An Advocate Persuades
By Joan Rocklin, Bob Rocklin, Chris Coughlin & Sandy Patrick

Summary Table of Contents—DRAFT

Chapter 1 • The Nature of Persuasion
Chapter 2 • The Ethical, Professional Advocate
Chapter 3 • A Litigation Overview
Chapter 4 • Motion Practice
Chapter 5 • Appellate Practice
Chapter 6 • Themes for Persuasive Arguments
Chapter 7 • Organizing Your Arguments
Chapter 8 • Developing Persuasive Arguments
Chapter 9 • Refining Persuasive Arguments
Chapter 10 • Constructing Motions and Supporting Memoranda of Law
Chapter 11 • Constructing an Appellate Briefs
Chapter 12 • Statements of Fact and of the Case
Chapter 13 • Editing for Persuasion
Chapter 14 • Oral Argument
Chapter 1 • The Nature of Persuasion
   I. Principles of Persuasion
      A. Source and Ethos
      B. Content and Logos
      C. Audience and Pathos
   II. Using the Principles Together

Chapter 2 • The Ethical, Professional Advocate
   I. Why Act Ethically and Professionally?
   II. Some Guiding Principles
      A. A “Zealous Advocate” Is Not a “Zealot”
      B. “It Is What It Is”
      C. “Winning” Is a Relative Term
   III. Specific Rules an Advocate Should Know

Chapter 3 • A Litigation Overview
   I. Civil vs. Criminal Litigation
   II. Civil Litigation
      A. Pre-Trial
      B. Trial
      C. Post-Trial
      D. Appeals
   III. Criminal Litigation
      A. Pre-Trial
      B. Trial
      C. Post-Trial
         1. Motions
         2. Sentencing
         3. Entry of judgment
      D. Appeals and Other Post-Conviction Remedies

Chapter 4 • Motion Practice
   I. A Trial Motion and Its Parts
      A. The Motion
      B. The Supporting Memorandum of Law
      C. Factual Support
   II. The Rules that Govern Trial Motions
      A. Procedural Rules
      B. Local Rules
      C. Standing Orders
      D. Finding the Rules
      E. Following the Rules
      F. Unwritten Rules
   III. After the Motion Is Drafted
      A. Service and Its Proof
      B. Filing with the Court
      C. The Opposing Party’s Response
         1. Statement of non-opposition
         2. Consent order
         3. Memorandum of law in opposition
      D. The Moving Party’s Reply Memorandum
Chapter 5 • Appellate Practice
I. Appellate Briefs
II. The Rules that Govern Appeals
III. The Court and Its Players: Judges, Law Clerks, and Staff Attorneys
IV. The Appellate Process
   A. The Decision to Appeal
      1. Whether to appeal
      2. Which issues to raise on appeal
   B. The Notice of Appeal
   C. The Record
   D. The Briefs
   E. Oral Argument
   F. The Opinion
   G. Petitions for Reconsideration or Rehearing
   H. Review in a Discretionary Court
   I. Motions in Appellate Courts
V. Fundamental Appellate Concepts
   A. Appellate Jurisdiction and Justiciability
   B. Preservation of Error and Plain Error
   C. Harmless Error
   D. Right for the Wrong Reason
   E. Standards of Review
      1. Rulings on issues law
      2. Factual findings
      3. Discretionary rulings
      4. Mixed questions of fact and law
      5. No articulated standard of review

Chapter 6 • Themes for Persuasive Arguments
I. The Purpose of a Theme
II. Developing a Theme
   A. Based on Procedural Law
   B. Based on Substantive Law and Its Underlying Policy
   C. Based on a Social Good or Value
   D. Based on Undisputed Law, Facts, or Values
III. When to Develop a Theme

