstate your case.

Rhetorical strategy, i.e., advocacy, targets human tendencies. If humans were computers, much of what we learn about persuasive legal writing — mostly the hard way, by having our drafts marked up, or worse, by losing — would be unnecessary. This column and a sequel will discuss how the techniques of advocacy take advantage of (oops — I mean how the techniques of advocacy *are shaped in light of*) human tendencies.

### Strong Openings

Law school writing teachers, prac-

ticating attorneys and books on legal writing all advise us to begin powerfully and lead from strength by crafting a Preliminary Statement around our best facts and by placing our strongest point first. Yet less experienced lawyers often do just the opposite. They start slowly and assume a neutral stance.



One associate explains that he is wary of appearing overzealous and having his brief dismissed as a mere sales pitch. He feels that his presentation will be more credible if overt persuasion is deferred until later in the brief, at which time the sheer weight of support already developed would have accomplished most of the persuasion for him. That way, he reasons, the material can, in essence, speak for itself — always a good tactic — and he can reduce the risk that he might be seen as just a huckster.

This is not a foolish concern. It shows an instinct for understatement that in the long run provides sturdier support for a writer’s credibility than a tendency to embellish. Instinctively, the associate knows he shouldn’t speak for the material, that it should speak for itself, but he gave himself a false choice — either be a salesman, with all the negative connotations that entails, or let the material sell itself, cumulatively and slowly.

A middle ground, fundamental to advocacy, is to begin with your best facts and let them speak for themselves. That way, you aren’t a huckster, and you don’t have to bring all your material to bear — all the facts and all the law — before you can make a sale. (Recall your last *tolerable* experience buying something big, like a car. Weren’t you persuaded when the salesperson set forth the best facts?)

Briefs should begin vigorously, i.e., by presenting the best facts early to strike a telling blow and create momentum. A brief should mobilize the reader’s inclination to take sides, which is just like a sports fan’s inclination to take sides and root for one team, usually the underdog, when the fan’s favorite team isn’t playing. The wise brief writer looks to satisfy that need as quickly as possible.

Readers also lack patience, especially in this hyper-informational age. Feeling rushed, they jump to conclusions. We want them to jump in our direction, particularly because they tend to remain committed to the side they choose first. Because they resist change, they interpret additional information to support their initial hypothesis. You want their initial hypothesis to favor you.

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A strong opening also creates the appearance of strength and develops momentum. The reader hasn't read the rest of your brief, so as far as the reader knows, you have a strong case overall. This initial impression is likely to endure. As it is said, "First impressions are lasting impressions."

Finally, a strong opening conveys confidence. If you show confidence in your product, you have a better chance of making a sale, not because the product is better but because buyers who have imperfect knowledge are willing to fill the gap with faith. If the salesperson has faith in the product, so may the buyer. Faith is catchy.

Is the product better because the salesperson appears confident in it? No. But deep down, buyers want to buy, and readers want to believe. A reader can rationalize that the writer wouldn't exude confidence if the product weren't good.

Are We Being Manipulative?

Some writers resist using rhetorical

tactics that seem to smack of manipulation, in part because of moral sensitivity and in part because of fear that the writer may, if caught at it, be perceived as having to use rhetorical tricks to compensate for a weak case. These are reasonable concerns, but starting strong — the tactic discussed in this column — is not manipulative in the pejorative sense of that word. It's about the order in which facts are presented. The writer determines the optimum order based on the way readers (humans) process information. The tactic isn't deceptive. To the contrary — it is helpful and expected.

### **Puzzler**

How would you tighten and sharpen the following sentence?

Absolute definiteness and certainty is simply not required, but rather reasonable certainty is sufficient.

Forget "simply." Though it adds

emphasis, it does so from an editorial perspective, imposing the writer's attitude. In effect, the writer is telling the reader what to think. Readers don't like to be told what to think. Also, drop "but rather," which is awkward and unnecessary.

You probably don't need both "definiteness" and "certainty" to set up the dichotomy between "absolute" and "reasonable." Certainty should be enough.

In a close call, I would go with the passive construction "is sufficient" rather than the active verb "suffice" because the "is" structure parallels the structure of the first part of the sentence; because the focus is on a state of sufficiency, which is a passive concept; and because "suffices" may be a bit highbrow for some readers.

I use a semicolon because the thoughts are closely related.

The new version:

Absolute certainty is not required; reasonable certainty is sufficient. ■