

Five Tips for the Persuasive Researcher

By Eric P. Voigt

You just received an assignment to prepare your first persuasive brief: a Rule 12(b)(6) motion to dismiss. You have spent the previous year drafting interoffice memorandums. Your heart pounds with excitement. This motion is your opportunity to demonstrate your ability to persuade through the written word. But before you begin your journey, you must understand that the quality of a motion strongly correlates with the quality of the research.

Writing persuasively for a client is different from objective writing. Unlike a research memorandum, where the cases may not be reviewed by your boss or client, the cases relied on in a motion will be analyzed by the judge and law clerks. As a young associate, you (not the assigning lawyer) are ultimately responsible for the legal arguments made and the cases cited in your motion. Accuracy trumps overzealous advocacy.

Below are five tips for drafting a persuasive piece that will make you shine.

1. Do not cite cases unless you have read them entirely. Read cases from the first to last word. When preparing motions, many young associates find the “smoking gun” quote supporting their argument and then stop reading the remainder of the case. Unknown to the associate, the court may have expressly rejected the quoted proposition five paragraphs later or ruled on a different issue in the same opinion that is adverse to your client. You do not want a telephone call from a partner asking why you did free research for opposing counsel and billed your client for it.

2. Know the holding of a case. This lesson from law school will serve you well in practice. The persuasive value of a case often rests with what the court actually did. One type of persuasive holding is where an appellate court ruled that the lower court abused its discretion for doing the same thing that your opponent is asking your judge to do. Alternatively, you may diminish the strength of your opponent’s cited cases by knowing the applicable legal standard. A Supreme Court decision upholding a jury verdict (under the deferential manifest-weight-of-the-evidence standard) is far less persuasive than an opinion affirming the issuance of summary judgment (under *de novo* review).

3. Research opinions drafted by your judge. Determine whether the presiding judge in your lawsuit has addressed the subject matter of your persuasive work. If so, you will not need to convince your judge that the prior opinion is well reasoned. And, by citing a decision favorable to your client, you will force the opposing party into the awkward and uncomfortable position of having to argue that your judge was wrong.

In one of my employment matters, the judge’s prior ruling was instrumental in dismissing the complaint against our client. My firm represented an employer in federal court against a

former employee who contended that the employment handbook altered his at-will status. To the chagrin of my opponent, I found an opinion from our federal judge (when he was a state appellate judge) where he specifically concluded that employment is presumed to be at will and may be terminated for good cause or no cause.

4. Use the West Digest System. Yes, you can research effectively without a computer. Digests are excellent book sources to find published cases addressing a specific legal topic. Digests contain summaries of federal and state judicial opinions, which are organized by date and subject matter (e.g., torts or damages).

You will have to explain why you did free research for the opposition and billed your client for it.

Although good starting points, case summaries are not adequate substitutes for reading entire cases, as explained in tip #1.

There are several practical uses of the digests. First, use the digests for brainstorming. Many times, I have developed creative strategies to defeat class certification by analyzing case summaries and learning which facts courts weigh heavily in evaluating the predominance and superiority requirements of Rule 23(b). Second, use the digests for researching the elements of a claim under federal or state law. Third, use the digests for discovery motions. The case summaries will shed light on various discovery issues, including when discovery is relevant or when good cause exists for a protective order.

5. Use the ABA website. ABA members have access to free resources on its website. The various Sections of the ABA publish numerous articles on procedural and substantive issues. For example, committees under the Section of Litigation publish quarterly newsletters on topics ranging from the admissibility of evidence for motions for summary judgment to the enforceability of non-competition agreements.¹ These newsletters provide concise summaries of and unique insights into particular subjects.

By applying the above tips, you will be on the path to successful motion practice. Importantly, if you have reached this point in the article, then you have already learned tip #1.

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Endnote

1. See, e.g., www.abanet.org/litigation/committees/pretrial.