Chapter 17: Persuasive Writing

# What is different between predictive and persuasive writing?

Your written product shifts from advisory to advocacy. Persuasive writing argues for a particular outcome that will benefit the client. When you write documents that should persuade, you have a position to promote, and your writing should reflect that. Later in this chapter, we will look at tools that you will use to present facts and analysis in ways that can convince the reader to agree with you.

# What is the same with both predictive and persuasive writing?

You still have to tell the truth and you cannot omit legally or factually significant details because they are not beneficial for your client. You still will use your tools of rule and case synthesis and you will still organize your analysis using CREAC. None of the basic analytical skills change; it is the presentation of what your analysis reveals that you alter.

# What are types of persuasive legal documents?

Types of persuasive documents include, but are not limited to:

1. Demand letters
2. Settlement letters
3. Complaint
4. Answer
5. Motions
6. Trial Briefs
7. Appellate Briefs

# How do I persuade in my writing?

There are three common methods to persuade your audience: *logos*, or logic; *pathos*, or emotion; and *ethos*, or credibility. Logical arguments appeal to the reader’s logical side through incisive legal analysis and reasoning using the CREAC structure. Emotional arguments can drive the reader to want to give your side the relief it is seeking through an effective and cohesive narrative because it feels right. Finally, you maintain credibility with your audience through being honest, accurate, and professional; logic and emotion do no good if the reader does not trust you. Through your writing you can use each of these methods to appeal to your reader to find in your favor. There are many tools that you can use to make your writing persuasive and still remain logical and credible. Below is a list of tools and a quick explanation of each one.

# Tools to Persuade

**Theory of the case:** Developing and using a cohesive theory throughout your brief helps your reader understand the law and facts in the light in which you want the reader to see them. A successful theory captures what is essential for your side to win and then weaves those essential points into the entirety of the brief. Identify your strongest points first. Also identify the easiest-to-understand argument for why your side wins. By effectively developing and using a theory of your case, you will ensure that you have a coherent brief that has no holes or gaps and that explains everything the reader needs to know to find for your side.

**Structure and Organization:** First, follow the format that you are told to use by the local rules (or professor’s instructions). Use your CREAC structure for the argument and citation of authority. Lead with your strongest argument. Focusing on maximizing your side’s strengths and minimizing your side’s weaknesses. Do not make every possible argument that shows your side should prevail; instead, develop the arguments that are most probable to lead to success.

**Tone and Style:** Write positively and affirmatively. Argue why your side wins, not why the other side loses. Do not use rhetorical questions. Avoid overly dramatic statements because they will reduce your credibility and fail to progress your argument. Stay focused on the case and why your side should prevail. Do not attack the parties, opposing counsel, judges, or any other person.

Primacy and Recency: What readers encounter first will shape how they perceive the remaining information conveyed; use that to your advantage. Show your strongest points or facts first. What readers encounter last will cement how they perceive the previous information received; use that to your advantage as well. End on a strong note with a conclusion that clearly explains why your side should prevail/

**Sandwiching Bad Facts:** There will always be facts that are not ideal for your side. You still have to disclose them. However, you can choose where you share those facts. The best place is to put a bad fact between good facts! For instance, if I want my mom to let me go to the mall, then I would say, “Mom, Cheryl says her mom can drive us to the mall! My room is not picked up like you asked. However, I have cleaned the bathroom and vacuumed the hallway!”

**Active versus passive voice**: Yes, you should always use the active voice when you can. However, using passive voice can be effective when you want to place distance between the actor and the action. For instance, “I ran over your dog” hurts a lot worse than “Your dog was run over by my car.”

**Remember your audience:** When asking the court to find in your favor, use phrases like “the court should” rather than “the court must.” No court wants to be told what to do. Any audience prefers easy-to-follow and well-thought-out legal arguments that do the heavy lifting for the reader. What will be an appropriate emotional appeal will depend on who is reading your persuasive piece. And, finally, remember that you must maintain your credibility at all times.

# What is policy?

**Policy** is the reason, goal, or purpose for why the law is put together in a certain way and why it requires what it does. Policies highlight a group’s values and priorities, including social and economic concerns. Policies also provide the rationale for having the law insist on certain types of outcomes.

There are four major types of policy arguments:

