

Introduction to Part 2 Transitioning from Predictive to Persuasive Legal Writing



As lawyers, we wear many different hats in our relationships with our clients. One role we play is one-on-one counselor, offering (hopefully) sage advice to our clients in times of conflict or opportunity. When we communicate in a confidential, privileged, or private manner with our clients, or about our client's circumstances with our colleagues in a law office environment, we perform *predictive* legal analysis—analyzing the strengths *and* weaknesses of our client's position on a legal issue in light of the applicable rule and then anticipating the most likely outcome. Thus, in the first semester of law school, professors and students typically embark upon legal writing instruction by focusing on *predictive* legal writing—analyzing our client scenarios in an objective manner, looking at legal issues from all angles. Then, in the second semester of law school, we usually transition to *persuasive* legal writing, which serves a different purpose and audience than predictive analysis. Now donning the hat of advocate rather than counselor, attorneys use persuasive legal writing to communicate externally with opposing counsel (in a litigation or business transaction), policy makers (legislators or other governmental entities), or decision makers (judges, arbitrators, or juries).

This book offers one method to master the lawyer's technique of persuasive legal writing. Many legal writing professors call upon the wisdom of Aristotle to introduce students to three key elements of rhetorical persuasion: *logos*, *pathos*, and *ethos*—logic, emotion, and credibility. This book seeks to situate Aristotle's triptych in our Millennial legal environment, providing law students and new lawyers with practical advice on how to incorporate his wisdom into everyday lawyering tasks.

Logic

To convince opposing counsel or a decision maker that a client's position is the correct one, a lawyer must—at a minimum—offer a logical argument. To do so, persuasive legal writers build upon the foundational steps of predictive writing by using structural frameworks like IREAC (Issue, Rule, Explanation, Application, Conclusion) or CREAC (Conclusion, Rule, Explanation, Application, Conclusion), or variations thereof. Persuasive legal writers pinpoint the client's narrow legal issue, research the applicable rule to extract key elements or factors, select helpful (and ideally, favorable) precedent to illustrate this rule, and then apply the rule to the client's facts. Here, instead of weighing the strengths and weaknesses of the client's position and then objectively predicting an outcome (as a lawyer would in an internal law office memorandum), persuasive legal writers focus on the strengths of the client's position and lead the reader down a logical path toward the desired result, stating a concrete conclusion that favors the client. To enhance logic, or *logos*, in a piece of persuasive writing, lawyers use a clear organizational structure, create rule frameworks identifying elements or factors, include well-crafted Rule Explanations of cases (using formulas like Facts + Holding + Rationale and Signal + Cite + Explanatory Parenthetical), and use Rule Applications to link the elements or factors of the rule to the client's facts in a way that demonstrates to the reader that the desired outcome makes sense. To convert a good piece of legal writing into a great one, a logical legal writer avoids making flawed assumptions about the breadth of the reader's knowledge and—like a good roadmap or global positioning system (GPS)—adds signposts, prompts, directions, and smooth transitions so the reader can follow a well-hewed path to the desired result.

Emotion

In predictive legal writing, lawyers often adopt a neutral tone, weighing good and bad facts in light of both favorable and unfavorable law to predict a likely outcome. In persuasive writing, to convince a reader, effective legal writers paint a vivid picture of the client's story, injecting an appropriate level of emotion—or *pathos*—into the narration of the client's circumstances. To tap into *pathos*, lawyers shape a theme, or a "theory" of the case, that will resonate with the reader. Theme-crafting might flow more readily when a lawyer represents a person who suffered a grave injury or a tragic loss at the hands of another, or when handling criminal matter where concepts like freedom and punishment are at stake. However, mindful lawyers representing seemingly impersonal corporate or business clients in financial transactions also employ case themes to foster an emotional connection between the third-party audience and the client's circumstances. For example, lawyers litigating contract disputes might brainstorm meaningful

themes about promises kept, economic growth, or the American dream. Attorneys representing clients in intellectual property disputes might innovate case themes about ingenuity, encouragement of ideas, and respect for hard work and originality. The *pathos* aspect of persuasion gives a lawyer permission to flex her creative muscles and construct the equivalent of a 30-second Super Bowl ad for a case—one that can be woven into briefs, oral arguments, and trials and convey a consistent message about why the client's preferred result in the case is the just one.

Credibility

An argument with *logos* and *pathos* aplenty will fall flat if the audience does not trust or believe the messenger. Thus, an effective persuasive writer establishes credibility with the reader through (1) accurately describing the parties' factual circumstances; (2) conducting thorough research about the legal rules; (3) making intelligent choices about which precedent (favorable and unfavorable) to illustrate; (4) respecting and adhering to court rules and procedures; (5) mindfully proofreading and cite-checking; and (6) conveying professional courtesy to opposing counsel and the ultimate decision maker(s). In Chapter 2 invites law students and new lawyers to consider their professional personas. As we learn how to become persuasive legal writers, we will revisit the concept of professionalism as a tool for enhancing the *ethos* of persuasive legal writing.

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While this book will touch on all three components of being a persuasive legal writer—*logos*, *pathos*, and *ethos*—persuasive style will bloom in different forms for each writer. During this learning process, take time to consider your personality and style of persuasion. When you want something—either for yourself or for another—how do you communicate most effectively with other human beings? Are you tough? Collaborative? Subtle? Solution oriented? Crafty? Methodical? Passionate?

Drawing upon the theme of mindfulness, this book encourages you to be the most influential version of your *authentic* self as you write persuasively. Not every attorney needs to be a podium-pounding orator to convince opposing counsel, a judge, or a jury to embrace a client's position. You will serve your clients best by tapping into and developing your personal persuasive strengths; yours might be elegant writing, well-reasoned logic, creative theme development, or collaborative problem solving. As you work through the second half of this book to understand the important structural framework of persuasive legal writing, be open to the process of learning about yourself, identifying strengths that you might not yet realize you have, and honing those skills to develop your persuasive legal voice.