



# PERSUASIVE WRITING<sup>1</sup>

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One of your primary duties as a lawyer, no matter your area of practice, is to advocate for your client. Today, most of this advocacy is accomplished through writing.<sup>2</sup> Therefore, persuasive writing is, as one professor puts it, “essential to the practice of law.”<sup>3</sup> Persuasive writing enables you to make strategic decisions about how to present and package your arguments to ensure your document is as convincing as possible. This handout provides a brief overview of the differences between objective and persuasive writing, and it then offers specific tips and tools for maximizing your persuasive potential.<sup>4</sup>

## I. Transitioning from Objective to Persuasive Writing<sup>5</sup>

In **objective writing**, you present information in a neutral way with the goal of informing and predicting. You discuss both the strengths and weaknesses of an argument and make a prediction, based on that analysis, as to the expected outcome. For example, you may prepare an internal memorandum to inform a supervising attorney about a specific area of the law, or you may write a letter to a client to provide an unbiased assessment of a case.

In **persuasive writing**, you present information with the goal of informing and persuading. You aim to convince a specific audience that your side is best and, therefore, you present information in the light most favorable to your client. Although you may still acknowledge both sides of the argument, you work to distinguish or minimize the significance of counterarguments. For example, you may write a motion to persuade a trial court to rule in your client’s favor, or you may write an appellate brief to sway the tribunal to remand your client’s case.

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<sup>1</sup> Revised by Catherine Carulas in 2019. Unless otherwise cited, the concepts in this handout were adapted from DIANA R. DONAHOE, TEACHINGLAW.COM (2016). The original handout was written in 2003 based on adaptations from MARY B. RAY & JILL RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN (3d ed. 2000).

<sup>2</sup> See MICHAEL SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 3 (3d ed. 2013).

<sup>3</sup> *Id.*

<sup>4</sup> This handout focuses on persuasive writing generally. Additional Writing Center handouts discuss persuasive writing in specific legal documents. All handouts are available at

<https://www.law.georgetown.edu/academics/academic-resources/the-writing-center/guides-and-handouts/>

<sup>5</sup> For specific guidance on how to transition from a memo to an appellate brief, see the Writing Center handout, *From Memo to Appellate Brief*, available at <https://www.law.georgetown.edu/wp-content/uploads/2018/07/From-Memo-to-Appellate-Brief.pdf>

## II. Persuasive Writing Techniques

This section offers various techniques to help make your writing more persuasive. As you read through this section, you may find that some of the tips and tools seem to contradict each other, or you may think that this guidance should be violated in your specific situation. No matter how you decide to present your client's case, make sure you are making *deliberate choices*. As you write and rewrite, you should think carefully and critically about how certain words or structures you employ are likely to be received by the decisionmaker.

**Develop a Theory of the Case:**<sup>6</sup> Persuasive documents should be grounded in a subtle theory. Your theory of the case presents a short, simple, and compelling answer to the question: "why should your client win?"; and it finishes the sentence: "you should find for my client because..." Example theories include: "the defendant was greedy," or "the defendant corporation thinks it is above the law," or "the officer was just doing her job." By injecting your theory throughout your document, your goal is to make the reader *want to find for your side*. The following are some tips to keep in mind when forming your theory.

- **Consider your audience:** Put yourself in the decisionmaker's shoes and ask yourself the same question she will ask: "why should I care?"<sup>7</sup> An answer to this question may change depending on the specific decisionmaker. If you are writing a brief or motion for a judge, think about common judicial anxieties, including: getting the law wrong; constructing novel "duties, rules, or defenses"; or reaching an unjust outcome.<sup>8</sup>

*Example:* If you represent the plaintiff in a negligence case, you could frame your theory as "Mr. Jones was vulnerable," or "the Defendant was distracted." Consider whether your decisionmaker is more likely to be swayed by a theory that focuses on the plaintiff's sympathetic qualities or one that emphasizes the defendant's flaws.

