

## The Rhetoric of Persuasive Writing

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In a way, all legal writing is, of course, “persuasive”: You are always, at the very least, trying to convince your reader that you have a competent command of your subject. But persuasive writing of the litigation variety is a special, and often misunderstood, challenge that deserves special attention.

A persuasive brief requires mastery of three different skills, only the last of which this article will consider. First, and most obvious, a writer must be able to “think like a lawyer”—to understand how to construct a strong, well-supported legal argument. Second, a litigator must be able to “think like a writer” about how to communicate information so that readers can understand it easily and quickly.

Finally, persuasive writing requires another step that takes place in between thinking like a lawyer and like a writer: “thinking like a rhetorician” about the difficulty of “moving” a reader’s mind from one location to another. Rhetoric, however, is seldom studied even in college. As a result, legal writing instructors may have to provide a crash course as a foundation for teaching their students how to think about persuasion. This column does not attempt to offer that course. But it will show how rhetoric yields two insights that can help your students learn to persuade and, at the same, to understand why lawyers can disagree so strongly about whether a document is persuasive.

### The Persuasive “Attitude”

From childhood onward, we associate persuasion with exhortation, if not coercion—with table-thumping and insults and raised voices. Novice litigators tend to translate these habits onto the page. They seem to take for granted that an argument consists of two people pounding each other. The one who pounds the hardest and longest wins. That this strategy seldom, if ever, succeeds does not deter wave after wave of new lawyers from leaping to the attack.

Is there a better alternative to this familiar, and seemingly natural, approach? There is. We first encountered it in an observation attributed to one of the master persuaders of all time: Ted Williams. (If your students don’t know who this is, shame on them. Stop the class and talk 20th-century culture for a while.) He was once asked how he was able to hit so many home runs. His response was that, when he went to the plate, he did not actually try to hit a home run. Instead, he attempted to crawl inside the pitcher’s head, to “know” the pitcher better than the pitcher himself did. Like a jujitsu fighter, he wanted to mold his batting to the pitcher’s strengths, not only his weaknesses.

What Williams understood was that his best results came from *reducing* the amount of effort he needed to exert when he swung the bat. Rather than attempt to clobber every pitch—rather than trying to destroy the pitcher as his “enemy”—he simply wanted to send the *ball* in the right direction. That required more knowledge of dynamics than of annihilation.

The best translation of that approach into the world of litigation comes from someone whom many might describe as the Ted Williams of the law: Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. In a chapter of one of his books,<sup>1</sup>

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<sup>1</sup> The formula in the text is adapted from Richard A. Posner, *Overcoming Law* 498–530 (1995).

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he addressed the question of persuasion in terms Ted Williams would have applauded. The best briefs, he noted, were those that *reduced* the amount of persuasive force that the writer felt obliged to exert. The most convenient way to summarize his point is with the following mock-physics formula:

**Persuasive force = distance x resistance**

The amount of persuasive force you will need to “move” a judge’s mind from one location to another is a function of the “distance” you want that judge’s mind to go, legally speaking, and the “resistance” or “friction” that hinders that movement. Your goal is to reduce the force with which you need to argue by reducing both the distance and the resistance. You point out that your argument requires the judge to go only a very short distance (“You’ve already taken much the same approach in a very similar case, your honor.”), and your opponent’s argument requires a long journey (“Your honor, they are asking you to stretch the law inappropriately.”). And, through clear and concise writing, you reduce the reader’s resistance by making it as easy as possible to assimilate your argument.

### The Elements of Persuasion

The study of rhetoric by the ancient Greeks produced much more than just a general strategic temperament, however.<sup>2</sup> They dissected the nature of persuasion into certain basic elements—an approach that continues to be the tradition today. But to be relevant to a modern legal argument, these elements must be updated.

