WRITING TO WIN: SETTLEMENT ADVOCACY THROUGH LEGAL WRITING

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I. INTRODUCTION: THE MORALITY PLAY

All litigation—no matter the issue or the stakes—is a morality play. It is the search for truth; each side tells the truth as it sees it, interferes with its opponent's, and tries to convince the arbiter that its moral is the right one.

Your client is the "hero," and the other party is the "villain." The facts are a story, with the parties and others as characters and the events as plot. The case is not simply about "right v. wrong," but it also involves something deeper—"right and wrong v. wrong."

This deeper sense of justice is the moral upon which the morality play is based. It should be a basic truth about your case that is both simple enough to be understood easily and accurate enough to withstand attack. The key to effective advocacy is choosing the right moral upon which to focus the play. This choice depends on both: (i) the facts of the case; and (ii) the basic principles of applicable (procedural and substantive) law.

The moral (sometimes referred to as the "core theme" is the unifying foundation of your position; a coherent view of the case around which all facts are presented and arguments are formulated. It is the single idea that will leave the greatest impression on the arbiter; it not only should help justify a decision in your favor, but it should also motivate the arbiter to agree with you. In deciding on the proper moral, consider:

- stripped to its essence, what is this case really about?
- what do you want stuck in the arbiter's head?
- with what lens do you want the issues/case/parties to be viewed?

The moral upon which you base your play should be compelling, logical, and appealing. It will allow you to: (i) win over your audience; (ii) explain all parts of your argument; and (iii) appeal to your audience's sense of justice. Thus, a persuasive moral is: (i) grounded in fact; (ii) has a solid basis in law; and (iii) is consistent with notions of justice, equity, and common sense. In other words, your client is on the side of "good."

The method with which you convey this moral throughout the litigation is the essence of persuasion. In persuasion, there generally are two divergent approaches. The first option is to beat the audience into submission. The second is to persuade in furtherance of Judge Posner's formula (persuasive effort needed = distance x resistance). In other words, your goal is to reduce the amount of persuasive effort you will need to achieve agreement by: (i) reducing the distance from the judge's starting point to your goal; and (ii) reducing the judge's resistance to your position by making obstacles less difficult, making the goal more attractive, and making your company along the way more agreeable.

Effective persuasion persuades gently. Gentle persuasion is the art of crafting your writing to sound as objective as possible while substantively being a piece of advocacy. Persuasive writing is compelling because the law and facts make it so. In gently persuading, you not only help to minimize the court's distance and resistance, you help to make the court believe it is reaching your desired conclusion on its own, because the law, the facts, and justice demands

such a conclusion. In gently persuading, you exhibit candor, conviction, and intelligence. After all, your credibility is essential (and is hard to attain but easy to lose).

The necessity of logic (which leaves the reader no choice but to agree with you), persuasion (which makes the reader want to agree with you), and credibility (which causes the reader to trust you) in effective narratives comes from classical rhetoric:

Qualities of the:	**Classical rhetoric for the polloi**	**Modern legal advocacy for the judge**
Speaker	*Ethos*: deference to an attractive persona (looking "up") • popularity • prestige • righteousness	*Ethos*: respect for a credible persona (looking "at") • veracity, integrity • professionalism
Argument	Authority *Logos*: plausible reasoning (thinking "for")	Authority *Logos*: systemic reasoning (thinking "with") • the legal "story" • consistency and coherence constraints
	Axios: worthiness of results	*Axios*: principled results • legal risk-avoidance • doing justice
Audience	*Pathos*: invoking emotion	*Pathos*: evoking emotion

Thus, for effective written advocacy, you must:

- Think like a lawyer: What are the strongest substantive aspects of your case?
- Think like a rhetorician: How can you make the substance more compelling?
- Think like a writer: How can you both capture the judge's attention and make it easier for the judge to follow and remember your arguments?

The materials that follow generally assume that you have mastered the first skill, and therefore focus on the other two—not because you necessarily lack them, but because they are not sufficiently taught in law school or understood in law practice. In particular, these materials demonstrate how thinking like a writer necessarily enhances persuasion. Indeed, the foundation of persuasive writing is first writing—that is, straightforward clarity in presenting information. Once that goal is achieved (and sometimes as part of it), the nuances of rhetoric become relevant.

II. THINKING LIKE A WRITER: THE PRINCIPLES OF "SUPER-CLARITY"

A. Introduction

Legal writers face two competing obligations. First, they must do full justice to the complexity of their subject matter, no matter how torturous or esoteric it is. At the same time, they must also transform that complexity into prose so lucid, crisp, and direct, that it will satisfy readers who demand absolute clarity even when—*especially when*—the subject is most obscure. In many professions, writers can back away from one of these obligation in service of the other. Lawyers may not. Worse, they must succeed in both the face of readers who often judge a document by a harsh and selfish standard: How quickly will it help them to reach *their* goals, not the writers.