Chapter 7 • Organizing Your Arguments
§ 7.1: Organizing Claims and Arguments
I. Organizing Multiple Claims
   A. Order Your Claims
   B. Tell the Reader the Order of Your Claims
II. Organizing Multiple Legal Arguments Within a Single Claim
   A. Order the Arguments Within a Claim
      1. Elements
      2. Steps
      3. Factors
   B. Use a Roadmap Section to Tell the Reader the Order of Your Arguments
      1. Conclusion
      2. Governing rule
      3. Disposing of uncontested elements or factors
      4. Mapping the remaining arguments
      5. Final conclusion
III. Introducing Sub-Arguments
IV. Organizing a Single Legal Argument

§ 7.2: Structuring Analogical Arguments
§ 7.3: Structuring Rule-based Arguments
  I. A Simple Rule-Based Argument
  II. Statutory Construction Arguments
  III. Policy Arguments
IV. Syllogisms

§ 7.4: Using Rule-Based and Analogical Arguments Together
§ 7.5: Structuring Factor Analyses
  I. Factors Analyzed as a Single Legal Argument
  II. Factors Analyzed in Multiple, Distinct Legal Arguments
  III. Choosing an Organizational Structure for a Factor Analysis

Chapter 8 • Developing Persuasive Arguments
I. Begin with Your Conclusion
II. Explain the Law Persuasively
  A. Rules
    1. Explain existing rules from your client’s perspective
    2. Develop rules that advance your client’s argument
    3. Acknowledge unfavorable rules in a favorable way
  B. Case Illustrations
    1. Highlight helpful facts
    2. Create hooks for your case illustrations
    3. Acknowledge unfavorable cases in a favorable way
III. Apply Your Persuasive Explanation of the Law to the Facts
  A. Developing your Application
  B. Responding to your Opponent’s Analysis
IV. End with a Final Conclusion

Chapter 9 • Refining Persuasive Arguments
I. Core Concepts
  A. Assert Your Point. Then, Provide Details.
  B. Use Location to Your Advantage
  C. Be Explicit
II. Persuasion Through Point Headings
  A. Create Assertive Point Headings
  B. Coordinate Your Point Headings
  C. Use Short Point Headings
  D. Divide the Text into Readable Chunks
  E. Use a Professional, Easy-to-Read Format
III. Paragraph-Level Persuasion
  A. The Thesis Sentence
  B. The Middle of the Paragraph
  C. Final Sentences
  D. Coherence Throughout
IV. Sentence-Level Persuasion
  A. Beginning, Middle, and End
  B. Subjects and Verbs
    1. Place the subject and verb close together and at the beginning of the main clause
    2. Prefer the active voice
    3. Prefer evocative verbs
4. Avoid “it is” and “there are”  
5. Use a noun instead of “it”  
C. Dependent Clauses  
D. Short Sentences  

V. Persuasion through Quotations  
A. Quote when Specific Words Matter  
B. Quote for Emphasis  
C. Avoid Block Quotes, but If You Must, Assert Your Point First  

VI. Persuasion through Citations  
A. Build Credibility Through Citations  
B. Emphasize the Weight of Authority  
C. Show a Trend Through Citations  
D. Use Explanatory Parentheticals Effectively  

Chapter 10 • Constructing Motions and Supporting Memoranda of Law  
I. Your Audience: The Trial Judge  
II. The Motion  
A. Caption  
B. Statement of the Relief Requested  
C. Legal Grounds for the Relief Requested  
D. Signature  

III. The Memorandum of Law  
A. Caption  
B. Introduction  
C. Statement of Facts  
D. Argument  
E. Conclusion  
F. Signature  

Chapter 11 • Constructing an Appellate Briefs  
I. Appellant’s Brief  
A. Cover  
B. Table of Contents  
C. Table of Authorities  
D. Statement of Jurisdiction  
E. Issues (or Questions) Presented  
1. The components of an effective issue presented  
2. One or more sentences?  
3. Incorporating the standard of review  
F. Statement of the Case  
G. Summary of the Argument  
H. Argument  
I. Conclusion and Relief Sought  

