

*American Society of Tax Problem Solvers (ASTPS)*

## The Power of Framing: How to Artfully Craft Persuasive Legal Arguments to Influence and Win Difficult Resolution Cases

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*It is not what you say but how you say it*

## What is Framing?

According to framing expert and author George Lakoff, "[framing] is critical [to winning a public debate] because a frame, once established in the mind of the reader (or listener, viewer, etc.), leads that person almost inevitably towards the conclusion desired by the framer, and it blocks consideration of other facts and interpretations."

George Lakoff, George Lakoff Manifesto 2, <http://bit.ly/4Qydx8>.



Rolf Dobelli, <https://www.youtube.com/watch?v=h1NPovKg5To&t=144s>

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# Framing, Conflict Resolution, and Negotiation

Framing and reframing are vital to the [negotiation](#) process and are tied to information processing, message patterns, linguistic cues, and socially constructed meanings. Knowing what types of frames are in use and how they are constructed allows one to draw conclusions about how they affect the development of a conflict, and can be used to influence it. Thus, analyzing the frames people use in a given conflict provides fresh insight and better understanding of the conflict dynamics and development. With such insight, and with the help of reframing, stakeholders may find new ways to reach agreements.

Putnam, L. and M. Holmer, 1992. "Framing, Reframing, and Issue Development", in Putnam L. and Roloff, M.E. (Eds.), *Communication and Negotiation*, Newbury Park, CA: Sage, Vol. 20. pp.128-155.



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## Framing in Tax Resolution

- ❖ Framing in Tax Resolution comes up most often in discussion of the financial statement
- ❖ Framing is most helpful in putting the numbers you put on the form in context
- ❖ It provides justification for why you used certain figures and calculations most favorable to your client
- ❖ If you think tax controversy is just filling out forms, then you are doing it wrong.



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# Examples

- ❖ Calculating Net Business Income for a Self-Employed Individual with a Seasonal Business
- ❖ Negotiating for lower installment agreement when the individual's necessary expenses are over the standards and they haven't been paying estimated tax payment.
- ❖ Valuation of Certain Assets



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# Framing and Persuasive Legal Writing

1. Transition from Objective to Persuasive Writing
2. Persuasive Writing Techniques
  1. Develop a Theory of the Case
  2. Tell A Compelling Story with Facts
    1. Include and emphasize useful facts
    2. Include and downplay/address unfavorable facts.
      1. Omitting facts damages your credibility and doesn't allow you to frame them in a way that helps your client
3. Reframe and Prioritize Your Strongest Points
4. Begin with Affirmative Statements
5. Make Legal Rules work for your client
  1. Be sure to distinguish unfavorable precedent
    1. Either Appeal to a Stronger Authority or distinguish based on facts/policy.
6. Think About Language

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).

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*Re-State or Re-Word In A More Constructive Way*

## What is Reframing?

Within processes of [reconciliation](#), [negotiation](#), or [joint problem solving](#), the explicit management of frames, and the framing process may lead to important shifts in both the frames themselves and in their impact on the conflict dynamics. This purposive management of frames is called [reframing](#). Use of frame analysis and reframing processes have the following goals:

- to clarify or "refresh" the perception of the issues in dispute (in order to promote more productive information exchange and listening to ideas not previously considered, and to expand the framework of discussion and explore means of action or solutions not yet attempted);
- to sharpen the parties' understanding of their interests and how the modes of action they have chosen serve those interests (in order to examine potential processes for managing conflict more productively and to reconsider patterns of relationships among stakeholders);
- to identify those subjects which the involved parties view differently, even when the basis for the divergent frames are more fully understood (in order to identify opportunities for trade-offs based on clearly understood differences); and
- to identify differences which cannot be bridged (in order to more fully appreciate conflict dynamics and to evaluate the potential for conflict reduction processes that do not violate these intractable differences, to determine the degree of importance attributed to these intractable differences in frames, and to seek ways to address them).

Thus, reframing, stemming from stakeholders' understanding of their own as well as others' expressed frames, may pave ways for resolving, or at least better managing, a dispute.

<https://www.beyondintractability.org/essay/framing>



<https://www.youtube.com/watch?v=QGhEjC-5WDE>

<https://www.youtube.com/watch?v=us3jWEy0yqY>

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*Reframing Example 1*

## Tax Preparer Penalty Case

- IRS assess Penalty Under 6694(b) for Willful or Reckless Conduct of a Tax Preparer
- IRS Claims they issued 1125 Letter a copy which was dated June 9, 2015. The audit took place on June 2, 2016. IRS claims date on letter harmless error.
- Tax Preparer receives a Notice of Levy and fails to timely file a CDP.
- Tax Preparer then receives a Notice of Tax Lien and timely files a CDP contesting the liability.
- Appeals makes determination that Tax Preparer already had an a prior opportunity to be heard and by failing to raise the issue by timely responding to the Notice of Levy, he was barred from contesting liability. Tax Prepare then files his own tax court case contesting Appeals Decision.
- IRS files 194 page Motion for Summary Judgment.