Lawyers who write well enough to meet these challenges go through three stages of intellectual growth:

1. Thinking Rigorously. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers—"the law"—is in fact quite complex. To "think like a lawyer," we have to become rigorously logical, to grasp subtle distinctions, to be fanatical about precision and completeness. Indeed, we have to tolerate, if not love, complexity. By the time we complete law school, we know the law looks like the Rocky Mountains—convoluted, difficult to map, and dangerous to traverse.

Many lawyers get stuck at this stage. Although they pay lip service to "clarity," all they truly care about is doing full justice to the law's complexity. Worse, because the law demands such rigor and precision, and because English can be such a slippery, ambiguous medium, they assume they have no choice but to wrestle mightily with the language, twisting it far out of its normal, idiomatic shape.

If this first stage is "thinking like a lawyer," the second and third stages are "thinking like a writer." Or, more accurately, "thinking like a reader."

2. Writing Clearly About Complexity. To reach this second stage, we must pass through the law's convolutions and emerge on the other side, capable of a clarity that rests on a new and sophisticated form of simplicity. This simplicity, however, is not over-simplification; rather, it results from developing the legal judgment and courage to focus on the essential core of an issue. It also arises, however, from the skills of the writer's—rather than the lawyer's—trade: writing clearly about complex information. For this skill, the goal is not just the kind of clarity that any decent writer can produce. It is what we will call "super-clarity," by analogy to super-glue: a clarity so powerful it reaches out and adheres to the mind of even the most hurried reader.

This skill has always been important, but these days it is critical. Our readers are overworked, impatient, and cantankerous. The last thing they want is another document or e-mail, even (or especially) from one of us. If they have no choice but to read it, they want to expend as little mental energy as possible along the way to understand (and, hopefully, agree with) our position or analysis. Although our substance may look like the mountains of western Canada, they would much rather be on a highway through the Prairie Provinces, driving at 110 (maybe 140) k.p.h. in a straight line to their goal. This is especially true if they are not lawyers.

But even lawyers and judges want us to carve a path through the law's complexity that is as straight, simple, and quick as the substance allows. As legal writers, therefore, we face a daunting challenge: turning the mountains of British Columbia into terrain that feels much more like Saskatchewan, without betraying the nuance and complexity of the mountain scenery.

To perform this miracle, we must understand how readers' minds deal with complex information and how, as a result, we should present it. With this insight, we can then make our writing not just logical, but also coherent—that is, we can make the logic clear to our readers at every step. We can organize our writing so it leads readers to focus immediately on what matters most. And we can write with enough impact so readers remember—and indeed respect—what we have to say.

3. Winning Your Readers' Attention and Trust. This third stages prepares us to deal with an even tougher challenge. Your readers approach every document with two questions: (i) "How will you help me?" and (ii) "How much of my time will you waste before you help me?" To answer these questions, we must develop a rhetorician's knack for seeing our writing through our readers' eyes and making it valuable on their terms, not just ours. If we can turn our documents around to see them from this angle, our writing will become pragmatic in the best sense of that word: efficient, focused on our readers' goals, and professionally engaging.

B. From Logic to Coherence

To master the art of super-clarity, then, lawyers must master three different skills, each challenging enough on its own: (i) thinking rigorously, (ii) writing clearly, and (iii) winning their readers' attention and trust. To meet all these challenges, they must become a much-better-than-average writer—and, probably, a much better writer than they were in college or law school.

Left unchecked, some aspects of legal thinking—obsessive precision, love of complexity, fear of leaving something out—can produce impenetrable prose. But all is not lost: our ability to think like a lawyer gives us an advantage over everyone else in learning how to be a much better writer much more quickly.

How is this possible? As different as thinking like a lawyer and thinking like a writer are, they resemble each other in one important way, and understanding and utilizing both methods of thinking enable us to write effectively for a purpose.

Thinking like a lawyer. When laypeople contemplate the law, they usually imagine a collection of "laws"—rules that tell them what they may or may not do in a particular situation. To them, "Thinking like a lawyer" means knowing as many legal "rules" as possible and applying the right one to the right situation (or figuring out how to evade it). If no legal "rule" applies, they assume the law can provide no guidance except vague precepts about justice, fairness, and the like.

We know better. What lies beyond the realm of clean, crisp legal rules is not chaos. Even when no clear rule applies, and even when "laws" conflict, they can still think like lawyers. This is because, as we know, legal analysis requires an understanding and manipulation of both legal "rules" and legal "principles." Rules are usually narrow, rigid, and obligatory, while principles are broad, flexible, and compelling rather than compulsory. Although principles may not dictate

a specific result in a specific situation, they allow us to mediate conflicts among rules and to apply "law" even when no "rule" controls.

