

Refining Persuasive Arguments

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After you have developed the substance of your arguments, you will then want to review your arguments to ensure that each part is presented as persuasively as possible. To present arguments as persuasively as possible, attorneys use a variety of writing techniques. These techniques emphasize why the outcome their client seeks is a correct and preferable outcome compared to the one opposing counsel seeks. These techniques, while helpful, are not magical. They will not cause you to prevail if the law and facts are not on your side. If, however, you have an argument that could win, these techniques make it easier for the court to see why your argument should win.

I. Core Concepts

Before turning to specific writing techniques, this chapter focuses on a few core concepts. If you understand these core concepts, you will find it easier to adjust the specific writing techniques to the particular argument you are drafting.

A. Assert Your Point. Then, Provide Details.

To write persuasively, you must be clear about the point you wish to make. A judge must first know what you are arguing for before the judge can decide whether to agree with you.

Lawyers, though, sometimes get distracted. Legal arguments are chock full of details—details about rules, about prior cases, about the client's case. Lawyers sometimes get so absorbed in the detail that they forget to tell the judge the point of all those details. Those lawyers will lose the judge in the details.

Instead, explain your point before providing supporting details. Explain why the details are important. Doing so will help focus the judge's attention and make it easier for the judge to work through the details.

In fact, to effectively communicate your argument you will need to repeatedly assert your point. You will need to assert your large, overarching point—that is, the ultimate legal conclusion you want the court to adopt. But you will also need to clearly assert those smaller points that support your larger argument. Lawyers assert their point—and explain the purpose of the details that follow—in numerous places. For example,

- A **point heading** asserts the conclusion the judge should reach after reading the more detailed arguments in that section.
- A **conclusion** at the outset of a legal argument explains the conclusion the judge should reach after reading the more detailed explanation and application of the law.

- A **thesis sentence** at the beginning of a paragraph explains the point the judge should take away after reading the details explained within the paragraph.
- A **hook** at the beginning of a case illustration explains the legal principle a court should derive after having read the particulars of a prior case.

Asserting your point before providing details has numerous benefits. It tells the judge what is to come. When you tell your reader what is to come, your reader feels more comfortable because she will have context for the argument. Your reader—the judge—is no longer stumbling in the dark wondering in which direction to head. Feeling comfortable and oriented, your reader is better able to absorb the argument.

Second, when you tell the judge where you are going and then actually go there, you gain the judge's trust. The judge knows you will do what you have promised to do. A judge who trusts you is one who is more likely to accept the information you provide.

Finally, explaining your point in advance of the detail shapes the way the judge will absorb the details. If you explain your point in advance, the judge will read the details trying to match the details to the point you have said you are going to make. By first stating your point, you give the judge a framework on which to hang the details. As the judge matches details to your stated point, those details will come together in the way you and your client see those details. Of course, a judge reads critically and may have other ideas than the one explained. Still, the judge will at least be encouraged to consider seeing the details in the way you and your client see them. Thus, by clearly stating your point before the supporting details, you begin the process of shaping how the judge will view the upcoming information.

Too many writers do not recognize when a mass of detail is in need of a clearly stated point. If you are one of those writers, you will leave the judge struggling in the dark and looking for direction; you will lose an opportunity to gain the judge's trust; and you will have missed an opportunity to shape those details in the way you want the judge to see it. Worst of all, without your guidance, the judge may reach an entirely different conclusion than the one you wanted.

Accordingly, this chapter highlights locations within your argument that are likely in need of a sentence that explains the point of all the detail to follow.

B. Use Location to Your Advantage

One of the best ways to emphasize your point is to put your point where the judge is most likely to see and process it. When reading text, most readers' eyes—including judges' eyes—tend to fall and rest on a few positions of emphasis. Thus, many of the techniques below are

based on the idea that you should put information where a judge is most likely to see it and absorb it. In particular, review your point headings, the first sentence of each paragraph, and the last sentence of each paragraph. Those are locations where the judges' eyes will rest. Take advantage of that fact and use those locations for the information you want to emphasize. Similarly, use those locations where the judges' eyes are less likely to rest to disclose information that is less helpful to you. Thus, disclose unhelpful information in the middle of a paragraph and in the middle of sentences, where that information will receive less emphasis.

C. Be Explicit

The last core concept is to “be explicit.” In other words, consider talking directly to the judge and state what you are up to. Judges appreciate candor, and being explicit helps gain their trust.

For example, if you are about to launch into a five-page detailed discussion of the relevant case law, tell the judge what you are about to do and why, as in Example 6-A. By giving such an explanation, the judge knows to settle in and expect a lot of facts. The judge will also appreciate being told why the factual minutiae is worth reading.

Example 6-A • Be explicit

The discussion of the cases that follows is necessarily fact-intensive because the standard this Court must apply is a “totality of the circumstances” standard.

Similarly, tell the court when you will address matters out of the normal order, as in Example 6-B. By doing so, you have told the court that it should expect something different and that you are doing something different to benefit the court.

Example 6-B • Be explicit

Although normally a court will consider the merits of a legal argument first, this brief begins with a discussion of harmless error because the case is most efficiently resolved on that basis.

In short, be explicit about where your argument is going and why—especially if you are about to do something unexpected or particularly difficult to absorb. By explicitly stating what you are doing, you help the judge follow your argument and you enhance your credibility with the court.

With these core concepts in mind, let's turn to specific writing techniques.

II. Persuasion Through Point Headings

One of the first locations where a judge's eyes will rest will be on your point headings. Moreover, a judge is likely to return to your point headings if the judge needs an overview of your argument or is searching for particular information. Thus, construct your point headings so that they emphasize the main points you want the court to accept.

To create persuasive point headings in your argument, follow these five guidelines. First, in your argument section, create assertive point headings that tell the judge the conclusion you want the court to reach and the reasons the court should reach that conclusion. Second, create point headings that work together and provide an outline of your argument. Third, keep your point headings short. Fourth, use point headings to divide the argument into readable chunks. Finally, create polished point headings in a traditional format so that they make your brief look professional and credible.

A. Create Assertive Point Headings

An assertive point heading has up to two parts:

1. The action you want the court to take or the conclusion you want the court to adopt, and
2. The primary reason the court should take that action or adopt that conclusion.

Of the point headings you will craft, you will need to think most carefully about the main point headings designated by Roman numerals. Those point headings designate a new claim. They should, therefore, assert the procedural action that you want the court to take with respect to that claim. Compare Example 6-C with 6-D. Example 6-C is the more effective opening point heading because it tells the court the procedural action it should take.

Example 6-C • A main point heading that asserts the procedural action the court should take

- I. **Plaintiffs' complaint should be dismissed because the ADEA does not permit disparate impact claims.**
-

Example 6-D • A main point heading that does not assert the procedural action the court should take

- I. **The ADEA does not permit disparate impact claims.**
-

Although as a general rule you should use point headings to assert the legal conclusions that you want the court to adopt, occasionally you may opt for descriptive point headings. Descriptive point headings are appropriate—not surprisingly—when the purpose of a section is to describe rather than to assert a legal argument, as in Example 6-E. (Descriptive point headings are also appropriate in statements of fact, but that idea will be addressed in more detail in Chapter 10, *Statements of Fact and of the Case*.)

Example 6-E • A descriptive point heading

I. Oregon’s method of statutory construction

B. Coordinate Your Point Headings

Because more than one element or factor will be argued within each claim, attorneys use sub-headings to alert the reader to each new element, factor, or part of an argument. These sub-headings, together with the main point heading, should be coordinated so that, together, they provide an overview of the arguments that support the claim. In longer motions and in all appellate briefs, you will see the point headings and sub-headings gathered together in a table of contents. Gathering the point headings and sub-headings in a table of contents not only helps the court find particular parts of your argument, it also allows the court to see the overarching structure of your argument. Example 6-F illustrates how a main point heading and its sub-headings can provide an overview of your argument.