II. Respondent’s Brief  
III. Appellant’s Reply Brief  

Chapter 12 • Statements of Fact and of the Case  
I. Statements of Fact vs. Statements of the Case  
II. Present the Conflict and Your Client  
A. Frame the Conflict  
B. Cast the Characters  
III. Decide Which Facts to Include  
A. Include All Legally Significant Facts  
B. Include Enough Background Facts to Provide Context
C. Include Emotional Facts Selectively
D. Include Procedural Facts
E. Weed Out Irrelevant Facts

IV. Organize Your Statement of Facts
A. Create an Opening Paragraph that Provides Context and Draws the Reader In
B. Choose a Logical Organization
C. Use Point Headings to Guide Your Reader
D. Close Your Statement of Facts

V. Create a Persuasive Statement of Facts
A. State Facts Accurately
B. Maintain a Reasonable Tone
C. Use Strong Thesis Sentences When Appropriate
D. Highlight Good Facts and Minimize Unfavorable Facts
  1. Use location to your advantage
  2. Give more airtime to favorable facts
  3. Pair unfavorable facts with favorable facts
E. Choose Your Words Carefully
  1. Choose vivid detail
  2. Choose strong verbs
F. Provide Clear, Accurate Citations to the Record
G. Let the Facts Determine the Length
H. Draft and Re-Draft

Chapter 13 • Editing for Persuasion
I. Check Your Procedural and Local Rules
II. Your Argument
A. Edit for Focus
   1. Review your thesis sentences
   2. Review your point headings
   3. Integrate your theme
B. Edit for Emphasis
   1. Review your explanations of the law
   2. Compare your explanation of the law to your application
   3. Address your weaknesses
C. Edit for Flow
   1. Provide roadmaps
   2. Smooth transitions
D. Polish for Clarity
   1. Bring subject and verb close together and toward the front of the sentence
   2. Minimize passive voice
   3. Minimize nominalizations
   4. Look for and revise unwieldy sentences
E. Polish for Credibility
   1. Check your procedural and local rules (again)
   2. Proofread
   3. Check citations
   4. Check the format

III. Statements of Fact (or of the Case)
IV. If You Are Drafting a Motion and Supporting Memorandum of Law
A. Edit Your Introduction
B. Edit All Remaining Sections
C. Polish Your Introduction and All Remaining Sections
V. If You Are Drafting an Appellate Brief
   A. Edit Your Issue Presented
   B. Edit the Summary of Your Argument
   C. Polish All Remaining Sections
VI. Customize Your Editing Checklist

Chapter 14 • Oral Argument
§ 14.1: The Purpose of Oral Argument
   I. The Court’s Goals
      A. Clarify Factual and Legal Points
      B. Determine the Practical Impact of a Ruling
   II. The Advocate’s Goals
      A. Ensure that the Court Understands Your Argument
      B. Correct Misapprehensions and Address Concerns
      C. Respond to Claims that You Did Not Address in the Briefs

§ 14.2: Preparing for Oral Argument
   I. Create a Strong Foundation
      A. Review the Briefs
      B. Know the Record
      C. Know the Law
      D. Review the Court’s Rules
   II. Prepare Your Argument
      A. Determine Where the “Game Will Be Played”
      B. Determine the Strengths and Weaknesses of Your Position and Your
         Opponent’s Position
      C. Know the Boundaries of Your Position
      D. Anticipate Every Question the Court Will Ask and Prepare Responses
      E. Involve Others
   III. Prepare Written Materials
      A. Script Your Opening
         1. Movant’s or appellant’s opening
         2. Respondent’s opening
      B. Create Lectern Materials
   IV. “Where Do I Park?” and Other Practical Matters
      A. Visit the Courtroom
      B. Investigate Court Protocol
      C. Choose Your Attire