Imagine the law to be like a brick wall, with the bricks—the things you see the most readily—being particular rules. Most non-lawyers regard the law as simply a pile of bricks, and law school as a place where students somehow memorize all of them. Lawyers realize that the law is not simply a haphazard pile, but a solid structure. Something in addition to the bricks themselves gives the wall its shape and strength, holding the entire social enterprise together. That is the mortar—the principles of the law. The two distinct materials together then form the edifice we call the law.

The key here, of course, is not the precise difference between rules and principles, but the fact that guidance—whether in writing or the law—arises from a combination of specific and general propositions. Particular rules can never be understood fully or applied appropriately unless they are placed within the context given them by broader and deeper principles.

Lawyers rely on this relationship between rules and principles all the time. It allows judges to apply the law coherently even in the face of conflicting precedents or no controlling authority at all. It helps litigators deal with a "bad" case by finding a way around the obstacle—or, more accurately, a way to go "over" it by locating a principle that lies "above" it and limits or recasts its relevance. It allows regulatory and transactional lawyers to maintain their sanity in the face of a maze of arcane rules. And, most important, it makes of the law a rational, grounded social institution, not just an arbitrary bureaucratic exercise of power.

Thinking like a writer. As lawyers, we emerged from law school with some intuitive, if not explicit, understanding of the structure of legal reasoning. Without it, we would be lost among a dizzying array of statutes, regulations, and precedents. As a writer, however, the odds are that the intellectual framework through which you approach your writing is much more primitive: a grab-bag of random advice. For a stark contrast between how we are taught to think about the law and about writing, put side by side the tables of contents of a classic legal treatise and a classic book about writing like *Elements of Style*. The first gives you a coherent intellectual structure, with the underlying legal principles informing and giving order to the book's contents. The second gives you a list of tips loosely organized into equally loose categories.

Even for lawyers who write decently, this lack of coherence is damaging. It prevents them from thinking clearly about the organizational and stylistic choices they face when they write. It makes it difficult for them to discuss those choices rationally with someone else when they work on a draft together. And it almost guarantees that they will focus more on a draft's trivial problems than on the ones that really matter. As a result, the dangers multiply: They will never improve much as writers, they are inefficient editors of their own prose, and they are inept—even dangerous—editors of other people's drafts.

As a lawyer, you no longer have to think about how to think about the law— you just do it, because you have internalized that skill. If you want to bring the same analytical acumen and sound judgment to your writing, however, you probably must step back to gain a more explicit understanding of what the "thinking" in thinking like a writer is all about. The best way for a lawyer to do that is by analogy to the kind of thinking in which you are already an expert.

Writing from principles. Just as the law does not consist solely of vague precepts about justice on the one hand and specific laws on the other, the "law" of good writing does not consist solely of vague precepts about clarity and specific "rules"—avoid the passive voice, write short sentences, use sub-headings, start a paragraph with a topic sentence, and the like. It also includes principles that establish the framework within which all rules (and what we will call "techniques") apply. Because these principles speak to the fundamental goals of communication, they are more important—if more abstract—than all the familiar rules and techniques. A technique applies only in a specific circumstance: when you use a verb, or construct a sentence, or write an introduction, or begin a paragraph. A principle applies always. Once we have internalized it, it becomes a cast of mind that guides us through every circumstance, whether we are thinking about the whole of a document or a paragraph or a sentence.

Writing for a purpose. The correspondence between thinking like a lawyer and like a writer goes one step further. Behind the law's coherent patterns of principles and rules lies something even more fundamental, something that creates and continues to support that coherence. This foundation consists of legal theories or sets of theories, such as "economic efficiency" or "human dignity" or "individual rights essential to freedom" or "personal responsibility for one's voluntary actions." These theories do not just underlie the law. They have a pragmatic function: By giving primacy to one theory rather than another, lawyers can decide how to apply legal principles to achieve their goals in specific situations, and how to act when the principles conflict or leave a question unresolved.

In the context of law practice, then, writing usually has two underlying purposes that match the last two stages of intellectual growth described earlier:

- Transforming western Canada into the Prairie Provinces by imposing "super-clarity" on even the most technical, convoluted material.

- Addressing your readers' needs specifically enough to make the document a sharp scalpel, not a blunt instrument, for the operation they want it to perform.

Just as legal theories help us to apply legal principles and rules by reminding us of our fundamental purposes, so these goals help us to apply the principles of good writing in specific situations. There is no such thing as "good" writing in the abstract.