Example 6-F • Example of a main point heading and supporting sub-headings

I. Plaintiffs’ complaint should be dismissed because the ADEA does not permit disparate impact claims.

A. The text of the ADEA precludes disparate impact claims.

- 1. Section 4(a) of the ADEA, which prohibits discrimination “because of age,” prohibits only intentional discrimination.**
- 2. Section 4(f) of the ADEA, which permits employers to consider “reasonable factors other than age,” precludes a discrimination claim based on the impact of an employment decision.**

B. The legislative history confirms that disparate impact claims are not cognizable under the ADEA.

C. Use Short Point Headings

In drafting point headings, your goal should be for the reader to be able to look down and quickly absorb the point heading's conclusion. Thus, pay attention to the length of the heading. A point heading that is too long will be difficult to absorb. How long is too long? No definitive answer exists, but here are some guidelines.

First, a point heading that sits on a single line is easiest to absorb. If your point heading is more than three lines, the point heading may be perceived as a forbidding block of text and your reader is less likely to wade through it. Thus, keep your point heading short.

Second, use multiple point headings if you have a complex idea that cannot be expressed in a single line. You will not always be able to draft a precise point heading that sits on a single line. You may need more than one line—or maybe several lines—to fashion a complete and accurate point heading. If a point heading is becoming too long for the reader to absorb its meaning, consider stating the conclusion you want the court to reach in one point heading and the reasons for that conclusion in sub-headings as in Example 6-F, above.

Finally, consider whether the point heading *needs* both the conclusion and the reasons for that conclusion. Sometimes, you may want to sacrifice completeness for conciseness. You will notice that in Example 6-F not all the point headings state the conclusion counsel wants the court to adopt and the reason the court should adopt that conclusion.

Different practitioners have different ideas about when a point heading becomes too long and the importance of including both your conclusion and the primary reason the court should adopt that conclusion. If you are working with a more senior attorney, follow the senior attorney's preference; likewise, if you are writing to a judge who you know prefers a particular style, follow that judge's preference.

Generally, most judges and attorneys prefer short point headings. We recommend aiming for one to two lines and not going beyond three lines. Your goal is to keep the point headings short, but choose words that convey as much substance as possible.

D. Divide the Text into Readable Chunks

When drafting point headings, one question that sometimes comes up is how frequently to insert a point heading. As a general rule, you should have a point heading before each dispositive issue. If those issues break down such that you have a single legal argument for each element or factor, you should include a point heading for each argument that addresses a single element or factor. Whether to sub-divide an argument addressing a single element or factor further depends on how long the legal argument is. Point headings should break text into readable chunks, both to give your reader a break and to help your reader return to your

argument and find specific information. However, do not include so many point headings that the text becomes choppy.

E. Use a Professional, Easy-to-Read Format

Point headings can also help provide a professional look to your argument if they are formatted effectively. Although attorneys vary in how they format their point headings, we recommend this format:

- **Numbering.** Each dispositive legal issue is given a Roman numeral. Sub-issues are identified with a capital letter, an Arabic number, a lower case letter, and then a lower-case Roman numeral.
- **Single space.** Each heading and sub-heading is single-spaced.
- **Punctuate properly.** If your point heading is a full sentence—and in your argument section usually all of your point headings will be full sentences that assert a conclusion—use proper punctuation, which includes a period at the end of the heading or sub-heading. If, as in Example 6-E, your heading is not a full sentence, it should not be punctuated.
- **Hanging indent.** If your point heading wraps to a second line, the first letter of the second line should appear under the first letter of the point heading. (This bulleted list uses hanging indent. The first letter of the second line appears under the first letter of the first line. The second line does not extend to the left under the bullet.)
- **Use bold.** Point headings should be in bold so that they stand out from the text and are easy to see. Italicized text tends to slow the reader down and, therefore, is less effective. Nonetheless, italicize if your workplace or court custom requires that you do so.
- **ALL CAPS? TRADITIONAL POINT HEADINGS USE ALL CAPS FOR POINT HEADINGS OF DISPOSITIVE ISSUES. ALL CAPS ARE, HOWEVER, MORE DIFFICULT TO READ. SO, AVOID THEM IF YOU CAN. NONETHELESS, IF YOUR WORKPLACE OR COURT REQUIRES ALL CAPS FOR MAIN HEADINGS, THEN ADHERE TO THOSE GUIDELINES.**
- **Initial Caps.** A Point Heading Using Initial Caps Capitalizes the First Letter of Most Words in the Point Headings. Typography Experts Now Recommend Against Using Initial Caps Because That Format Is More Difficult to Read and Tends to Slow the Reader Down. Thus, Capitalize Only the First Letter of the Heading and Any Proper Nouns.
- *Do not combine typeface alterations. Headings become especially hard to read when the writer combines two or more typeface alterations.*

The format described above will create point headings that are both professional-looking and easy-to-read. Example 6-G illustrates that format.

Example 6-G • Professional, easy-to-read point headings

- I. Each dispositive point heading has a Roman numeral.**
 - A. An outline should not have an “A” without a “B” or a “1” without a “2.”**
 - B. However, when your argument has only one dispositive point, you may have a “I” without a “II.”**
 - 1. Hanging indents make your point headings look polished.**
 - 2. Create a hanging indent by positioning the first word of the second line under the first word of the first line.**
 - a. Experts in typography have recommended changes to traditional formats.**
 - i. Avoid “all caps,” which is difficult to read and slows the reader down.**
 - ii. Avoid italicized text, which is difficult to read and slows the reader down.**
 - b. Use bold instead, which will make the point heading pop from the page.**
 - C. Assertive point headings are complete sentences with final punctuation.**

Although we recommend the format described above and illustrated in Example 6-G, if you work in a very traditional office or jurisdiction, you may need to follow a more traditional format. The most traditionally formatted point headings will be formatted as in Example 6-H.

Example 6-H • Traditionally formatted point headings

- I. EACH DISPOSITIVE POINT HEADING STILL HAS A ROMAN NUMERAL, BUT YOU WILL USE ALL CAPS AND THE TEXT MAY BE BOLDED AS WELL.**
 - A. The First Sub-Heading Will Use Initial Caps and May Be Bolded As Well.**
 - 1. In the next sub-heading, the text is bolded, but, like any other sentence, only the first letter of the point heading is capitalized.**
 - 2. Hanging indents still make your point headings look polished.**

- a. The next sub-heading will, again, use ordinary capitalization, but the text will likely be underlined.
 - i. You can see a trend in the formatting.
 - ii. Each sub-heading is formatted with less emphasis than the previous heading to reflect the smaller ideas contained in each sub-heading.
- b. Again, never have an "A" without a "B"; however, when your argument has only one dispositive point, you may have a "I" without a "II."

B. Assertive Point Headings are Complete Sentences With Final Punctuation.

III. Paragraph-Level Persuasion

The techniques for persuading at the paragraph level are straightforward and can be explained quickly.

A persuasive paragraph is one that is cohesive and coherent. A “cohesive” paragraph is a paragraph that focuses on a single idea. Cohesion requires that a paragraph’s first sentence clearly state what the whole paragraph is about and that every sentence within the paragraph relate to that first sentence. A “coherent” paragraph is a paragraph in which the ideas flow logically, from one to the next. When a paragraph is cohesive and coherent, a judge is more likely to follow your logical path to the conclusion you wish the judge to reach. By contrast, when a paragraph lacks cohesion or coherence, a judge is more likely to stumble along, veer off your intended path, and arrive at a different conclusion.

Each part of your paragraph—the thesis, the sentences that comprise the body of the paragraph, and the final sentence of a paragraph—can be used to persuade. Although simple, these techniques are powerful. Their appropriate use will provide organization and direction to your reader and will be critical to the effective presentation of your argument.

A. The Thesis Sentence

Every single paragraph within your argument should begin with a thesis sentence. That’s right: every single paragraph.

Thesis vs. Topic Sentences

A thesis sentence asserts a proposition that the paragraph’s text will prove. By contrast, a topic sentence merely describes the kind of information that the paragraph includes. A topic sentence asserts no point that will be proved.

Lawyers prefer thesis sentences over topic sentences because paragraphs should be structured to make a point.

Cohesion and Coherence

A persuasive paragraph is both **cohesive** and **coherent**. A **cohesive** paragraph has a main idea established in the thesis sentence and every sentence within the paragraph supports that thesis. In a **coherent** paragraph, the ideas flow logically from one to the next.