§ 14.3: Presenting Oral Argument
   I. Your Frame of Mind
   II. Inhabit Your Space Confidently
   III. Leave Your Baggage Behind
   IV. Make Eye Contact
   V. Speak Slowly and Simply
   VI. Have a Conversation
   VII. Use Humor with Care
   VIII. Assert Conclusions, Not Your Beliefs
   IX. Deliver Your Opening
   X. Respond to Questions from the Bench
      A. Stop Talking and Listen
      B. Pause
      C. Ask for Clarification, If Necessary
      D. Respond With “Yes” or “No”; Then Explain Your Answer
      E. Never Praise a Judge’s Question
F. Always Answer a Question When It Is Asked
G. Embrace Hypotheticals
H. Recognize Friendly Questions
I. Admit When You Do Not Know the Answer
J. Do Not Ask Any Other Questions
K. Recognize the Logical End of an Answer
L. After Answering the Court’s Question, Return to Your Planned Argument or Adjust as Necessary

XI. Conclude
XII. Listen When the Court Questions Opposing Counsel
XIII. Rebuttal

§ 14.4: Trial Courts vs. Appellate Courts

I. Arguing Before Trial Courts
   A. Jurisdictional Variation
   B. Your Audience: One Judge
   C. Busy Dockets
   D. Shorter Timelines to Oral Arguments
   E. Addressing the Court
   F. Typical Questions from the Trial Court’s Perspective
   G. Time Allotted for Oral Argument

II. Arguing Before Appellate Courts
   A. Jurisdictional Variation
   B. Your Audience: A Panel of Judges
   C. Appellate Courts Have More Time to Prepare
   D. Longer Timelines to Oral Arguments
   E. Addressing the Court
   F. Typical Questions from the Appellate Court’s Perspective
   G. Time Allotted for Oral Argument
Chapter 8

Developing Persuasive Arguments

I. Begin with Your Conclusion

II. Explain the Law Persuasively
   A. Rules
      1. Explain existing rules from your client’s perspective
      2. Develop rules that advance your client’s argument
      3. Acknowledge unfavorable rules in a favorable way
   B. Case Illustrations
      1. Highlight helpful facts
      2. Create hooks for your case illustrations
      3. Acknowledge unfavorable cases in a favorable way

III. Apply Your Persuasive Explanation of the Law to the Facts
   A. Developing your Application
   B. Responding to your Opponent’s Analysis

IV. End with a Final Conclusion
As you saw in the last chapter, attorneys use the same structures to organize their writing whether they are writing objectively or persuasively. This chapter focuses on what does change when you write persuasively. Although you will use the same structures, the content of your arguments will subtly shift. In all instances, the purpose of that shift is to make it easier for the court to rule in favor of your client.

That shift to persuasion is a subtle shift. When advocating for a particular outcome, neither the law nor the facts suddenly change. As discussed in Chapter 2, *The Ethical, Professional Advocate*, “it is what it is,” and you must work within the confines of the law and the facts. Moreover, if you stretch the law or facts too far, you are likely to undermine every effort at persuasion because the court will no longer trust you.

Although you must accept the law and facts as they are, you can present both so that they more readily allow the court to reach the outcome you seek. This chapter, *Developing Persuasive Arguments*, and the next chapter, Chapter 9, *Refining Persuasive Arguments*, provide you with techniques to do just that. This chapter focuses on developing the substance of a persuasive legal argument, while the next chapter addresses how to fine-tune that substance.

In developing the substance of a persuasive argument, this chapter looks at each component part of a legal argument—the conclusion, the explanation of the law, the application, and the final conclusion—and addresses how each can be developed to present your client’s case in the most persuasive way and make it easier for a court to find in your client’s favor.
I. Begin with Your Conclusion

A persuasive legal argument should begin with a conclusion. That conclusion should state the decision you believe the court should reach regarding the element or factor at issue.

Stating your conclusion at the outset of your argument has at least two persuasive functions. First, stating your conclusion tells the judge where you are going and, therefore, helps a judge follow your argument. An argument that is easier to follow is more likely to be absorbed and accepted. In addition, stating your conclusion at the outset is likely to provide repetition about a key point. You will also state your conclusion in a point heading and at the end of your argument. That repetition helps your main idea stick in the judge’s head.