In writing, this function is performed by the fundamental purpose of the document you are writing. Whatever the specific document, the purpose is to explain and persuade—not to entertain, create suspense, or inspire.

C. Principles of Super-Clarity

In the practice of law, as distinct from law school or legal journalism, this purpose usually walks hand in hand with another, more specific one. In practice, most legal writing is not addressed to the broad and anonymous audience for which a journalist or book author writes, or to the objective and patient readers that law professors pretend to be when they read student writing. Practicing lawyers most often write for specific readers—a client, a judge, regulators, other lawyers in the firm or department, or opposing counsel. And those readers usually expect

not just general enlightenment, but immediate help with a real-world issue or problem or decision. For them, clarity is useless unless it quickly and efficiently serves their pragmatic ends.

To create this essential coherence, we must begin by seeing our document from our readers' perspective. To us, it is a finished product that we can grasp as a whole. For them, as they are reading it, the document as a whole—and the institutional knowledge and thought that went into creating it—never exists. At any one point, readers will remember only a few sentences that, in relatively precise form, what has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

Thus, in writing a document, we are organizing a complex process: the flow of information through our readers' minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arguing syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. Rather, they read actively, although much of the action happens in a split-second and never reaches full consciousness. At each moment, they are deciding how much of what they just read they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

To help readers through this process, writers have to create a clarity based not just on logic, but also on how a reader's mind deals with complicated information. This cognitive clarity is based on three facts about how people read. In terms of logic alone, none of them matters. In terms of coherence—of clarity in the reader's head at every moment, not just at the document's end—they are critical:

First, because readers have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern – the story, the logic, the theme – enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been – and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.

Second, as the information flows past, they want its structure and sequence to match the logical order of the propositions or events it is describing. In other words, they want the document to unfold in step-by-step synchrony with the legal analysis or factual story it conveys, so that its form matches its underlying substance. They don't like it, for example, when your writing follows the wandering path you took in researching an issue, rather than the logic of the analysis you finally uncovered. Nor do they like it if you recite facts chronologically when the key factual issues have nothing to do with the interminable tale of who-did-what-when. They are irritated if a section is divided into five sub-sections that look of equal importance, when the fourth is logically subordinate to the third. And they are annoyed, if only subliminally, when a sentence's structure implies that three details are equally important, although two are just appendages to the other.

Finally, with words as with food, they cannot easily ingest an unbroken flow. At both the large scale (the document as a whole) and the small (paragraphs and sentences), they want writing cut into manageable pieces, so they can pause and begin to digest each before they go on to the next.

From these facts are drawn three principles that apply at all levels of a document, from its overall organization down to its sentences. In the summary fashion in which they are outlined below, they may seem too abstract to be useful. Properly understood and applied, however, they blossom into a rich, practical, and efficient approach to improving your writing and editing. If you edit or supervise other lawyers' writing, they will also give you concepts and a vocabulary that will enable you to talk about drafts more clearly and effectively (and objectively).

Principles of Super-Clarity

Principle 1: Readers absorb information best if they understand its significance as soon as they see it. They can do so only if you provide an adequate focus or framework before you confront them with details. Therefore:

- **(a) Put focus before details.**
- **(b) Put familiar information before new information.**
- **(c) Make the information's structure explicit.**

Principle 2: Readers absorb sequences of information best if the sequence's order (its "form") is consistent with the information's purpose (its "substance"). Therefore:

- **(a) At the "macro" levels of a document:**
  - **(i) Match the organization of your information to the logic of your analysis.**
  - **(ii) Pay attention to the difference between how you initially encountered and understood complex information (its "superficial" order) and how you later analyzed and assessed that information (its "deep structure"). You communicate more confidently by using the latter as your organizing guide.**
- **(b) At the sentence level, link the sentence's grammatical form (its "syntactical core") to the focus or theme of your information. You communicate more clearly and efficiently by telling your story through the subjects, verbs, and objects of your sentences.**

Principle 3: Readers absorb information best if they can absorb it in relatively short pieces.

(a) Break information into segments.

(b) Put the most important information into the most emphatic segments.

(c) Make the segments concise.

Although all these principles apply at all levels of a document, their order here is significant: They are listed in the basic order of an effective and efficient edit. Principles 1 and 2(a) are more about the "command" you have over your information – the message you want to preach – while 2(b) and 3 are more about the "control" you have over the details that comprise the message. Both levels, of course, are important to a good document. But this program is organized to emphasize the former first and the latter second. It will begin by focusing primarily on large-scale organization, for two reasons: First, contrary to what most editors believe instinctively, structural elements are more crucial to the success of any document than syntactical polishing. Second, in contrast, to the years of training writers have endured about elegant sentences, few have ever been given any practical guidance about structuring complex documents.