A “thesis” is a proposition put forward for consideration—one that the speaker will prove. A “thesis sentence” is an assertion to be proved in the paragraph that follows. By first asserting the point you intend to prove, your reader will have an easier time absorbing the details within the paragraph. In the best motions and briefs, the thesis sentences for each paragraph form a skeletal outline of the argument you are presenting to the court.

Compare the paragraph in Example 6-I, which uses a thesis sentence, and the paragraph in Example 6-J, which does not. Notice how the thesis sentence in Example 6-I tells the court the conclusion it should reach after reading the paragraph. In doing so, the thesis sentence shapes the way the court absorbs the information provided in the paragraph.

Example 6-I • More effective approach: a thesis sentence that asserts the point the paragraph will prove

....An officer establishes reasonable suspicion to search a suspect if the officer can point to specific and articulable facts that give rise to a reasonable inference that the person might pose an immediate threat. *See State v. Ehly*, 854 P.2d 421, 430 (Or. 1993).

To establish a reasonable belief that the defendant might pose an immediate threat, officers may rely on their knowledge that the defendant associates with a known dangerous person or that the person is connected with an activity that involves weapons. For example, in *Ehly*, this Court determined that officers had reasonable suspicion to conduct a protective search. *Id.* at 432. In that case, officers knew that the defendant was a drug user and that “many people who use illegal narcotics possess guns.” *Id.* at 430. Moreover, the officers also knew that defendant was “running” with a person who carried weapons. *Id.* Because the defendant was rummaging through a gym bag with his hands concealed and did not respond to the officer’s suggestion to dump out the contents of the bag, this Court concluded that it was reasonable for one of the officers to dump the contents of the bag onto the motel room bed. *Id.* at 432.

With a strong thesis sentence, the judge knows the writer’s primary assertion and what point the paragraph will prove. Here, the thesis sentence also acts as a hook for the case illustration.

The writer omits the thesis sentence and jumps directly into the facts of a case. By not providing a thesis sentence, the lawyer has lost an opportunity to focus the court's attention on the legal proposition that is important in that case.

Example 6-J • Less effective approach: a paragraph with no thesis sentence

...An officer establishes reasonable suspicion to search a suspect if the officer can point to specific and articulable facts that give rise to a reasonable inference that the person might pose an immediate threat. See *State v. Ehly*, 854 P.2d 421, 430 (Or. 1993).

→ In *Ehly*, this Court determined that officers had reasonable suspicion to conduct a protective search. *Id.* at 432. In that case, officers knew that the defendant was a drug user and that “many people who use illegal narcotics possess guns.” *Id.* at 430. Moreover, the officers also knew that defendant was “running” with a person who carried weapons. *Id.* Because the defendant was rummaging through a gym bag with his hands concealed and did not respond to the officer’s suggestion to dump out the contents of the bag, this Court concluded that it was reasonable for one of the officers to dump the contents of the bag out on the motel room bed. *Id.* at 432.

B. The Body of the Paragraph

Because the body of the paragraph contains your arguments and supporting evidence, it needs to be both cohesive and coherent. You can create a cohesive and coherent paragraph with a few techniques: creating “sentence chains” within the paragraph, using appropriate transitional words between sentences, and by following an expected order. These techniques will link the sentences of your paragraph—from the paragraph’s first sentence to its last—so that your paragraph is cohesive and coherent. The middle of the paragraph is also where you can insert less favorable information so that the less favorable information is de-emphasized.

1. Sentence Chains

Writers use “sentence chains” as a technique to keep the reader focused on the actor, topic, or idea being discussed in that paragraph. You can create sentence chains in different ways.

One kind of sentence chain is a topic chain. Topic chains connect each sentence within a paragraph to the paragraph’s topic by focusing on a specific actor, thing, or subject. In examples 6-K and 6-L below, notice the difference between the two versions of the paragraph. Which one has more cohesion? Why?

Example 6-K • A paragraph without a sentence chain

Lem Kasaka graduated from the Wharton School of Business in 2010 and immediately began working for a start-up company, Pure, which sells high-end vitamin and food supplements, skin and haircare products, make-up, books on

In this example, each sentence supports the topic sentence, although the subject of each sentence varies (as noted by the shaded sections).

physical and mental wellness, and other products promoting a clean and healthy lifestyle. The company grew exponentially in value, reaching a net worth of \$52 million in just nine years with Mr. Kasaka as CFO. He had been promoted from lead financial analyst in 2013. Securing capital and growing the business were Mr. Kasaka's initial job duties. By 2017, the company had a chain of fifteen stores spanning the West Coast with venues in Los Angeles, Santa Barbara, San Francisco, and Seattle, along with stores in Seoul, Tokyo, and London. Much of the company's success was driven by Mr. Kasaka's vision to brand the company as one promoting a pure Zen lifestyle that would inspire clean living and good physical and mental health.

Example 6-L • The same paragraph with a topic chain

Lem Kasaka is the Chief Financial Officer of Pure, and he was the guiding force behind the company's quick rise to international success. Mr. Kasaka graduated from Wharton School of Business in 2010, and he immediately became a partner in the fledgling start-up company. Under Mr. Kasaka's leadership, Pure went from a small store selling high-end beauty products and vitamins to an international company worth more than \$52 million dollars in just nine years. Mr. Kasaka expanded the store's brand to one that promotes a clean Zen lifestyle supporting clean living and good physical and mental health. By 2017, Mr. Kasaka had grown the company from a single store in Los Angeles to an international brand with storefronts in major West Coast cities and across the world in Seoul, Tokyo, and London.

Here, the shaded portions show the technique of chaining sentences by using the same subject or topic. Which paragraph is more cohesive?

Notice how the topic chains in Example 6-L create paragraph cohesion because each sentence focuses on the same subject—Mr. Kasaka. By keeping the focus on one person, a reader can more easily see how the sentences connect to each other and support the paragraph's thesis. In contrast, the sentences in Example 6-K are harder to follow because the subject of each sentence changes—some topics are about Mr. Kasaka and others focus on the business or its success.

You can also create sentence chains by using “bridges” that connect sentences. “Bridges,” sometimes called lexical chains or substantive transitions, take a key word or phrase from a preceding sentence and repeat that key word or phrase at the beginning of the very next sentence. The overlap from sentence to sentence allows the reader to track the progression of your ideas. Notice how a writer's use of bridging (or overlapping) language promotes coherence and cohesiveness in Example 6-M. Figure 6-N further illustrates how language choices can link ideas. By contrast, the lack of bridging language in Example 6-O makes it more difficult for the reader to follow the explanation of the law.

Cohesion and Coherence

A persuasive paragraph is both **cohesive** and **coherent**. A **cohesive** paragraph has a main idea established in the thesis sentence and every sentence within the paragraph supports that thesis. In a **coherent** paragraph, the ideas flow logically from one to the next.

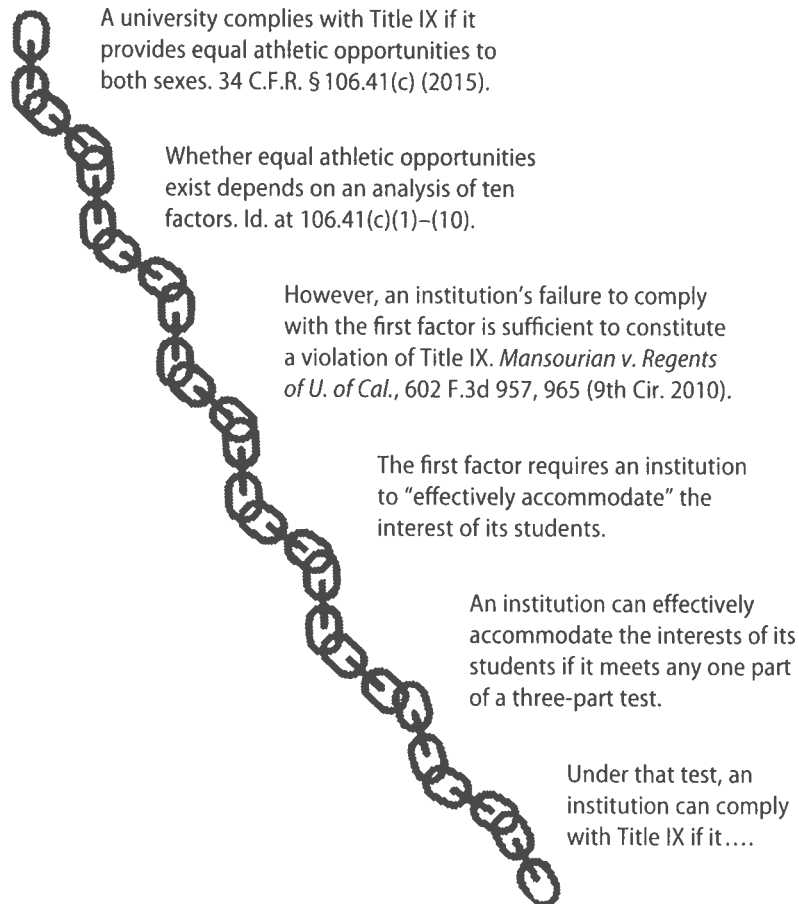
The shaded text highlights bridging language. Notice how each sentence begins with an idea expressed in the previous sentence.