Occasionally, you may choose to omit the initial conclusion and begin an argument with a statement of the issue before the court. For example, if your introduction and a point heading already state the conclusion, stating it again may seem overly repetitive. When in doubt, though, state your conclusion about the element or factor in dispute and take advantage of its persuasive effect.

II. Explain the Law Persuasively

Although you will likely begin with a conclusion, and the conclusion is your first persuasive step, the real work begins with explaining the law. Many attorneys think that explaining the law is the easy part. You simply look up the law and write down what you find. If, however, you think that the real work of developing arguments begins when the law is applied to the current case, you will lose significant persuasive opportunities. In particular, you will lose the opportunity to present the law in a way that is most favorable to your client. You will also lose the opportunity to prime the court so
that it is receptive to the analysis that will follow. Thus, do not wait. Begin persuading as soon as you begin explaining.

The next sections addresses how to present rules and case illustrations persuasively. Although the section explains rules and case illustrations separately, keep in mind that, when your argument includes both rules and case illustrations, the two must work together.

A. Rules

You can use several techniques to present legal rules in a persuasive light. First, you can present existing rules so that they state the law from your client’s perspective. Second, you can develop new rules that will advance your argument. Finally, you can address unfavorable rules in a way that minimizes their negative impact.

1. Explain existing rules from your client’s perspective

As mentioned above, too many attorneys explain the rules to the court in the same way that they read the rules. You, however, can do more than merely cut and paste the rules as you found them. As you set out a rule, think about how you can emphasize those parts of the rule that are most helpful to your position. Although no set formula dictates how to do that, here are a few techniques to get you thinking.

First, you should consider whether to state a rule positively or negatively. If you are arguing that a standard is met, then frame the rule so that it explains when the required standard is met. By contrast, if you are arguing that a standard is not met, then frame the rule so that it explains when the standard is not met.

Take, for example, the rule for summary judgment. If you represent the moving party and argue that the court should grant summary judgment on your client’s behalf, you should emphasize
when summary judgment must be granted. By contrast, if you represent the non-moving party, you will want to emphasize when summary judgment cannot be granted. Example 8-A shows the rule for summary judgment and how opposing counsel might present that same rule in two different ways. Note that the rule is the same under either version; what has changed is how the rule is presented.

Example 8-A • Explaining the summary judgment standard consistently with your client’s position by stating when the standard is met or not met.

The rule as written: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

The moving party: Summary judgment must be granted if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The non-moving party: Summary judgment may not be granted if there is an issue of material fact. Fed. R. Civ. P. 56(a).

You can use the same technique with more substantive rules. If you are alleging discrimination, explain when discrimination takes place. If you are defending against a charge of discrimination, explain when a party does not discriminate under the law, as in Example 8-B.
Example 8-B • Explaining a substantive rule consistently with your client’s position by stating the rule positively or negatively

The rule as written: “A recipient which operates or sponsors interscholastic . . . athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes . . . .” 34 C.F.R. 106.41(c)(1).

Plaintiff: A university discriminates against its female students if it fails to effectively accommodate the interests and abilities of its female students. 34 C.F.R. 106.41(c)(1); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993).

Defendant: A university complies with Title IX if it effectively accommodates the interests and abilities of its female students. 34 C.F.R. 106.41(c)(1); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993).