- **Think about your opponent's theory:** Take time to think through what theory your opponent might advance. If you are responding to an opponent's document, you may already know the other side's theory. How can your theory best counter your opponent's likely theory?
- **Keep your theory subtle:** The most effective theories are typically those that are never affirmatively stated. Rather, your goal is to set out the facts, organize your arguments, structure your paragraphs, and choose words according to your theory so that after she reads your document, the decisionmaker cannot help but understand why your client should win.

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<sup>6</sup> The "theory of the case" is sometimes referred to as a theme or thesis. For additional tips on developing the theory of the case, see the Writing Center handout, *From Memo to Appellate Brief*, *supra* note 5.

<sup>7</sup> ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 27 (2d ed. 2014).

<sup>8</sup> *Id.*

**Tell a Compelling Story with the Facts:**<sup>9</sup> The facts section is typically your first opportunity to present your client’s perspective to the decisionmaker. The following are some tips to keep in mind when writing the facts section.

- **Start by engaging the reader:** You should use the first sentences of your facts section as an opportunity to draw your reader in and introduce your theory of the case. You can start the facts in a number of ways; for example:

- Consider starting with an action point in your story.

*Example:* Around 9:00 pm on March 22, 2019, Mr. Jones was relaxing on his couch after a long day of work when he heard a loud banging on his front door. Mr. Jones opened the door to find four armed, uniformed officers standing on his stoop.

- Consider starting with a “panoramic shot”<sup>10</sup> to give your reader a bird’s-eye view of the context in which your controversy arises.

*Example:* “The plotline of this controversy is all too familiar: Wunderkind entrepreneur conceives of a transformative business and propels it to a meteoric success, but failed rivals insist they thought up the idea first and demand all the profits.”<sup>11</sup>

- **Include and emphasize useful facts:** Your facts section must include all legally significant facts—that is, any facts you will use in your argument—and you should make an effort to highlight your best facts.

*Example:* If you want your reader to remember that the defendant paid \$5 million to a government official, repeat the \$5 million figure in various ways throughout your facts section.<sup>12</sup>

- **Include and downplay unfavorable facts:** Even though you should present the facts in the light most favorable to your client, do not omit damaging facts. You establish credibility by mentioning any potentially harmful facts and integrating them into your story.

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<sup>9</sup> For more thorough guidance on drafting a facts section in an appellate brief, see the Writing Center handout, *Writing a Statement of Facts in an Appellate Brief*, available at <https://www.law.georgetown.edu/wp-content/uploads/2018/07/StatementofFactsinaBriefFinal.pdf>

<sup>10</sup> GUBERMAN, *supra* note 7, at 56.

<sup>11</sup> This example was the opening line of Joshua Rosenkranz’s facts section in his brief in *Facebook, Inc. v. ConnectU, Inc.* The sentence was reproduced and analyzed by Ross Guberman in *Point Made: How to Write Like the Nation’s Top Advocates*. See GUBERMAN, *supra* note 7, at 56.

<sup>12</sup> See NOAH A. MESSING, *THE ART OF ADVOCACY* 8–9 (2013).

**Prioritize Your Strongest Points in the Argument Section:**<sup>13</sup> In terms of the large-scale organization of your argument, choose the structure that is most logical and convincing to your audience. Keep the following in mind when determining how to organize your arguments.

- Begin with a threshold issue: You should start with a threshold issue, if there is one, because you do not want to violate the reader’s sense of logical progression.
- Organize to emphasize your strongest arguments: If your legal issues are more independent, you should order them to highlight your strongest arguments.
  - Consider the following when organizing your arguments: “the strength of the law, equity or judicial priority.”<sup>14</sup>
  - Although you must address weak points in your client’s case, carefully consider where to put your weaker arguments and counterarguments. Use the structure that best suits your position and avoid letting your opponent’s structure dictate how you present your arguments.
- Be conscious of “air time”: Keep in mind that your document should highlight your client’s strongest arguments. Although you should effectively respond to the other side’s main points, you may come off as defensive if you dedicate more space than is necessary to rebutting their arguments.
- Use headings:<sup>15</sup> Look to headings—both point headings and subheadings—to guide your reader through your argument. The decisionmaker should be able to quickly skim your headings and understand why your client should win.<sup>16</sup>

**Begin Paragraphs with an Affirmative Statement:** Within paragraphs in your argument section, your topic sentences should work to both inform the reader of the rule, factor, or element the paragraph will discuss, as well as to persuade. Aim to start paragraphs with an affirmative statement of your argument. If you start with a response to an opponent’s argument, you may come off as defensive, which could impair your credibility.