Overall, the program has three specific goals and two more general ones. It will show you how to:

- capture and hold a reader's full attention, even when your reader is impatient, irascible and tempted to skim;
- create not just average clarity, but "super-clarity," by analogy with super-glue: a clarity that will reach out and adhere to the mind of even the most hurried reader; and
- write a prose that is energetic, perhaps even graceful, and that projects an image that enhances your credibility.

In addition, the program will:

- make you a more effective, disciplined editor; and
- allow you to talk about drafts with other people more clearly and analytically.

III. EXHIBITING COMMAND: IMPLEMENTING THE "MACRO" SUPER-CLARITY PRINCIPLES

A. Super-Clarity Principle 1: The Importance of "Meta-Information"

The three corollaries to Principle 1 reflect a challenge: to be an effective communicator, you must provide the reader with two different kinds of information. One is obvious, although a challenge by itself to grasp and organize—the law or facts that form the substance of your argument or analysis. The other, however, is far less obvious and a separate challenge: for your reader to appreciate your substantive information, you must also provide information *about* your information. This critical preliminary perspective, or "meta-information," prepares your reader's mind to absorb your substance. The three corollaries below capture the methods for presenting meta-information to your reader most effectively and efficiently.

1. Corollary (a): Put Focus Before Details

Unless they have photographic memories (and they don't), readers cannot absorb and remember complicated information if they don't know why the details matter and which ones matter most. If they can't grasp the significance of the details, they will balk at reading them. As a result, before dumping data on readers, we must provide a focus. The focus's job is to make them smart enough to understand why the details matter, which will be important, and how they are organized.

More specifically, we must provide readers with answers to three questions they automatically ask at the beginning of a new document, section, or passage:

1. ***What is the topic?*** In plain English, what is this all about?

2. ***What is the point?*** What is the specific conclusion or action the writer wishes me to take?

3. ***What should I focus on?*** Should I be looking for or thinking about something specific as I read? If so, tell me what it is as quickly as possible so I can read more intelligently.

These questions often overlap, and in many places the same sentences (or a single sentence) can answer all of them. But the answers have different functions. The topic tells readers what part of the factual or legal universe they are about to enter, so they can bring to bear what they already know about the topic. The point tells them where you are heading, so they don't have to guess. The focus allows them to concentrate on the details that are most important.

From the perspective of an over-worked judge, all three types of contextual information matter. But the point often matters most. Judges prefer almost every passage to begin with its point, rather than keeping the point as a prize – or punishment – for fighting through the passage to its end.

Here is how the Honourable Mr. Justice Marshall Rothstein puts this advice:

> [P]oint first writing is the most important suggestion for good writing…. Point first writing means that the proposition is stated first and then developed. You may think that the judge needs to understand how an argument develops … [to] appreciate the point … [o]r that an anticipated conclusion will make the ultimate conclusion repetitive. Forget those concerns…. Point first writing is especially important in complex appeals or judicial reviews where it is easy for … the judge to get lost.[*]

The concepts of topic, point, and focus are simple. But their application can be difficult, especially in a document's interior where most writers stop worrying about "introductions." The task of introducing never ends, however, because behind it lies a principle – put context before details – that applies to organizing passages of every kind, in all places and of all sizes.

EXAMPLE NO. 1

This example comes from the opening paragraphs of a judgment—not a factum—dealing with an evidentiary motion.

Before:

OPINION GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

1. At approximately 4:00 p.m. on December 7, 2017, Ontario Provincial Police Constables Charles Jones, Ronald Brown and David Green, accompanied by Crown Attorney Frank Smith, went to John Torrance's home located at 1819 Fawn Way, Centerville, Ontario. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red notebook from Torrance's bedroom. Torrance seeks an Order preventing the Crown from entering these materials into evidence.

2. Torrance had developed as a prime suspect in a homicide that occurred during earlier that afternoon. That fact led the O.P.P. to his residence. At trial, Constables Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

3. Jones stated that Brown was in charge, and that upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the constables' visit was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance.

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[*] The Honourable Mr. Justice Marshall Rothstein, *It's English, But What's Your Point*, *in* EFFECTIVE WRITTEN ADVOCACY (Canada Law Book 2008).