Similarly, your explanation of the rule can emphasize the breadth or the narrowness of a standard. Compare the explanations of the standard for granting summary judgment in Example 8-C. Notice how the non-moving party uses the word “only” to suggest that summary judgment should be granted in limited circumstances.
Example 8-C • Explaining the summary judgment standard consistently with your client’s position by emphasizing the breadth or narrowness of a standard

The moving party: Summary judgment **must** be granted if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The non-moving party: Summary judgment may be granted **only** if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

***

2. **Develop rules that advance your argument**

Presenting rules consistently with your client’s perspective may involve developing rules that will advance your analysis. You might think of the law as settled and believe that you should not “create” new law. Although reasonable, that kind of thinking will limit your usefulness to your client. Within the settled law—and usually within the settled case law—there exist patterns of judicial or legislative thinking. Before they are articulated, those patterns are sometimes called “implicit rules.” As an advocate, one of the ways you can help your client is to make those implicit rules explicit. By making implicit rules explicit, you will provide the court with a way to reach a conclusion that is consistent with the currently existing law. And courts want their decisions to be consistent with past decisions.

Of course, all sorts of patterns exist in the law and only some are relevant and helpful. To make sure that you are drawing out relevant and helpful patterns, you need to (1) formulate a possible rule and then (2) evaluate that rule. To formulate a possible rule, you must first identify a pattern in the cases that seems to explain why
courts reach their conclusions and, second, craft a rule from the pattern that encompasses both the prior cases and your client’s case. Crafting the rule may require you to explain the rule more broadly or more narrowly.

After you have formulated a possible rule, then you must evaluate the rule to make sure that it is wise to use. To evaluate the rule, ask yourself these two questions:

• Is my proposed rule consistent with all the other law that governs this issue?

• If so, does my proposed rule make common sense?

These two questions are important because, if your proposed rule is not consistent with other applicable authorities, then you are not providing the court with an easy way to rule in your favor. Moreover, and perhaps not surprisingly, judges prefer rules that make sense.

Let’s look at how you might develop a rule that advances your client’s position.

* * *
B. Responding to Your Opponent’s Analysis

The aspect of persuasive writing that is most different from objective writing is addressing weaknesses in your argument that give rise to an opposing analysis. You must address those weaknesses without emphasizing them—a balancing act that is not always easy to accomplish. Thus, this section addresses how to address the weaknesses and then where to address the weaknesses.

With respect to how to address weaknesses (and the counter-analyses that they spawn), the key is to address the weakness from your client’s perspective and not from your opponent’s perspective.

Often when we think about a weakness in a case, we think about how our opponent will exploit a certain facet of the law or a certain fact. Thus, we tend to think about weaknesses from our opponent’s perspective. As a result, a common impulse is to first explain a weakness from our opponent’s perspective and then explain why that perspective is incorrect. To the extent possible, you should avoid that first step—explaining the weakness from your opponent’s perspective. Instead, skip right to the second step—explaining the weakness from your perspective. Examples 8-R and 8-S show you how.

Example 8-R is less effective because in that example the plaintiff’s attorney first explains the defendant’s argument. In doing so, the attorney inadvertently emphasizes the defendant’s argument—in essence, making defendant’s argument for him. You should not help your opponent in that way.
Example 8-R • Less effective approach: highlighting your opponent’s argument

Defendant carves out an exception for four-year-olds who are supervised by an adult. Defendant has pointed to three cases, *Ehrlich*, *Trent*, and *Romanchuk*. In those cases, the courts have held that, as a matter of law, the four-year-old could not be held liable for negligence. *Ehrlich* v. Marra, 300 N.Y.S.2d 81, 82 (N.Y. App. Div. 1940); *Boyd* v. *Trent*, 746 N.Y.S.2d 191, 193 (N.Y. App. Div. 2002); *Romanchuk* v. *Westchester Cnty.*, 337 N.Y.S.2d 926, 927 (N.Y. App. Div. 1972). In each of those cases, a parent was present when the alleged negligent act took place. *Ehrlich*, 300 N.Y.S.2d at 82 (parent present when child crossed street and was struck by car); *Boyd*, 746 N.Y.S.2d at 193 (parent present when child extricated herself from her car seat, moved to the front seat, and contributed to a car accident); *Romanchuk*, 337 N.Y.S.2d. at 926-928 (parent present when child went sledding and hit another at the bottom of the slope). On that basis, Defendant concludes that when a parent is present and supervising a child, the child cannot be found guilty of negligence as a matter of law.