*Less persuasive topic sentence:* The defense argues that the plaintiff gave no warning. This is not the case, however, because the plaintiff left messages on the defendant’s answering machine on two occasions.

*More persuasive topic sentence:* The plaintiff gave adequate warning; she called the defendant repeatedly and left messages on his answering machine on two occasions.

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<sup>13</sup> For additional guidance, see the Writing Center handout, *Tips for Effective Organization*, available at <https://www.law.georgetown.edu/academics/academic-resources/the-writing-center/guides-and-handouts/tips-for-effective-organization/>

<sup>14</sup> Mary-Beth Moylan & Adrienne Brungess, *Persuasive Legal Writing*, in MARY-BETH MOYLAN & STEPHANIE J. THOMPSON, *GLOBAL LAWYERING SKILLS* 129, 138 (2013).

<sup>15</sup> For additional guidance, see the Writing Center handout, *Writing Effective Point Headings*, available at <https://www.law.georgetown.edu/wp-content/uploads/2018/11/Updated-Handout.Pointheadings.pdf>

<sup>16</sup> GUBERMAN, *supra* note 7, at 93.

**Make Legal Rules Work for Your Client:**<sup>17</sup> Although legal rules must be accurate, they are often not completely rigid. You should read and reread prior caselaw to see if there are ways to state legal rules so they are more favorable to your client. Consider the following tips.

- Start with your client’s desired outcome: Framing a legal rule to emphasize your desired outcome helps to solidify the result in the decisionmaker’s mind.
- Highlight your opponent’s burden of proof: Whenever possible, hammer home the point that your opponent cannot win on an issue *unless she meets her burden*.
- Think about how widely you want the rule to apply: When you state a rule narrowly, you restrict its potential application. On the other hand, when you present a rule broadly, you expand its perceived application.

*Sample persuasive rule for defendant*: An officer violates the Fourth Amendment when she conducts a search without a warrant. U.S. Const. amend. IV. A narrow exception to the warrant requirement may exist if the government can prove that the officer obtained voluntary consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

*Sample persuasive rule for government*: A warrantless search does not violate the Fourth Amendment when it is conducted pursuant to an individual’s voluntary consent. *See* U.S. Const. amend. IV; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

**Use Parentheticals to Support Rules**: Consider accompanying case citations after rules with parentheticals. One way to write a parenthetical is to begin with a gerund (an *-ing* word) followed by “a reason the court did what it did.”<sup>18</sup>

*Example*: A consenting party has apparent authority to consent to a search if she stayed overnight or spent substantial time at the defendant’s residence. *See Kinney*, 953 F.2d at 867 (finding defendant’s girlfriend had apparent authority because she was “obviously an inhabitant of the apartment” where she stayed there most nights and stored her belongings).

**Distinguish Unfavorable Precedent**: Although you must address unfavorable precedent, you can distinguish unhelpful authority to make your argument more persuasive.<sup>19</sup> For example:

- Appeal to stronger legal authority: Perhaps a state intermediate appellate court applied a legal rule in a way that disfavors your client, but the state supreme court applied the rule in a way that you can interpret more favorably.
- Distinguish based on facts or policy: Perhaps the facts of a former case are so different from those in your case that you can argue the legal rule should be

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<sup>17</sup> See generally Moylan & Brungess, *supra* note 14, at 132.

<sup>18</sup> GUBERMAN, *supra* note 7, at 167.

<sup>19</sup> LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 229–32 (7th ed. 2018).

applied differently. Or maybe applying a legal rule as applied by a former court would reach a result that would make no sense or would be unjust.