The Greeks were interested in the nature of a persuasive *speaker* rather than a writer, and they were also interested in a common and dangerous situation: a leader’s attempt to sway the opinions and actions of the *hoi polloi*, the unwashed, uneducated masses. The Greeks then divided the persuasive situation into three aspects: the qualities of the speaker, the argument he would propound,

and the audience that would hear it. These elements have become familiar to us as *ethos*, *logos* (and *axios*), and *pathos*.

*Ethos*: According to Greek rhetoric, an effective speaker was one whose “character” could dominate an audience—one who could move a rabble from one place to another by force of personality. In essence, the speaker would attempt to have the audience look “up” to him. This required an attractive persona to whom the audience would defer, a persona based on popularity and prestige, and a message that appeared to be steeped in righteousness.

Those qualities are quite foreign to a modern effort to persuade in a legal context. Judges do not want to have lawyers attempt to dominate them. (Nor, however, do they want the opposite: lawyers who grovel before the bench so that the judge comes to look “down” on them.) Instead, they respond positively to a writer whom they can look “at” as a professional equal, someone on whom they can rely to argue truthfully, rationally, and calmly. This requires a credible persona, one that has the qualities of veracity and integrity and professionalism—and that does not try to have the judge look down on opposing counsel: Sneering at the other side, although remarkably common, is off-putting to any sensible judge.

*Logos and axios*: Although this concept is the background for the familiar topic of “logic,” which most of us suffered through in college, the Greeks understood this idea in the persuasive context as something much less rigorous: merely “plausible” reasoning—reasoning that was good enough to get a rabble to agree. Thus, the speaker was attempting to think “for” the audience, which was largely incapable of thinking for itself. Greek rhetoric also developed the useful idea of *axios*: the outcome of the speaker’s argument should be “worthy” or admirable from the audience’s perhaps selfish perspective: protection from enemies, punishment of the unpopular, and the like.

<sup>2</sup> Sources discussing rhetoric theory are, of course, legion. To name just one, see, e.g., Eugene Garver, *Aristotle’s Rhetoric: An Art of Character* (1995).

In modern advocacy before a judge, the argument must be more than merely plausible: Although it need not meet all the tests of formal logic, the argument must reflect, and be based carefully within, the systemic reasoning of the law. It must accept the constraints of internal consistency and logical coherence that judges impose on themselves (we hope), even if that means abandoning an attractive line of pseudo-reasoning or an easy hyperbole. In effect, judges look for lawyers who can think “with” them as a professional equal, not an over-the-top advocate for a position. And a worthy argument will be one that produces “principled” results—results that “do justice,” and can therefore be the basis of judicial pride.

*Pathos*: This is the most misunderstood of the rhetorical elements. It is associated with the emotions, and the attempt to use an audience’s agitation or excitement to persuade them to accept a conclusion. But because the Greeks were focused on an audience that was not of the same class as the speaker, they understood *pathos* as the speaker’s effort to *invoke* emotion in an easily swayed audience, by exhibiting the emotion himself and more or less explicitly encouraging the audience to feel it.

Although this technique is often employed in modern litigation, it is most often a mistake. A frequent example is the tendency of litigators to

characterize testimony in the hopes of arousing sympathy or outrage: “That witness was a liar!” This, more often than not, inspires skepticism. The better approach is instead to *evoke* emotion: to lay out calmly a story or an argument that eventually arouses an emotional response in the readers—but a response that seems their own spontaneous reaction rather than one forced on them. The facts are presented in such a way that the reader begins to think, “Wait a minute. I bet that witness was lying.”

Persuasion works best, then, when it is largely invisible. It results from creating a path down which judges can travel smoothly and comfortably toward a conclusion they believe they would have reached on their own, not because they were pushed toward it. As hard as this lesson may be, your students should learn to resist their penchant for regarding written advocacy as warfare. Their goal should be not to become their opponent’s most virulent enemy, but to become the judge’s alter ego. That requires a persona with whom judges can deal as an equal, an argument that judges would be proud to make their own, and the self-confidence to let judges reach their own conclusion about which side deserves sympathy or opprobrium.

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