Example 6-M • Bridging language creates a coherent explanation of rules

A university complies with Title IX if it provides equal athletic opportunities to both sexes. 34 C.F.R. § 106.41(c) (2015). Whether equal athletic opportunities exist depends on an analysis of ten factors. *Id.* at 106.41(c)(1)-(10). However, an institution's failure to comply with the first factor is sufficient to constitute a violation of Title IX. *Mansourian v. Regents of U. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010).

The first factor requires an institution to "effectively accommodate" the interests of its students. An institution can effectively accommodate the interests of its students if it meets any one part of a three-part test. Under that test, an institution can comply with Title IX if it . . .

Figure 6-N • Use bridging language to link ideas



Example 6-O • The lack of “bridging language” makes the logic of a paragraph more difficult to follow

A university complies with Title IX if it provides equal athletic opportunities to both sexes. 34 C.F.R. § 106.41(c) (2015). The conclusion rests on an analysis of ten factors. *Id.* at 106.41(c)(1)-(10). However, an institution’s failure to comply with the first factor is sufficient to constitute a violation of Title IX. *Mansourian v. Regents of U. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010).

An institution can “effectively accommodate” the interests of its students if it meets any one part of a three-part test. An institution can comply with Title IX if it...

Notice how the connection between ideas is more difficult to follow without bridging language.

Sentence chains are a powerful way to enhance the cohesion of your paragraph and lead your reader from one idea to the next. At other times, a good transitional word or phrase will do the trick.

2. Use the appropriate transitions

Appropriate transitions can also connect ideas and promote coherence. Occasionally, a writer will add a transitional word, but the selected transitional word does not accurately describe the relationship between ideas. Compare Examples 6-P and 6-Q. Can you see how the wrong transitional word can disrupt the logical flow of your argument? Table 6-R will help you select an appropriate transitional word if you are unsure which transitional word will best connect two ideas.

Example 6-P • The correct transition allows your reader to understand the relationship between ideas

Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* For example, in one past case plaintiffs established actual possession by showing that they used the property in the same way they did their adjoining land. *Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995). In another case, plaintiffs proved actual possession by building a fence and planting vegetation. *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994).

Example 6-Q • An incorrect transition confuses

"In addition" is not an appropriate transition because the sentence that follows does not add to the law. The sentence that follows provides an example of the rule just stated.

"By contrast" is also inappropriate because the sentence is another similar example of the rule that courts focus on the type of activity.

Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000.) Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* In addition, in one past case plaintiffs showed that they used the disputed land as an owner would by showing that they used the property in the same way they did their adjoining land. *Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995). By contrast, plaintiffs in another case proved actual possession by building a fence and planting vegetation. *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994).

Table 6-R • Transitions¹

Introduce	Add	Contrast	Sequence	Emphasize
First	Again	However	First, second,	Certainly
Initially	Moreover	Although	third...	Above all
To begin	Additionally	But	Initially	Indeed
The first reason	Similarly	Yet	Then	Especially
Primarily	Also	Unlike	Finally	Accordingly
In general	Likewise	In contrast	Before	Since
Alternatively	Further	Nevertheless	Next	Not only...
A further reason		Nonetheless	Last	but also
		Rather		
Connect	Exemplify	Despite	Restate	Conclude
Because	For example	Instead	That is	Finally
Thus	For instance	Still	In other words	As a result
As a result	To illustrate	On the other	More simply	Thus
Thereby	In particular	hand	As noted	Therefore
Therefore	Namely			In short
Hence	Specifically			Consequently

1. Excerpted from Laurel Oates, Anne Enquist, and Jeremy Francis, *The Legal Writing Handbook: Analysis, Research & Writing* 620-21 (8th ed. 2021), and supplemented by Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 86 (2d ed. 2013).

3. Order information in expected ways

Throughout this book, we have described logical orders that lawyers expect. Using an expected order can also create coherence. Information presented in a customary order will seem logical to your legal reader. This section emphasizes the customary order in which to present rules and case illustrations.²

With respect to rules, usually, your rules should be explained with the broadest concept first.³ Rules are refined and explained in more detail as you move through a paragraph. Then, use a bridge to connect one rule to the next. Again, in Examples 6-M and 6-O, you can see the difference between an explanation of rules that uses bridging language and an explanation that does not.

For case illustrations, follow this standard order: Begin with a hook that explains the legal principle that the following case will illustrate. Next, explain the facts. Usually, chronological order is the best order for facts; although, you may occasionally prefer a topical organization.⁴ Be sure to provide all the facts relevant to the court's decision before moving on. The final two steps are to state the court's holding and the court's reasoning (if the court provides reasoning beyond the relevant facts). Often, lawyers will end with the court's holding because it offers a nice summary, but you can end on either the court's holding or the court's reasoning, whichever most emphasizes the point you want to make.

Rules and case illustrations do not always form independent paragraphs, but when they do, the above organizational principles will help provide cohesion and logical coherence to your paragraph. Using sentence chaining techniques can further enhance coherence and cohesion.

2. Other logical orders that lawyers might expect to see in a paragraph are (1) the order described for a roadmap paragraph, explained in §3.1, *Organizing Claims and Arguments*; (2) the order described for an analogical argument, discussed in §3.2, *Structuring Analogical Arguments*; and (3) the order in which a statutory construction argument is presented, described in §3.3, *Structuring Rule-Based Arguments*.

3. As explained in Chapter 5, *Drafting Persuasive Arguments*, part A.1, *Rules*, you may for persuasive reasons sometimes choose not to follow the common approach of explaining the more general rules first.

4. For more on chronological versus topical organizations, see Chapter 10, *Statements of Fact and of the Case*.

4. Place damaging information in the middle of a paragraph

The body of the paragraph can also be used to disclose information that is less favorable to your client, but that you are ethically bound to disclose. In the middle of the paragraph, you can frame the less favorable information in a more favorable light. Also, as discussed above, information in the middle—of a section, paragraph, or sentence—gets less attention.

Examples 6-S, 6-T, and 6-U show the difference between a paragraph that puts damaging information in the middle, beginning, or end of a paragraph. Which structure minimizes the damaging information the most?

Example 6-S • Damaging information buried in the middle of the paragraph

The facts in this case, even when viewed most favorably for the plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication. Although Moore’s blood alcohol level was .13, she did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms, Defendant Soto could not have known she was intoxicated.

Here, the writer embeds the damaging information (the fact that Moore’s blood alcohol level was far in excess of the permitted level of .08 percent) in the middle of the paragraph, a position that will de-emphasize that information.

Example 6-T • Damaging information at the beginning of the paragraph

Although Moore’s blood alcohol level was .13, she did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms, Defendant Soto could not have known she was intoxicated. Therefore the facts in this case, even when viewed most favorably for Plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication.

Here, the damaging fact is at the beginning of the paragraph, a position that tends to highlight the information.

Example 6-U • Damaging information at the end of the paragraph

The facts in this case, even when viewed most favorably for Plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication. She did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms that would support her blood alcohol level of .13, Defendant Soto could not have known she was intoxicated.

Here, the damaging fact is in the last sentence. Although the last sentence receives less attention than the first sentence, it still receives more attention than the middle of the paragraph.