**Play Around with Sentences:** You can also maximize your persuasive impact within sentences themselves. Consider the following techniques.

- Focus on the subject: You highlight a main point by putting it in the main subject and verb of your sentence. On the other hand, you can deemphasize a point by putting it in the dependent clause.
  - One way to minimize the significance of a bad fact is to start a sentence with “although” to “subordinate the bad fact to its more favorable context.”<sup>20</sup>

*Example:* Although Mrs. Smith is not fluent in English, when Officer Jones asked her about her son’s whereabouts, she calmly picked up a notepad, flipped through the pages, and pointed to a page on which her son’s work address was written.

*Example:* Although the defendant had not come to a full stop at the official stop sign, he had slowed to less than five miles per hour and was not accelerating at the time of the accident.

- Vary sentence structure and length: Consider altering sentence structure and length to keep your reader’s attention.
  - At certain points, however, consider repeating sentence or phrase structures to create a sense of rhythm and anticipation, or to emphasize certain points.

*Example:* At best, the City confused its argument by trying to do too much without a full explanation. At worst, the City contradicted itself by misapplying the law.

- Consider using a series of short sentences when you want to convey that something happened quickly or longer sentences when you want to convey that the actor or action was deliberate and thoughtful.

*Example:* The car sped by. Shots were fired. The witness glanced at the passing car. She saw someone.

The witness was walking on the street, paying close attention to her surroundings given that it was evening. She noticed a car speeding by her, and she then heard the bang of several gunshots.

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<sup>20</sup> GUBERMAN, *supra* note 7, at 82.

Drawn by the noise of the gunshots, she turned her attention to the car and stared at the shooter.

- Consider using short, pointed sentences when you want to build up to an action or emphasize a key point.

*Example:* “Substituting one decisionmaker for another may yield a different result, but not in any sense a more ‘correct’ one. *So too here.*”<sup>21</sup>

**Think About Language:** When it comes down to individual words, you should think carefully about the terms and phrases you choose and how they will affect the legal reader. Consider the nuanced meaning of words and the images conveyed by such words.

- Consider using active or passive voice: Use active voice to emphasize actors and actions. Active sentences are often easier to read, less wordy, and more convincing than those written in passive voice. Therefore, when in doubt, it is always useful to try to write actively. Nevertheless, you should consider turning to passive voice when you want to downplay an actor or action.

*Example:* If you are representing Mr. Smith, who is accused of assault, it is probably more effective to say “the plaintiff was struck by Mr. Smith” than “Mr. Smith struck the plaintiff.”

- Consider transforming common phrases into vivid verbs<sup>22</sup> to emphasize an action:

*Example:* Instead of “take out of context,” consider “pluck”; instead of “take into consideration,” consider “heed.”<sup>23</sup>

- Use concrete facts: As compared with abstract words, descriptive language creates clear and memorable images in the reader’s mind.

*Less Persuasive:* Vehicle

*More Persuasive:* 1965 black Stingray

- Use colorful, descriptive words to add emphasis:

*Example:* If you are representing the defendant in a criminal case you may say that the police “banged” or “slammed” on the door, while the government may say the police “knocked.”

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<sup>21</sup> This example comes from John Roberts’s brief in *Alaska v. EPA*. The sentence was reproduced and analyzed by Ross Guberman in *Point Made: How to Write Like the Nation’s Top Advocates*. See GUBERMAN, *supra* note 7, at 227 (emphasis added).

<sup>22</sup> See *id.* at 198 (producing a list of 50 “zinger verbs”).

<sup>23</sup> These examples were drawn from *id.* at 191.

- Avoid overly theatrical language: Although colorful language helps paint a picture in your reader’s mind, overly dramatic language can damage your credibility. Remember that the goal of persuasive writing is to guide your decisionmaker to a specific conclusion. A reader is far more likely to be persuaded if she comes to that conclusion herself.

*Example*: Pretend you represent the plaintiff and want to convey that the defendant was motivated by greed. Instead of telling the reader that the defendant was greedy, use the facts of the case so that when she sets down your document she automatically thinks: “the defendant was greedy.”