After (creating a context first):

1. John Torrance seeks an order exclude evidence seized from a drawer in his bedroom by provincial police constables who searched his parents' home, where he lived. The constables conduced a search after Torrance's father had signed a form permitting them to "search my home . . . in an attempt to locate my son . . . and to seize and take any letter, papers, materials, or other property that they may require for use in their investigation." The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

2. At approximately 4:00 p.m. on . . . .

EXAMPLE NO. 2

Before:

a. Showing Prejudice

1. Insurer contends that it need not demonstrate prejudice caused by Policyholder's alleged late notice because its policy expressly states that notice is a "condition precedent" to coverage. But notice is *always* a condition precedent to coverage. In *Smith v. Jones*, the umbrella excess liability insurance policy did not label the notice provision a condition precedent, but the NewProvince Supreme Court held that, because notice is an inherent condition precedent to coverage, the trial court necessarily found compliance when it found a duty to indemnify.

2. NewProvince courts nevertheless have long followed the notice-prejudice rule, under which an insurer must show prejudice to defeat a claim for coverage. . . .

3. The notice prejudice rule applies to liability policies like the Insurer policy at issue here. . . .

After (a context-first revision):

a. Even When Notice Is an Explicit Condition Precedent, Prejudice Must Be Shown

1. NewProvince courts have long followed the rule that, when an insured fails to provide timely notice, the insurer must demonstrate prejudice to defeat a claim for coverage. Courts have applied that rule without regard to whether the policy expressly states that notice is a "condition precedent" to coverage, because notice is always a condition precedent under NewProvince law. . . . .

EXAMPLE NO. 3

From a factum's facts section; the legal issue is whether the union had just cause for firing its business agent, Mr. Jones?

Before:

The aftermath of the strike

1. In February 2018, the strike was concluded with a collective agreement. Although the agreement included respectable wage increases, it appears to have significantly increased management's rights and to have reduced job security for the union's members. As a result, management was able to eliminate about 150 employees.

2. At the next meeting of the Local, Mr. Gene Green, complained about the agreement and Mr. Jones's role in reaching it. . . . .

3. In the following several days, there were discussions among the members of the Local's Executive Committee about Mr. Jones' performance during the negotiations leading up to the agreement. . . .

[THREE PAGES OF FACTS FOLLOW]

After:

The aftermath of the strike

1. In February 2018, the strike was concluded with a collective agreement. Although the agreement included respectable wage increases, it appears to have significantly increased management's rights and to have reduced job security for the union's members. As a result, management was able to eliminate about 150 employees.

2. Over the next six months, Mr. Jones's role in the union was discussed in a series of Local meetings and individual conversations among its Executive. ***[THE FOCUS]:*** The documentary evidence of and testimony about these meetings and conversations focus on two questions: Is there reliable evidence that Mr. Jones failed to perform his job satisfactorily? And is there reliable evidence of other motives for his dismissal?

3. At the next meeting of the Local, ...

2. Corollary (b): Put Old Information Before New Information

One way of putting focus before details is to put "old" information before "new" information. To apply this principle, you should recognize that old information comes in a variety of forms. Some of it is information you are certain your audience possesses before it begins to read. This can range from the very basic, like the meaning of "case law," to the more particular, like the methods by which courts interpret statutes, to the very specific, like the law of fraudulent conveyance. The other large block of old material is the information you give them as they read, so that they approach each new paragraph (and sentence) with a constantly increasing stock of old information.

EXAMPLE NO. 4

Before:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. The Supreme Court applies a reasonableness test to determine whether a citizen's rights have been violated in unreasonable search cases. The test balances the citizen's privacy interests against the government's interests that are furthered by the search.

After:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the Supreme Court applies a reasonableness test. This test balances the citizen's privacy interests against the government's interests that are furthered by the search.

EXAMPLE NO. 5

Before:

This case is not so much a contest between the Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction Canadian economic life will take in the coming years. The concept of the conglomerate corporation—not a particularly new idea, but one that lately has gained great momentum—is at the center of this struggle. The attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers, is one reason for the recent popularity of this concept. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. Although the market shares of the several component firms within their individual markets remain unchanged in conglomerate mergers, their capital resources become pooled—that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in Canada.

After:

This case is not so much a contest between the Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction Canadian economic life will take in the coming years. At the center of this struggle is the concept of the conglomerate corporation—not a particularly new idea, but one that lately has gained great momentum. One reason for its recent popularity is the attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. In these conglomerate mergers, although the market shares of the several component firms within their individual markets remain unchanged, their capital resources become pooled—that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in Canada.

EXAMPLE NO. 6

This example, which comes from an interoffice memorandum concerning a client's tax treatment under U.S. law, demonstrates that focus (corollary (a)) is more important than old-to-new (corollary (b)).