C. The Final Sentence

Finally, cohesion and coherence can be created by carefully crafting the final sentence of your paragraph. In the final sentence of your paragraph, consider returning to the point you asserted in your thesis sentence. Returning to your thesis closes the loop by establishing that you have now proved what your thesis sentence said you would prove. In addition, and as noted at the outset of this chapter, a reader's eyes tend to rest on (and the reader tends to absorb) the first and last sentences of a paragraph, so the last sentence is an ideal place to remind the reader of the conclusion you believe the reader should reach.

Look at Example 6-V. In that example, you can see how a final sentence repeating the paragraph's thesis helps drive home the point you want to make.

Example 6-V • Repeating assertion in the final sentence

Officer Ephgrave's interaction with defendant Adams was mere conversation, and not a stop because the defendant could not reasonably believe his liberty was ever restrained at any point during his encounter with Officer Ephgrave. Like the officer who asked for identification in *Gilmore*, here Officer Ephgrave wanted to learn if Adams was involved in the bank robbery. In addition, as in *Gilmore* where the officer only requested information but did not alter the defendant's course, Officer Ephgrave did not alter Adams's course or prevent him from leaving. Officer Ephgrave asked Adams if he was planning to leave, to which Adams responded that he was not. Further, Officer Ephgrave said he would move his car whenever Adams needed to leave. According to Officer Ephgrave, Adams said, "Oh, okay. No problem." Therefore, Officer Ephgrave did not prevent Adams from leaving nor did he alter Adams's course. Accordingly, Adams could not reasonably believe that his liberty was restrained; the statement was mere conversation.

The final sentence re-asserts the conclusion, thereby driving home the point of the paragraph.

Although having a final sentence that repeats the original thesis is helpful, occasionally such a sentence is overly repetitive or adds length unnecessarily. In those instances, omit it. For complex or detailed paragraphs, use the opportunity to hammer home your point by restating your thesis in the final sentence of a paragraph.

IV. Sentence-Level Persuasion

Just as paragraphs can be shaped to present your arguments more or less persuasively, individual sentences can be shaped to present information more or less persuasively.

A. Beginning, Middle, and End

The same locational guidelines that apply to paragraphs apply to sentences. Readers tend to absorb information at the beginning and end of sentences; readers pay less attention to information in the middle.

Compare Examples 6-W and 6-X. Can you see how the same information in different locations is emphasized differently? Thus, think carefully about where you locate information within a sentence.

Example 6-W • Damaging information at the beginning of the sentence

Even with a blood alcohol level of .13, Moore did not demonstrate outward signs of intoxication such as having slurred speech or smelling of alcohol.

Here, the damaging information appears at the beginning of the sentence, a place where it will receive less emphasis.

Example 6-X • Damaging information in the middle of the sentence

Moore did not demonstrate signs of intoxication consistent with a blood alcohol level of .13 because her speech was not slurred and she did not smell of alcohol.

Here, the negative information appears in the middle of the sentence, a place where it will receive less emphasis.

B. Subjects and Verbs

Another focal point of a sentence is the subject and verb. Readers naturally want to know “who did what,” and they will consciously or subconsciously seek out that information first. You can make it easier for the judge to find that information if you follow the steps below.

1. Place the subject and verb close together and at the beginning of the main clause

You will make the information in your sentences easier to absorb if you place the subject and verb of the sentence at the beginning of the main clause and if you place the subject and verb close together. Compare Examples 6-Y and 6-Z. In the first example, Example 6-Y, the subject and verb (shaded) are far apart. In the second example, Example 6-Z, they are close together. Can you see how, as a result, the sentence in the first example is more difficult to absorb?

Example 6-Y • Subject and verb far apart

The police officer, believing that it was suspicious that the defendant's vehicle sped up after the police officer began following it, pulled the defendant's vehicle over.

Example 6-Z • Subject and verb close together

The police believed that it was suspicious that the defendant's vehicle sped up after the police officer began following it. The police officer, therefore, pulled the defendant's vehicle over.

As Examples 6-Y and 6-Z indicate, often, when the subject and verb of a sentence are far apart, one way to fix the problem is to remove the information that separates the subject and verb and put it into its own sentence.

2. Prefer the active voice

As a general rule, you should write using the active voice.

The active voice is best understood in comparison to the passive voice.⁵ In the active voice, the subject is the “be-er” or the “do-er” of the sentence. By contrast, in a sentence written in the passive voice the subject is neither a “be-er” nor a “do-er.” Rather, the subject is acted on by another force.⁶

Example 6-aa is written in the active voice, while Examples 6-bb and 6-cc are written in the passive voice. In the first example, Example 6-aa, the supervisor is the subject of the sentence, and he is the “do-er” because he dismisses the plaintiff from his job. Because the subject is the “do-er,” that sentence is in the active voice. By contrast, in the next two examples, Examples 6-bb and 6-cc, the plaintiff is the subject, but is not doing anything. Rather, something is happening to the plaintiff by the supervisor, in Example 6-bb, and by some unnamed source in Example 6-cc. Thus, those two sentences are written in the passive voice.

Example 6-aa • Active voice

The plaintiff's supervisor then dismissed the plaintiff from his job.

Example 6-bb • Passive voice

The plaintiff was then dismissed from his job by his supervisor.

Example 6-cc • Passive voice

The plaintiff was then dismissed from his job.

5. Remember that “passive voice” is different from “past tense.” “Past tense” refers to *when* an action occurs. “Passive voice” refers to *who* did the action.

6. Capital Community College, *Guide to Grammar & Writing*, <http://guidetogrammar.org/grammar/passive> (last visited Aug. 4, 2021).

Although, usually, you should prefer to clearly name “who did what,” there are times when you do not want to call attention to “who did what.” For example, if you represent an automobile driver following an accident with a cyclist, you may want to de-emphasize the role of your client (the driver), by using the passive voice, as in Example 6-dd. Other times, your client may have done something appropriate but distasteful, such as fire an employee. Again, you might use the passive voice, as in Example 6-ee. In both of those cases, the passive voice puts the actor (your client) in the background and the action in the foreground.

Example 6-dd • Appropriate passive voice

The cyclist was hit in the intersection.

Example 6-ee • Appropriate passive voice

Ms. Jones was then fired.

Finally, you may have to use the passive voice when you do not know who did what. For example, you may need to refer to a report, but the record does not disclose who prepared the report. In that case, you may have no choice but to use the passive voice.

Although passive voice has its uses, remember that the active voice is usually easier for your reader to absorb and makes for more evocative and stronger writing, both of which help persuade. Thus, prefer the active voice.

Verb Choice Makes a Difference!

Word choice can affect both the reader’s perception and memory. In a 1974 experiment, psychologists Elizabeth Loftus and John Palmer showed a film of an auto accident to study participants. Some participants were asked how fast they thought the cars were going when they “hit” each other. Other participants were asked, respectively, how fast the cars were going when they “smashed into” each other, “collided with” each other, “bumped into” each other, or “contacted” each other. The results were impressive: The average speed estimate by those who were asked how fast the cars were going when they “smashed into” each other was nearly ten miles per hour faster than the estimate by those who were asked how fast the cars were going when they “contacted” each other.

The Loftus and Palmer study demonstrates that your choice of wording can have a significant impact on the reader’s perception of what happened.

3. Prefer evocative verbs

When selecting verbs, go for strong verbs that show action. In Example 6-dd, for instance, the sentence could be rewritten with active verbs for punch. Saying the driver collided, hit, bumped, or crashed into the cyclist elevates the impact and visual image in the sentence. Unless, of course, you represent the driver, in which case, less evocative verbs will serve your client better.

4. Avoid “it is” and “there are”

For all the reasons stated above, avoid the “it is” or “there is” structure in a sentence when the “it” and the “there” do not actually refer to a specific subject. We often use the phrases “it is” and “there are” when we speak, but that structure creates weak writing. Those phrases obscure the subject of the sentence by creating a false subject (“it” or “there”); they use a weak verb, “is” or “are”; and they often create a wordier sentence. Compare the sentences in Example 6-ff. Which version of each sentence is stronger?

Example 6-ff • Avoid “it is” and “there are”

Version 1: It is likely the defendant posted the information after her conversation with the seller.

Version 2: The defendant likely posted the information after her conversation with the seller.

Version 1: There are five factors that the court considers.