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## Tax Preparer Penalty Case Continued

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- **Issue 1: Respondent Has Not Met The Burden Of Proof**
  - A genuine dispute of fact existing to whether or not Respondent properly sent the 1125 Letter.
- **Issue 2: IRS Appeals Officer Failed to Verify All Requirements of Applicable Law and Procedure had been met**
  - Pursuant to I.R.C. § 6330(c)(2)(a), a taxpayer may raise any relevant issues including spousal defenses, challenges to the appropriateness of collection actions, and collections alternatives. The taxpayer may also challenge the underlying tax liability only if the taxpayer did not receive a statutory notice of deficiency for the tax liability and did not otherwise have an opportunity to dispute the tax liability. I.R.C. § 6330(c)(2)(B). However, the Appeals Officer must also verify that the requirements of any applicable law or administrative procedure have been met which is a separate and distinct issue. I.R.C. § 6330(c)(1), (3). See Hoyle v. Commissioner, 131 T.C. 200-203 (2008)(holding the Court can review whether Respondent's Appeals officer verified compliance with applicable law under I.R.C. § 6330(c)(1) without regard to whether Petitioner raised it at the appeals hearing). See also Lee v. Commissioner, 144 T.C. 40, 48 (2015)(finding whether a responsible person had an opportunity to dispute the trust fund recovery penalty is distinct from whether the Service issued proper notice under section 6672, i.e., by properly issuing a Letter 1153).

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## Tax Preparer Penalty Case Continued

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- **Issue 3: Requirement to Send 1125 Letter In Certain Cases**
  - While I.R.C. § 6694(b) penalties are not subject to deficiency procedures, Treas. Reg. § 1.6694-4(a)(1) provides that the IRS will send before assessment of either penalty, a 30 day letter to the tax return preparer notifying him of the proposed penalty or penalties and offering an opportunity to the tax return preparer to request further administrative consideration and a final administrative determination by the IRS concerning the assessment, unless the period of limitations (if any) under section 6696(d) may expire without adequate opportunity for assessment of either penalty. In this case, there was no reason for Respondent not to send the 30 day letter because there is no statutory period for assessment of the § 6694(b) penalties due to the fact the penalty involves willfulness. I.R.C. § 6696(d).
- **Issue 4: If Respondent Does Not Have A Requirement to Send The 1125 Letter They Have Effectively Removed Administrative Due Process**
  - Respondent failed to provide the Letter 1125 also known as the 30 day letter and Form 5816, which violated Petitioner's rights for assessing the penalties without administrative due process. This exact scenario is one of many public policy concerns expressed in the final regulations. In passing the regulations related to § 6694(b) penalties, a number of individual commentators questioned whether the proposed regulations would remove administrative appeal rights available to tax return preparers who are subject to the penalty under § 6694. See FR Doc. E8-29750 Filed 12-15-08(available at [www.federalregister.gov/d/E8-29750/p-68](http://www.federalregister.gov/d/E8-29750/p-68)). This concern is address by stating that under Treasury Regulations in place since 1991, the IRS will send a 30-day letter to the tax return preparer and these appeal rights are maintained in Treas. Reg. § 1.6694-4(a) of the final regulations. Id. If Respondent is allowed to ignore and not comply with this provision, then Respondent has effectively removed administrative appeal rights and Petitioner has been denied administrative due process. To allow the assessment to stand as valid without proof that the necessary procedures were met under Treas. Reg. § 1.6694-4(a) completely undermines the principles of due process and is a clear violation of the Petitioner's rights.

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*Reframing Example 2*

## Employment Tax Liability Case

- Taxpayer has 2 Payroll Tax Accounts
  - Account A has a payroll tax liability of \$6.3M for a total of 7 periods, 3 of which are late deposit/late payment penalty only and the tax was full paid.
  - Account B has corporate and payroll tax liability of \$3.8M for a total of 7 periods, 3 of which are late deposit/late payment penalty only and the tax was full paid.
  - In essences, both companies have failed to pay the tax for only 4 periods.
  - Taxpayer would like to avoid Tax Lien because they use factoring and have a \$50M line of credit.
  - Taxpayer pays over \$21M in employment taxes per year



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*Reframing Example 2*

## Employment Tax Liability Case

- Taxpayer is set into two full pay installment agreement over six year period
- No Federal Tax Liens were filed
- No TFRP was pursued



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*Wait a minute*

## How is this outcome possible?

Is it Magic or Framing?

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*You Guess It.... Framing*

## Employment Tax Liability Case

- If a federal tax lien is filed, the \$50M line of credit will be cancelled and Taxpayer will cease operations.
- Taxpayer is the business of people not assets. They have no assets to which a federal lien can attach to.
- If they cease operations, not only will the government forgo collecting their \$10M past due liability, they will also forgo collecting over \$21M a year in on-going revenue.
- My questions to the Revenue Officer was are you okay costing the government \$21M a year to collect \$10M?
  - To which they responded, I better go talk to my manager.



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## Time for More Examples and Questions?

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# 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. DONAHUE, 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/wp-content/uploads/2018/07/2014-Tips-for-EffectiveOrganization.pdf>

<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/wp-content/uploads/2019/08/Concise-is-Nice.pdf>

<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.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/writing/effective\\_appellate\\_brief\\_writing/](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/writing/effective_appellate_brief_writing/).