1. **Normative**
   1. The court should consider how the outcome will support our shared values.
   2. ‘“[I]t is the paramount public policy of this State that courts will not lightly interfere with the freedom of parties to contract on any subject matter, on any terms, unless prohibited by statute or public policy, and injury to the public interest clearly appears.’”  Atl. Specialty Ins. Co. v. City of Coll. Park, 851 S.E.2d 189, 195 (Ga. Ct. App. 2020) (citation omitted).
   3. “If the public policy of Georgia does not permit parties to contract to keep embarrassing-but-discoverable materials secret, then with greater force, that public policy does not permit parties to enter into an enforceable agreement to keep arguably criminal matters secret in the face of an official investigation.” Camp v. Eichelkraut, 539 S.E.2d 588, 597–98 (Ga. Ct. App. 2000).
2. **Economic**
   1. The court should consider how the outcome will impact society through the monetary and objective consequences of its decision.
   2. “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.” United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
   3. “The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.” Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934).
   4. “Parties generally favor arbitration precisely because of the economics of dispute resolution. (‘Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts’). As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer.” 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) (citation omitted).
   5. “Where loss of a limb is involved at an arbitrary point in time, here 90 days, the insured under these cases is confronted with the ugly choice whether to continue treatment and retain hope of regaining the use of his leg or to amputate his leg in order to be eligible for insurance benefits which he would forgo if amputation became necessary at a later time. We find an insurance limitation forcing such a gruesome choice may be unreasonable and thus may be void as against public policy.” Strickland v. Gulf Life Ins. Co., 240 Ga. 723, 725 (1978).
3. **Institutional**
   1. The court should consider what its place is within the governmental system and address whose job it is to make the rule when deciding the outcome.
   2. “We stress, finally, that §8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States.” Bank Markazi v. Peterson, 136 S. Ct. 1310, 1328 (2016) (citations omitted).
   3. “It contains no words of command which would invade the province of the judiciary or would delegate to the judiciary the legislature's duty. ‘It is always the duty of a court, in construing a statute, to ascertain and give full effect to the legislative intent....’” In that case, the caption of the act contained an expression by the legislature of the act's purpose and this Court suggested that in construing a doubtful statute there was ‘no better source to which a court may go for the purpose of finding the legislature's meaning of an act passed by it.’ The present case may contain that ‘better source’ since the legislature has been explicit in the body of the statute itself in stating its intent that the admission of expert testimony in the courts of this State be governed by the strictest standards available.” Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 277–78 (2008).
   4. “However, in answer to the question of whether or not to recognize a ‘wrongful birth’ action, the majority of courts that have addressed the question have answered in the affirmative. In spite of the widespread recognition and, in fact, because of that recognition and the confusion which has followed in its wake, we hold that ‘wrongful birth’ actions shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature.” Atlanta Obstetrics & Gynecology Grp. v. Abelson, 260 Ga. 711, 714 (1990) (citation omitted).
   5. “The legislature recognized this as a subject for legislation, and passed the act of 1887, providing a penalty in case any message is not duly transmitted and delivered. This act gives a conventional redress of some money value, and is, perhaps, the best remedy that could be devised. It provides a penalty for punishment of the wrong-doer.” Chapman v. W. Union Tel. Co., 88 Ga. 763, 776 (1892).
   6. “It ought seldom or ever to be decided, in *a doubtful case*, that a law is void for its repugnance to the Constitution. And it is not on slight implications and vague conjectures that the Legislature is to be pronounced to have transcended its powers. On the contrary, the opposition between the law and the Constitution should be such, that the judges feel a clear and strong conviction of their incompatibility with each other. The presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies its constitutionality. These doctrines have been repeatedly advanced by the highest judicatory in the nation.” Nunn v. State, 1 Ga. 243, 246 (1846) (citations omitted).
4. **Judicial Administration**
   1. The court should consider how the outcome will affect how courts operate in the future and whether it will impact the ability of courts to achieve justice.
   2. “‘[A]lthough a court may exercise its inherent discretion to resolve matters in the interest of judicial economy, [cit.], the goal of judicial economy cannot justify sacrificing the rights of the parties. [Cit.].’ Nor can it justify an appellate court in usurping the role of the trial court. ‘An appellate court should not ... substitute itself as the initial finder of fact to reach an issue not properly before it . . . .’” Harper v. State, 283 Ga. 102, 104 (2008) (citations omitted).
   3. “Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of ‘[wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’” Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citations omitted).
   4. “This Court also has a significant interest in supervising the administration of the judicial system. See this Court's Rule 10(a) (the Court will consider whether the courts below have ‘so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power’). The Court may use its supervisory authority to invalidate local rules that were promulgated in violation of an Act of Congress. The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes.” Hollingsworth v. Perry, 558 U.S. 183, 196 (2010) (citation omitted).

# Where do I find policy?

There are a variety of places you can find policy if you know how to look. If only the courts through their judicial opinions would always brightly signal POLICY HERE, our jobs would be a lot easier. However, as with most things in law, it is not that simple. Sometimes courts will say something like, “our state’s policy is” or “we have long valued”; each of these is an excellent cue that a policy consideration is about to follow. Statutes can contain sections that give the rationale for their enactment, and you can use this to determine what the law is prioritizing.

Most often you will need to read the cases carefully to determine what the policy goals are. Look at what facts the court considers when conducting its reasoning. Is it valuing protecting parental rights, promoting economic freedom, or providing unfettered access to resources? Remember that policy is the *why* the law exists, so look for explanations to support why the court reached the outcome it did. Put another way, look for how the court explains why it values certain outcomes over others or why the reasoning it uses achieves the right outcome.

When you are looking for policy, it might be easy to find or you might have to hunt for it. Comb through the cases and the statutes to find the *why*, and you will have located the policy arguments to make.

# Where do I write about policy?

When you are writing about policy arguments, they should go after your fact-based and law-based arguments. Within your CREAC-block, your policy arguments will go into your E and A sections. In the E sections, you will use cases from other jurisdictions to show how particular policy considerations in those jurisdictions led to particular outcomes. Then, in the A sections, you will show how the outcomes in those cases, relying on policy considerations, can inform the court in your current situation what the right outcome should be.

When you want the court to use a particular persuasive authority to come to an outcome you like, you should show how the policy considerations in that case are similar to policy considerations in the mandatory authorities by demonstrating how the policies in both value similar things. This showing of similarity will mean that you can use the positive persuasive authority to inform the outcome in the current situation because the policies match. Then you link the mandatory authority to your current situation to ask for your desired outcome.

When you do not want the court to use a particular persuasive authority to come to an outcome because you do not like that outcome, you should show how the policy considerations in that case are inapplicable to the mandatory authorities by demonstrating the policy considerations are different and therefore do not value similar things. This showing of inapplicability will mean that you cannot use the negative persuasive authority to inform the outcome in the current situation because the policies do not match Then, you state the policy considerations in the mandatory authority that do reach the outcome you desire.

# Conclusion

Persuasive writing is one of the primary forms of analysis and writing that lawyers perform. Remember that when you are asked to complete a persuasive writing task, you know what the legal conclusion should be. When writing persuasively, you are showing the reader how the path through legal analysis leads to the destination that best benefits your assigned position.