Version 2: The court considers five factors.

5. Use a noun instead of “it”

Another good rule of thumb is to eliminate the word “it” altogether, and use a noun instead. “It” can create confusion or ambiguity when the reader is not clear which noun “it” refers to. For example, look at this sentence: “The tractor-trailer hit the bridge, but it was not damaged.” What was not damaged—the truck or the bridge? Be clear in your writing—replace “it” with a noun.

C. Dependent Clauses

Dependent clauses are a wonderful way to acknowledge less favorable information. A dependent clause is a group of words that have a subject and verb but cannot stand alone. In Example 6-gg the shaded text is a dependent clause. The important point about dependent clauses is that the actual subject and verb of the sentence are located elsewhere. As

mentioned above, readers naturally look for the subject and verb of a sentence. Thus, the subject and verb of a sentence receive more attention. By putting information in a part of the sentence that is separate from the subject and verb, you will de-emphasize that information. Compare the two different versions of the sentence in Example 6-gg. Can you see how the emphasis shifts depending on which information is placed in the dependent clause? Choose the structure that works best for your argument.

Example 6-gg • The dependent clause receives less emphasis

Version 1: Although Moore's blood alcohol level was .13, she did not demonstrate any outward signs of intoxication.

Version 2: Although she did not demonstrate any outward signs of intoxication, Moore's blood alcohol level was .13.

Be careful, though, about putting a dependent clause in the first sentence of a paragraph. The first sentence of a paragraph is emphasized. Thus, you will undo your efforts to de-emphasize information if that information appears at the beginning of a paragraph.

D. Short Sentences

Short sentences add punch. Use them. Sparingly.

Example 6-hh • Too many short sentences

Officer Ephgrave pulled into the lot. He parked his car behind the defendant's car. The defendant yelled to move the car. Officer Ephgrave walked over to the defendant. He asked if the defendant was planning to leave. The defendant said, "No, I'm going to sit a little longer." Officer Ephgrave said no other parking slots were available. Ephgrave said he could move. The defendant said, "Oh, okay. No problem."

Although we love a punchy, short sentence, a short sentence has punch only when placed in contrast to longer sentences. Thus, if every sentence you use is short and punchy, the resulting read will be bumpy, like riding a bike over cobblestones, as in Example 6-hh. A short sentence has a stronger effect if interspersed among longer, flowing sentences. The short sentences in Examples 6-ii and 6-jj are much more effective.

Example 6-ii • Contrast a long sentence with a short punchy sentence⁷

By 2000, the investigation of the helicopter-conversion industry was winding down, with disappointing results for Wales and the U.S. Attorney's Office. Only one case remained.

Example 6-jj • Contrast a long sentence with a short punchy sentence

The firm, called Intrex Helicopters, which was based at Powell's home, was renovating a single helicopter for civilian use. Still, the stakes were substantial.

V. Persuasion through Quotations

When used appropriately, quotations can be used for persuasive effect. When used inappropriately, quotations disrupt your writing and clutter your prose.

To achieve persuasive effect and avoid quotation-clutter, you should, as a general rule, avoid quoting a text. Too often attorneys are not confident enough in their own analytical skills to explain what a court said or did and why. In motions and briefs written by those lawyers, you will see one quotation right after the next, with the tone, style, and word choice changing with each sentence. Such motions and briefs not only shout "Lazy!" and "This writer refuses to think!," they also are very difficult to read. As a state supreme court justice once stated, "Quotations are no substitute for analysis."⁸ Instead, as a general rule, take the time to understand the law and explain it in a cohesive, straight-forward manner.

That said, when used thoughtfully, quotations can be persuasive.

A. Quote When Specific Words Matter

One good reason to quote text is because the specific wording matters to the legal argument. For example, attorneys will usually quote a governing statute so that the court knows the exact language of the statute. Similarly, if a witness's statement is important to the analysis, that statement should be quoted so that the reader knows what the witness actually said—as opposed to your characterization of what the

7. Jeffrey Toobin, *An Unsolved Killing*, *The New Yorker*, Aug. 6, 2007, at 43, 48. This example was brought to our attention by Ross Guberman, *Legal Writing Pro: Lessons from The New Yorker*, <http://www.legalwritingpro.com/articles/D09-new-yorker.php> (last visited Aug. 4, 2021).

8. Former Oregon Supreme Court Justice W. Michael Gillette to one of the authors.

witness said. Likewise, quote the contract when the contractual language is the subject of the dispute. On those occasions when the precise words matter, quoting text will emphasize the precision with which you are addressing the text and the care you are taking to accurately represent the facts.

B. Quote for Emphasis

Quotations are also effective when used to link your explanation of the law to your application. Sometimes a court will explain its reasoning in such an evocative way and in a way that so perfectly suits your client's case that you want to provide that quote in your explanation of the law. That's great. But if you provide that quote in only your explanation of the law, you are losing an opportunity. That quote will be most persuasive if you then repeat it in your application. By re-integrating that quote (or a key part of that quote) in your explanation of the law, you will be helping your reader to see how your analysis is exactly consistent with the analysis in prior case law. Table 6-kk provides an example.

Table 6-kk • Weaving a quotation into your analysis

Original quotation from <i>Richards v. Sandusky Community Schs.</i>, 102 F. Supp. 2d 753, 763 (E.D. Mich. 2000)	"The only evidence provided by plaintiff that would support a contention that she was 'about to report' defendants' alleged health and safety violations is the fact that plaintiff received the appropriate paperwork from OSHA. Plaintiff, however, admitted that she never completed the paperwork. (Richards Dep. at 63). This fact, by itself, falls drastically short of the clear and convincing proof required under the [Whistle-blowers' Protection Act]."
Quotation in the explanation of the law	In <i>Richards</i> , the court held that the plaintiff could not prove that she was "about to report" a violation. In that case, the plaintiff first reported a possible health violation internally to her employer. See <i>Richards v. Sandusky Community Schs.</i> , 102 F. Supp. 2d 753, 755, 763 n.14 (E.D. Mich. 2000). Then, she contacted OSHA and received the appropriate paperwork to file a complaint. <i>Id.</i> at 763 n.14. The plaintiff never completed the paperwork. <i>Id.</i> at 763. The <i>Richards</i> court held that this evidence was insufficient to prove that the plaintiff was "about to report" a violation. <i>Id.</i> In fact, the court held that the evidence fell "drastically short of the clear and convincing proof required." <i>Id.</i>
Quotation integrated into the application	Mr. Conway, like the plaintiff in <i>Richards</i> , reported the violation internally, to his supervisor, but he did nothing further. Although Mr. Conway went online and downloaded the necessary paperwork, this action is exactly like going to OSHA and receiving, but never filling out, the appropriate paperwork. As the <i>Richards</i> court explained, such action falls "drastically short of the clear and convincing proof required."

C. Avoid Block Quotes, but If You Must Use Them, Assert Your Point First

As a general rule, most careful writers would say, “Avoid block quotations.” The reason: Most readers tend to skip over them because the dense text is difficult to read. Thus, if you must cite to a long portion of a case or some statutory material, try to integrate that text into your sentences, quoting only key sections or phrases of the source.

Sometimes, however, you cannot avoid a block quotation, such as when you need to cite to a statutory section in its entirety or when a large portion of a record needs to be presented in one block in your argument. When you cannot avoid the block quotation, explain the point of the quotation just before the quotation. By explaining the point of the quotation, your reader will be encouraged to read the quotation to see if, in fact, the quotation supports that point.

Examples 6-ll and 6-mm show how an explanatory sentence can make the advocate’s point easier to understand. The quotation is from the legislative history to a statute that permits the revocation of a person’s driver’s license when that person has been convicted of driving under the influence of intoxicants “for a third time.” In a brief, a state assistant attorney general wants to use the legislative history to argue that the statute should be construed so that the phrase “for a third time” is understood to permit a revocation when a person has been convicted of “three or more” DUIs. In Example 6-mm, notice how the sentence that precedes the block quote makes it easier to understand the point the assistant attorney general wants to make.