- Avoid overly definitive words: Aim for an authoritative tone but be wary of words such as “clearly,” “definitely,” or “unquestionably.”<sup>24</sup> These conclusory words may undermine your credibility. Also, if you are writing to persuade a decisionmaker that your side is best, your opponent likely thinks she has a fairly strong argument on the other side. Therefore, the resolution is probably not “clear.”
- Avoid hedging: Although you should avoid words such as “clearly” and “definitely,” you should also consider how hedging may undermine your case.

*Example*: If you are representing the government in a criminal case, it would be less persuasive to say “it seems like the defendant murdered Mrs. Jones” versus “the defendant murdered Mrs. Jones.”

- Determine how to refer to key actors: Early in the writing process, decide how you will refer to your client and the other parties. You should keep these terms consistent throughout the document.

*Example*: If you represent a defendant in a criminal case, you probably want to make her seem more sympathetic. Therefore, it would be more persuasive to refer to her as “Mrs. Jones” rather than “Defendant.” In contrast, the government in the same case will probably refer to your client as “Defendant.”

- Again, keep in mind, however, that you should avoid seeming overly dramatic. For example, if you represent a plaintiff suing a corporation, referring to the defendant as “the corporate defendant” throughout the entire document may come off as a little transparent, which could impair your credibility. Therefore, in some situations, it may be most effective to simply refer to both parties by name.

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<sup>24</sup> See Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J. L. & PUB. POL’Y 202, 206–08 (1993).



- Use plain language and be concise:<sup>25</sup> When in doubt, write in plain English. Complex language is not only distracting, it may also undermine your credibility. The reader may think you have something to hide or are simply trying to impress her by using overly formal, wordy, and obscure language. Do not make the decisionmaker’s job more difficult by forcing her to grab a dictionary to understand what you are trying to say.

**Consider the Tone of the Document:** As you read and reread your draft, consider the tone you are trying to convey. When in doubt, a formal, confident tone is likely more persuasive than one that is whiny, negative, or hesitant. In addition, you should always aim to take the high road; you will come off as more credible if you rely on the strength of your arguments rather than personal attacks on your opponent.

**Maximize Presentation:** Although you are unlikely to win on presentation alone, ensuring your formatting, sentences, and words look good to the reader will help her better understand and grasp your arguments.

- Emphasize sparingly: Although boldface, italics, and underlining have their place in legal briefs, you should always think before adding emphasis because, as one decisionmaker notes, “[e]ffectiveness [can be] lost by *excessive* capitalization, underlining, boldface type, or italics.”<sup>26</sup>
- Provide visual aids: When possible, consider using pictures, maps, diagrams, and other visual aids in your documents because “[s]eeing a case makes it come alive to judges.”<sup>27</sup> Nevertheless, while these tools may help persuade the reader, make sure you use them effectively; you should avoid confusing or distracting the decisionmaker.
- Proofread: A sloppy document that is riddled with spelling, citation, or grammatical errors is less persuasive than a perfectly polished product. Thus, ensuring that your document is polished will enhance your credibility in the eyes of the decisionmaker. Again, although proofreading is unlikely to make up for ineffective legal analysis, if all else is even, the fact that you took the time to proofread and polish may tip the scales in your favor.

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<sup>25</sup> You will find tools for conciseness in the Writing Center handout, *Concise is Nice*, available at <https://www.law.georgetown.edu/academics/academic-resources/the-writing-center/guides-and-handouts/concise-is-nice/>

<sup>26</sup> GUBERMAN, *supra* note 7, at 288 (quoting Daniel M. Friedman, *Winning on Appeal*, 9 LITIG. 15, 17 (1983)) (emphasis added).

<sup>27</sup> Richard A. Posner, *Effective Appellate Brief Writing*, AM. BAR ASS’N (June 19, 2018), <https://www.law.georgetown.edu/academics/academic-resources/the-writing-center/guides-and-handouts/concise-is-nice/>