Although each of those cases did conclude as a matter of law that a four-year-old could not be held liable for negligence, such a conclusion is a minority conclusion. The majority of courts that have considered the issue have concluded that a four-year-old can be held liable for negligence. See e.g., *Sun Jeong Koo* v. *St. Bernard*, 392 N.Y.S.2d 815, 816 (Sup. Ct. Queens Cnty. 1977) (considering *Ehrlich* but rejecting a bright-line rule in negligence case against a child of 4 years and 10 months); *Searles* v. *Dardani*, 347 N.Y.S.2d 662, 665 (Sup. Ct. Albany Cnty. 1973) (considering *Ehrlich*, but concluding that jury should decide whether a child of four and a half years was negligent); *Republic Ins. Co.* v. *Michel*, 885 F. Supp. 426, 433 (E.D.N.Y. 1995) (considering *Ehrlich*, but concluding that a four-and-a-half year old could be liable for negligence).

Thus, the bright-line rule first expressed in *Ehrlich*, and then followed in *Trent* and *Romanchuk* represents a minority view. The majority view in this jurisdiction is that a jury is permitted to decide whether a four-year-old is liable for negligence.

The fix for beginning an argument by describing your opponent’s position, as in Example 8-R, is easy: Just skip over your description of the opposing position. In Example 8-S, you can see how plaintiff’s counsel can re-write the argument so that the defendant’s argument is not emphasized and just go straight to explaining how the plaintiff sees things.
Example 8-S • More effective: present the argument from your perspective only

The majority view in this jurisdiction is that a four-year-old can be held liable for negligence. See, e.g., Sun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 816 (Sup. Ct. Queens Cnty. 1977); Searles v. Dardani, 347 N.Y.S.2d 662, 665 (Sup. Ct. Albany Cnty. 1973); Republic Ins. Co. v. Michel, 885 F. Supp. 426, 433 (E.D.N.Y. Feb 23, 1995). Any attempt to carve out an exception for four-year-olds who are supervised by an adult is unsupported by the weight of authority. In asserting that novel rule, the defendant relies on Romanchuk, Ehrlich, and Trent. Although each of those cases did conclude as a matter of law that a four-year-old could not be held liable for negligence, the courts that have considered the issue since then have rejected a bright-line rule and concluded that a four-year-old can be held liable for negligence. See e.g., Sun Jeong Koo, 392 N.Y.S.2d at 816 (considering Ehrlich, but rejecting a bright-line rule in negligence case against a 4-year old child); Searles, 347 N.Y.S.2d at 665 (considering Ehrlich, but concluding that a jury should decide whether a four-year-old child was negligent); Republic Ins. Co., 885 F. Supp. at 433 (considering Ehrlich, but concluding that a four year old could be liable for negligence). No court has considered, let alone followed, Trent or Romanchuk.

Thus, the bright-line rule first expressed in Ehrlich, and then followed in Trent and Romanchuk, represents a minority view. This court should conclude—as all recent courts have concluded—that a jury can determine whether a four-year-old was negligent.

Admittedly, when drafting an argument, you may find it easier to first draft your opponent’s argument and then respond to it, as in Example 8-R. Doing so may help you clarify your opponent’s argument and write a more effective response. But that is your draft. In the final product, eliminate as much of your opponent’s argument as possible so that the court reads about the issue only from your client’s perspective.

With respect to where to address a weakness, you will ordinarily respond to a counter-analysis after you have presented your primary analysis. The judge will expect to see your argument first, so when you apply the law, first explain your analysis before explaining why an alternative analysis is unwarranted.¹

¹ Some weaknesses are less significant and do not need to be addressed with a full counter-analysis. Less significant weaknesses can be addressed with a dependent clause, as discussed in Chapter 9, Refining Persuasive Arguments.