Example 6-ll • A block quotation without its point explained

When Representative Barker carried the bill on the House floor, he stated the following:

Under the current law, someone convicted of driving under the influence of intoxicants does not permanently lose their driving privileges until after their fourth conviction. This means that after the initial DUI arrest, which often results in a diversion program, someone has to be convicted four more times to lose their privileges. As an Oregonian and the father of two daughters, I find this to be unacceptably tolerant towards such reckless behavior.

Example 6-mm • A block quotation with its point explained

When Representative Barker carried the bill onto the House floor, he stated that waiting until a fourth DUI conviction to revoke a driver’s license was unacceptable:

Under the current law, someone convicted of driving under the influence of intoxicants does not permanently lose their driving privileges until after their fourth conviction. This means that after the initial DUI arrest, which often results in a diversion program, someone has to be convicted four more times to lose their privileges. As an Oregonian and the father of two daughters, I find this to be unacceptably tolerant towards such reckless behavior.

In addition to providing an explanatory sentence before the quotation, consider also providing a sentence immediately after the quotation to sum up or further explain the point of the quotation. When a reader jumps over a block quote, the reader's eye often lands on the first text after the block quote. Thus, you can also emphasize your point by summarizing it in the text immediately after the block quote.

Because readers have difficulty extracting the point from a block of text, if you must use a block quote, help your reader: Explain the point the reader should have taken away had the reader actually read the block quote.

A Judge's Thoughts on Block Quotes

"Block quotes, by the way, are a must; they take up a lot of space but nobody reads them. Whenever I see a block quote I figure the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer. Let's face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase."

The Hon. Alex Kozinski
U.S. Court of Appeals, 9th Cir.
The Wrong Stuff,
1992 BYU L. Rev. 325, 329 (1992).

VI. Persuasion through Citations

The techniques discussed above will help you refine the substance of your argument. As a general rule, your argument should be made in the text, which the court will read, and not through citations, which many readers skip over. However, effective use of citations can bolster the argument that you make in the text.

A. Build Credibility Through Citations

As we explained in Chapter 2, *The Ethical, Professional Advocate*, you should always conduct yourself so that you are perceived as a professional

and credible lawyer. Citations, though tedious, are one of those places where you can reinforce the idea that you are a professional, credible attorney. Simply do two things. First, many jurisdictions have local rules that establish how to cite in that jurisdiction. Follow those rules. Second, be accurate. Be certain that your citation is, in fact, directing the court to the proper authority and the proper page within that authority. No need to make the court's job more difficult by giving the judge a citation to nowhere.

In addition to conveying your credibility, citations can provide more substantive support for your argument, thus making it more persuasive.

B. Emphasize the Weight of Authority

Citations, first, emphasize the binding authority for your argument. As a general rule, attorneys choose cases from the same jurisdiction and from the highest court possible. The citation will then reveal that the case is binding on the courts below.

Sometimes, though, questions arise about which authority will best emphasize the binding nature of the authority. For example, when a legal proposition is frequently stated, you may wonder whether to cite the first case to have stated the proposition or a more recent case. Citing the earliest case highlights the point that the proposition has ancient roots, but may leave the reader wondering whether the proposition still holds true. Whether to cite the earliest case, the latest case, or a combination depends on the point you want to make in the text. For example, if your text emphasizes that a rule of law was first recognized decades ago, the appropriate citation is to the first case, as in Example 6-nn.

Example 6-nn • Citing to an early case to emphasize the historical roots of a doctrine

When determining the custody of a child, Minnesota has historically declared a preference for the natural parents of the child. *See State v. ex rel. Larson v. Halverson*, 127 Minn. 387, 389-89 (1914) (holding that a natural's parent's rights of custody and control are a "paramount" consideration).

By contrast, if you want to emphasize the applicability of a principle without particularly emphasizing its history, use a current case and the citation signal, "e.g.," as in Example 6-oo. The citation signal "e.g." means "for example" and is used to indicate that the cited case is just one of many cases that support a proposition.⁹

9. ALWD & Carolyn V. Williams, *ALWD Guide to Legal Citation* 370-72 (7th ed. 2021) (R. 35); *The Bluebook: A Uniform System of Citation* 4-5 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (R. B1.2).

Example 6-oo • Citing to a current case to focus on current law

When determining the custody of a child, Minnesota prefers the child be placed with a natural parent. *See, e.g., Durkin v. Hinich*, 442 N.W.2d 148, 152–153 (Minn. 1989) (“[T]here is a presumption in custody determinations that a natural parent is fit to raise his or her own child.”).

Finally, if you want to emphasize both the ancient roots of a proposition and that it is still good law, you can cite to both the first case and a recent application of the rule, as in Example 6-pp.

Example 6-pp • Citing to both an early and current case to emphasize continuity of policy

When determining the custody of a child, Minnesota has historically and to this day expressed its preference that a child be placed with the child’s natural parents. *See State v. ex rel. Larson v. Halverson*, 127 Minn. 387, 389–89 (1914) (holding that a natural parent’s rights of custody and control are a “paramount” consideration); *In re Custody of N.A.K.*, 649 N.W.2d 166, 175 (Minn. 2002) (concluding that upon the death of a custodial parent, custody will be awarded to the non-custodial parent unless that assumption is overcome by “extraordinary circumstances”).

C. Show a Trend Through Citations

If you want to establish a trend in the law or argue that a majority of courts have reached a conclusion that you want the court to reach in your client’s case, a string cite may be the simplest, most direct way of establishing that point. A string cite, when combined with parentheticals, can quickly establish a trend without having to describe the facts of each case in detail.

Take for example the case in which the estate of an elderly woman sued a four-year-old bicyclist and her parents after the four-year-old collided with the elderly woman. Counsel for the elderly woman wanted to establish that the majority of courts did allow for the possibility that a four-year-old could be negligent by using a string cite after describing the lead case. Thus, the attorney drafted the text in Example 6-qq in which the attorney asserts that the majority of courts allow for four-year-olds to be sued and then supports that assertion with a string cite.

Example 6-qq • Using string cites to show a trend in the law

The *Comardo* decision, which concludes that a jury must assess the culpability of a four-year-old, has been consistently followed since that case was decided in 1928. *See Chandler v. Keene*, 168 N.Y.S.2d 788, 791 (N.Y. App. Div. 1957) (holding that a jury properly decided whether a child of four years and

eleven months was contributorily negligent); *Weidenfeld v. Surface Transp. Corp. of N.Y.*, 55 N.Y.S.2d 780, 783 (N.Y. App. Div. 1945) (same regarding a four-year-old child); *Sun Jeong Koo v. St. Bernard*, 392 N.Y.S.2d 815, 816 (N.Y. Sup. Ct. 1977) (same regarding a child of four years and ten months); *Searles v. Dardani*, 347 N.Y.S.2d 662, 665 (N.Y. Sup. Ct. 1973) (same regarding a child of four and a half years); *Republic Ins. Co. v. Michel*, 885 F. Supp. 426, 433 (E.D.N.Y. 1995) (same regarding a child of four years and four and a half months); *Redmond v. City of New York*, 447 N.Y.S.2d 434, 434 (N.Y. 1981) (same regarding a child of four years and ten months).

As you can see, though, string cites can be difficult to read because they, essentially, create a long block of text, and readers tend to skip over long blocks of text. Moreover, a string cite is useful only if the point of law that you are discussing is in controversy. If your opponent is likely to agree that courts have adopted a particular point of law, then a string cite is simply a waste of space and of the court's time. Thus, use string cites sparingly.

If you wish to assert a point of law that is uncontroversial and is stated by a number of authorities, consider using the signal "e.g." rather than a string cite. When many cases state the same proposition and the opposing party is unlikely to dispute the proposition, you can simply choose one case that states the proposition and precede the citation with "e.g.," as in Example 6-rr. The abbreviation "e.g." tells the reader that the case you have chosen to cite is just one of several that state the same proposition.