Before:

I. PARTNERSHIP OR CORPORATE TAX STATUS UNDER SECTION 7704

A **publicly traded partnership** shall be treated as a corporation pursuant to § 7704(a). However, Congress created an exception for publicly traded partnerships with passive-type income. To be a **publicly traded partnership** with passive-type income, a partnership must meet the gross income requirements of § 7704(c)(2), which requires 90% or more of a partnership's gross income to be "**qualifying income**." **Qualifying income** means, among other things, "in the case of a **partnership** described in the second sentence of subsection (c)(3), income and gains from commodities . . . or futures, forwards, and options with respect to commodities." The **partnership** that is described in the second sentence of subsection (c)(3) is one whose "principal activity" is "the buying and selling of commodities . . . , or options, futures, or forwards with respect to commodities." *The issue is* whether a publicly traded partnership's activities of entering into and terminating commodity forward contracts is within the meaning of buying and selling of forwards with respect to commodities under § 7704(c)(3).

After:

Our client, which is a publicly traded partnership, would ordinarily be taxed as a corporation rather than a partnership under § 7704 – unless it can show that it falls within an exception to that section for its particular business of trading in commodity futures contracts. To make this argument, § 7704 will require a series of steps:

(1) A partnership tax rate . . .

3. Applying Corollary (c): Make the Structure Explicit

The challenge continues: it's not enough for our writing to be organized logically. The organization also much be obvious to the reader, from the start and at each step along the way.

One way to do that is by "mapping" the organization. Mapping has three steps:

(i) Create a clear map of your analysis and stamp it firmly on your reader's mind. The more complex the analysis, the more important the map. Except in very simple briefs, don't assume that the mapping is taken care of by the table of contents and the statement of issues.

(ii) Follow through: remain true to the conceptual structure that your map represents. Don't change the sequence or relationship of your points halfway through the brief. When you reread a draft of a brief, especially a long one, make sure maps are accurate and congruent.

(iii) When you respond to an opponent's argument, map its structure clearly and be explicit about your response to each point. But don't allow your opponent to dictate the structure of your analysis —or, for that matter, your characterization of his argument.

EXAMPLE NO. 7

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a non-forfeitable interest in a non-qualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less often than unfunded ones for two reasons. First, they have tax disadvantages: If an employee is given a non-forfeitable interest in a non-qualified trust, he will be taxed immediately on the amounts set aside for him. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a non-forfeitable interest in a non-qualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

EXAMPLE NO. 8

Before:

You have asked me to research whether our client, a corporation seeking to interview a former employee suspected of wrongdoing, has a duty under the penal laws of Ontario or of Canada to report any criminal activity it becomes aware of during the interview. In addition, you have asked me whether under the penal laws of Ontario or Canada, the corporation may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

After:

Our client, a corporation, seeks to interview a former employee suspected of wrongdoing. You have asked whether, under the penal laws of Ontario or Canada, our client:

The next three examples (Nos. 9-11) demonstrate effective roadmaps at various stages of the document. The three that follow (Nos. 12-14) demonstrate ineffective (and, indeed, harmful) roadmaps.

EXAMPLE NO. 9

The Division's claim raises three issues. Was an overpayment made? If so, does Section 44:10-4(a), and the case law interpreting it, authorize a client to recover the money? If not, can the Division rely on Regulation 44:10(4), which purports to authorize a lien despite the lack of direct statutory authorization?

EXAMPLE NO. 10

The issues raised on this appeal fall into five categories: (i) issues relating to whether the Debtors and the Brown family have standing to appeal, (ii) issues arising out of the disqualification of Judge John B. Smith as a result of his financial interest in J.P. Morgan & Company ("J.P. Morgan"), (iii) issues relating to substantive consolidation, (iv) issues relating to the classification system of the Committees' Plan, and (v) issues raised by the doctrine of mootness. Issues in category (iii) are raised only by the Debtors and issues in category (iv) are raised only by the Brown family.

EXAMPLE NO. 11

1. Defendant Smith & Co., Inc. ("Smith") respectfully submits this memorandum in support of its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

2. By this motion, Smith seeks dismissal of the only claim in Jones's complaint that survived the jury's verdict. The complaint recited six causes of action. One, breach of contract, was dismissed by Jones before trial. Another, tortious interference with business relations, was

dismissed by this Court at the close of Jones's case. Of the four claims that went to the jury, the jury found in Smith's favor on three: fraud and breach of express and implied warranties of title. The only claim on which the jury found in Jones's favor was breach of the implied warranty of merchantability.

3. Judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion. First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether "The Orchard" would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

4. Second, the alleged breach of warranty occurred with respect to goods that were never sold to Jones. Jones was therefore left to argue that Smith had anticipatorily repudiated its contract within the meaning of the Code. But before there can be a finding of anticipatory repudiation, a party must make a written demand for adequate assurance of due performance. Jones made no such written demand.

