

Your Skills: The Key to Persuasion is Credibility

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Thinking about doing your first appeal? Maybe your second or third? We're writing to help you be persuasive.

Teachers have been writing about persuasion since the classical Greeks. They described the three elements as reason, passion and personal credibility.

You can find volumes of advice about writing persuasive legal reasoning. We're not going to repeat them.

Advice about appellate practice uniformly says don't try passion. Whether this is so is a cutting-edge subject. We will only barely touch it.

How to be credible? You can be a personally credible brief writer even if you are writing to a court in which you have never appeared. You have a head start if you don't have a bad track record with the court.

First, you need to understand some things about your audience: appellate judges and staff attorneys. When they pick up a brief they are natural skeptics. They know you are selling something. You need to show them you are an honest seller. They are pragmatists; they want to solve the problems of this case without doing harm. They dislike abstraction and appreciate being shown your points by concrete illustration.

To demonstrate honesty and overcome skepticism, be sure to follow these seven rules about the basic structure of a brief:

1. Provide a record reference after every factual assertion. This signals you are an honest master of the facts.
2. Provide a legal citation (including a pinpoint cite) for every statement of law. This signals you are an honest master of the law.
3. Put the record and legal citations in the body of the text, not in footnotes. This shows you respect the reader. Don't worry that citations clutter the brief or break up the flow. Appellate judges and staff attorneys are experts at reading through record references and citations. Most appellate judges dislike the practice of relegating citations to footnotes. This is especially true of the many appellate judges and staff attorneys who read briefs in PDF form because scrolling to find footnotes is particularly annoying.
4. Provide the full text of every important statute or constitutional provision. This shows you are confident and candid. Do so in the body of the brief if the full text isn't too long. Otherwise, include a statutory appendix.
5. Check every quotation. Few things can destroy credibility faster than a material misquotation.
6. Obey the applicable rules of court and follow the applicable style manual (e.g., the California Style Manual for appeals in California state court). This shows it isn't your first rodeo.

7. Don't scream with typography. Loud or excessive typographical emphasis signals lack of faith in one's own reasoning and the reader's. Try to emphasize key language by your choice of sentence and paragraph structure. If you must use typographic emphasis, choose only one format for the whole brief. Pick between italics and underscore. Never both, and never bold, except perhaps for your heading formats.

Of course, your substance must convey your credibility, too. Here are principles that apply regardless of the subject of your appeal.

Be honest about the standard of review and don't make arguments inconsistent with the standard of review. Taking a ridiculous position on the standard of review will ruin your credibility, as will failing to acknowledge the proper standard. If the standard of review and related presumptions — such as the presumption that a jury decided disputed facts in a manner supporting the judgment — saddle you with bad facts, acknowledge those bad facts and explain why you should still win. Don't ignore them, because the court and your opponent will not.

Also be honest about opposing parties' good arguments. An appellant's brief that presents only self-evident, irrefutable truth raises the question how any trial judge could be so ignorant or foolish. The appellate judge or staff attorney will search for what you have omitted. You lose credibility and amplify the effect of the opposing position if the judge finds you omitted a potentially valid alternative perspective on the case, a competing rule, an exception to the rule, a conflict in case law or the like.

Remember that appellate judges (unlike some jurors) try to approach issues analytically rather than emotionally. Overt appeals to emotion, such as sympathy for an injured party or disgust over a party's violation of good morals, are likely to backfire with appellate judges, especially if it appears you are substituting emotion for sound legal analysis.

Some rhetorical practices that are (regrettably) common in trial court briefing are credibility-sapping with appellate judges. The worst is the personal attack. Unless your brief argues for reversal because of judicial misconduct, never attack the integrity, intelligence or diligence of the trial judge. This applies also to soft attacks, such as ascribing a motive to the judge. We caution against mentioning a judge's name, unless there's an important reason to distinguish between orders of two or more judges. Personal attacks on a judge relegate you to the level of crackpots and hotheads.

Also, do not attack opposing counsel. Suppose your opponent has played fast and loose with the record or has misquoted an important statute or case. These are great opportunities for you. Point out the errors in neutral language and correct them by stating the true facts or quotation. Don't impute a motive to the opponent and particularly don't accuse him of trying to "mislead" the court. You insult the appellate staff attorneys and judges by signaling your fear that they could be fooled by a crooked advocate. Use objective words like "misstate" or "misquote." If you mismanage the opportunity given you by a dishonest opponent, the court may treat both of you as school yard squabblers, equally at fault. Never mud wrestle a pig. You both get filthy, but the pig loves it.

Banish inflammatory adjectives — like "blatant" and "outrageous" — from your appellate vocabulary. The logic of your arguments, not the decibel level of your rhetoric, should do the persuading. It hurts your credibility if your brief resorts to "screaming in print" because you suggest that your arguments cannot persuade on their own merit.

If you apply the practices we have discussed, the tone, structure and appearance of your brief will convey that you are an honest advocate whose arguments are worthy of attention. You will be at least one step ahead of (the sadly large number of) lawyers whose written products speak carelessness, disrespect or deception.

Attorneys

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