Example 6-rr • Using "e.g." to present a common and undisputed proposition

When a district court grants an injunction based on its interpretation of a statute, this Court's review is de novo. *See, e.g., Edina Educ. Ass'n v. Bd. of Educ. of Indep. Sch. Dist. No. 273*, 562 N.W.2d 306, 311 (Minn. App. 1997) (reviewing de novo injunction based on interpretation of Data Practices Act).¹⁰

D. Use Explanatory Parentheticals Effectively

An explanatory parenthetical is a part of a citation that is used to help a reader understand the citation's significance.¹¹ When you assert a propo-

10. Adapted from *Williams v. Nat'l Football League*, 794 N.W.2d 391, 395 (Minn. Ct. App. 2011).

11. See the *ALWD Guide to Legal Citation*, *supra* note 9, at 385–89 (R. 37), or *The Bluebook: A Uniform System of Citation*, *supra* note 9, at 5–6 (R. B1.3), for details about how to incorporate explanatory parentheticals.

sition that depends on synthesizing the holdings from a series of cases, parentheticals can be an effective way to prove the asserted proposition without delving into the specific facts and holdings of each case you have reviewed. For example, parentheticals can be used to great effect to establish a trend in the law. Both Example 6-qq and Example 6-ss use parentheticals to show that a series of courts have reached the conclusion that the writer wants the court to reach in this case.

Example 6-ss • Parentheticals used to establish a trend¹²

Plaintiff's claim must fail because the First Amendment does not allow a citizen to avoid paying taxes because she objects to government policy. *Adams v. Comm'r*, 170 F.3d 173, 182 (3d Cir. 1999) ("Plaintiffs engaging in civil disobedience through tax protests must pay the penalties incurred as a result of engaging in such disobedience."); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent return cannot be avoided by evoking the First Amendment[.]"); *Welch v. United States*, 750 F.2d 1101, 1108 (1st Cir. 1985) ("[N]oncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment[.]"); *United States v. Ness*, 652 F.2d 890, 892 (9th Cir. (1981) ("Tax violations are not a protected form of political dissent.").

Parentheticals should be used for less important ideas, not the primary points of your analysis. Great points can get lost in a mass of citations, and even the most engaged readers tend to skip over a string of citations with parentheticals. Thus, your argument must appear in the text and not in citations. To test whether you have used parentheticals effectively, read your motion or brief without the citations and their parentheticals to see whether you have also made your point within the text.



The techniques in this chapter, summarized in Table 6-tt, should help fine-tune your brief so that a court can see why your substantive arguments should win. Although these techniques cannot eradicate undesirable law or facts, they can help emphasize why the outcome your client seeks is a correct and preferable outcome to the one opposing counsel seeks.

¹². Adapted from *Greene v. I.R.S.*, No. 1:08-CV-0280, 2008 WL 5378120, at *5 (N.D.N.Y. Dec. 23, 2008).

Table 6-tt • Persuasive Techniques Chart

Technique	What it does	Example of technique in action
Use a thesis sentence— one that directly tells the proposition you are advocating — to begin every paragraph in your document.	<ul style="list-style-type: none"> Helps judge see the outline of points Helps judge better absorb the ideas in the paragraph 	Officer Ephgrave’s interaction with the defendant was a mere conversation and not a stop because the defendant could not reasonably believe his liberty was restrained at any point during the encounter. [Remainder of paragraph follows]
Sandwich unfavorable law or facts in the middle of a paragraph.	<ul style="list-style-type: none"> Embedding the material lessens the impact of the information, particularly when unfavorable material is sandwiched between favorable material 	The facts in this case, even when viewed most favorably for the plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication. Although Moore’s blood alcohol level was .13 , she did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms, Defendant Soto could not have known she was intoxicated.
In a paragraph’s last sentence, restate the point (or thesis) of that paragraph.	<ul style="list-style-type: none"> Drives home point of paragraph, especially when a paragraph is long or more complex 	Therefore, Officer Ephgrave did not prevent the defendant from leaving, nor did he alter the defendant’s course. Accordingly, the defendant could not reasonably believe that his liberty was restrained.
Within a paragraph, use bridging language to connect rules or ideas.	<ul style="list-style-type: none"> Increases coherence (the flow of logical ideas) and cohesion (the point a group of ideas together make) Stating key words or phrases in one sentence then repeating them in the next sentence enhances a judge’s ability to follow an idea 	A university complies with Title IX if it provides equal athletic opportunities to both sexes. Whether equal athletic opportunities exist depends on an analysis of ten factors . However, an institution’s failure to comply with the first factor is sufficient to constitute a violation of Title IX.
Within a paragraph, chain sentences to promote cohesion.	<ul style="list-style-type: none"> Enhances cohesion and coherence Can chain by using the same word or group of words Can chain by focusing on the same topic 	Lem Kasaka is the Chief Financial Officer of Pure, and he was the guiding force behind the company’s quick rise to international success. Mr. Kasaka graduated with an MBA in 2010, and he immediately became a partner in the fledgling start-up company. Under Mr. Kasaka’s leadership , the company went from a small store to an international company.

Chart continues on the next page

continued

Technique	What it does	Example of technique in action
Sandwich less-favorable law or facts within the middle of a sentence.	<ul style="list-style-type: none"> The beginning or end of a sentence can be a point of emphasis; putting the less-favorable material in the end de-emphasizes it. 	Ms. Moore did not demonstrate signs of intoxication consistent with a blood alcohol level of .13 because her speech was not slurred, and she did not smell of alcohol.
Put less-favorable material in a dependent clause to lessen the material's impact.	<ul style="list-style-type: none"> Acknowledges the material while de-emphasizing it Avoid, though, using this technique at the beginning of a paragraph. 	Although Ms. Moore's blood alcohol level was .13, she did not demonstrate any outward signs of intoxication.
Interperse short sentences to add punch amidst a group of longer sentences.	<ul style="list-style-type: none"> Helps vary pacing throughout a paragraph Helps propel the reader through longer or complex material Emphasizes a point or fact. 	Although the respondent argues that two statutes support her claim, neither of the statutes supports her assertion that the statute of limitations should be extended. Indeed, those statutes plainly assert the opposite.
Keep subjects and verbs close together for maximum clarity.	<ul style="list-style-type: none"> Strengthens sentence Helps reader absorb information 	The police officer pulled over the defendant's car, believing that it was suspicious that defendant's vehicle sped up after the officer began following him.
Try to use active voice more than passive voice.	<ul style="list-style-type: none"> A sentence written in active voice shows who is doing the action. Sentences that show who did the action and that use action verbs are typically clearer, shorter, and more vivid. Use passive voice only when you want to intentionally de-emphasize who did the action or when you do not know who the actor was. 	Prefer: The taxi driver hit the skateboarder in the intersection. Not: The skateboarder was hit in the intersection. (Unless you want to minimize the taxi driver's role.)

Technique	What it does	Example of technique in action
Avoid the “it is/there is” construction.	<ul style="list-style-type: none"> • This construction muddles the subject and verb. • Such construction often makes the sentence longer and wordier. 	<p>Prefer: The court reviews five factors. (5 words)</p> <p>Not: There are five factors that the court reviews. (8 words)</p>
Replace the word “it” with a noun when possible.	<ul style="list-style-type: none"> • The word “it,” while understandable when talking, can be confusing to a reader. • When possible, use the actual noun instead of the pronoun. 	<p>Prefer: The tractor-trailer hit the bridge, but the bridge was not damaged.</p> <p>Not: The tractor-trailer hit the bridge, but it was not damaged.</p>
Use transitions appropriately to create context and to move the reader through the points.	<ul style="list-style-type: none"> • Transitions can act like signals for the reader, pointing to the direction the prose is going. • Transitions can connect thoughts, ideas, and arguments fluidly. 	<p>First, although the respondent purports to rely on two statutes to support her claim, neither of the statutes supports her assertion that the statute of limitations should be extended. Instead, those statutes flatly refute the respondent’s argument.</p>

Practice Points



- Effective writing techniques can help you more clearly explain why your client wins, but no writing technique can undo bad law or bad facts.
- Put information that you want the judge to retain in places where the judge is most likely to see it:
 - In point headings
 - In thesis sentences
 - In a sentence before a block quote
- Assert your point before providing detail so that you can focus the judge's attention on the point you wish to make.
 - State your conclusion before a new section in your brief.
 - Create a thesis sentence for each paragraph.
 - Create a hook for each case illustration.
 - Start your application with an assertion of what you will prove.
 - State the point of a block quotation as an introduction to the block quotation.
- Be explicit about what you are doing and why you are doing it so that a judge can more easily follow along.
- Create coherent paragraphs and clear sentences that are easy for an over-worked judge to absorb.