5. Third, there is a fundamental inconsistency between the jury's findings that the warranties of title were not breached and that the warranty of merchantability nevertheless was. Jones alleged no defects in "The Orchard" other than a defect in title. He claimed that the painting was unmerchantable because title was defective, and for no other reason. The jury found no defect in title and thus removed the only basis for finding a breach of warranty of merchantability. Jones has, in effect, proceeded on the theory that a breach of warranty of merchantability is a "lesser included offense" of a breach of warranty of title. No case decided under the Codes supports that theory.

6. Fourth, even if there was a breach of the warranty of merchantability, that breach was not a proximate cause of any injury to Jones. It is undisputed that Gekkoso, Jones's client, knew that Romania had tried to seize the painting in Spain in 1982. Knowing this, it was nevertheless willing to enter into a contract with Jones to purchase the painting. If Jones's view of the evidence is accepted, Gekkoso ultimately cancelled because it believed that Jones had lied about this incident. Under this view, it was Jones's deception, and not any breach of warranty, that caused him injury.

EXAMPLE NO. 12

Generally, a court will not second-guess the decision the directors of a corporation make when it can be shown that the directors acted in an informed manner, in good faith, and in the honest belief that the action taken was in the best interest of the corporation. As will be discussed below, we think that you can show that you have complied with these requirements.

1. Good Faith .....

2. Disinterestedness .....

3. Due Care .....

EXAMPLE NO. 13

In the first paragraph below, the second sentence creates a map of the brief's analysis—and therefore creates an implicit contract between writer and reader. But the second paragraph, which appears several pages later, breaks the contract by drawing a very different map.

From p. 1:

Magna Defendants' Memorandum of Law in

Support of Motion to Dismiss Complaint

Introduction

Magna Corporation ("Magna") and the Magna individual defendants ("the Magna Defendants") submit this Memorandum of Law in support of their motion, pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), to dismiss the Consolidated and Amended Class Action complaint filed July 10, 1992. This complaint fails to plead scienter, does not plead fraud with the requisite particularity, fails to state a cause of action under either federal or the applicable state law and is brought prematurely. It should be dismissed.

From p. 8:

As we argue below, and as all defendants have argued in earlier memoranda of law submitted to this Court, this claim is insufficient for four reasons. First, the complaint pleads no fact showing a duty by the Magna Defendants to make affirmative disclosures to these plaintiffs. Second, it lacks specificity and therefore fails to plead scienter. Third, it fails to state a claim under the securities law. Finally, the complaint asserts the type of mismanagement allegation that has been routinely deemed insufficient to support a securities fraud action in the Second Circuit.

1. has a duty to report any criminal activity it becomes aware of during the interview, and

2. may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

The next two examples show how a document's large-scale organization can be a tool of persuasion.

EXAMPLE NO. 14

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EXAMPLE NO. 15

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4. Implementing Principle 1: Macro-Organizational Issues

a. Meta-Information Throughout the Document: Creating Foci and Roadmaps Wherever Necessary

EXAMPLE NO. 16

The BCCI Liquidators' task has been a daunting one. The former management of BCCI—all of whom were displaced by the regulatory actions of July 1991—left a morass caused by mismanagement, self-dealing and fraud, and a shortfall between realizable assets and liabilities of several billion dollars. That shortfall will come from the pockets of depositors and other creditors, all of whom are truly "victims" of BCCI. The mission of the BCCI Liquidators, in essence, has been to maximize the funds available for ultimate distribution to these victims. Included in the funds potentially available to diminish this inevitable shortfall were an estimated $550 million in accounts, loan portfolios and other assets of BCCI in the United States as of the time of the collapse.

[MAP & FOCUS:] The BCCI Liquidators have pursued their goal by two means: (1) initiating proceedings under Section 304 of the Bankruptcy Code that would enable the entire BCCI estate to be administered in a foreign proceeding for the benefit of creditors worldwide; and (2) reaching an agreement with the United States that would prevent the forfeiture of all BCCI assets in this country.

A. The Section 304 Proceedings

On August 1, 1991, in the United States Bankruptcy Court for the Southern District of New York, the BCCI Liquidators filed petitions pursuant to Section 304 of the Bankruptcy Code. Section 304 is an unusual provision because its use does . . . .

* * *

EXAMPLE NO. 17

Although the cases above present favorable support for defendant's position, the 25th Circuit has declined to follow Carter's holding.

[FOCUS:] In four decisions, the 25th Circuit has held that a promise of immunity made by a United States Attorney in one district does not necessarily bind a United States Attorney in another district. Instead, these cases have held that an agreement that includes a promise of immunity must be construed in light of its circumstances.

In a 1972 case, United States v. Smith, Judge Green listed two factors that limit the enforceability of such an agreement . . . .

In a 1979 case, in contrast, Judge Green upheld an agreement on the grounds that . . . .

EXAMPLE NO. 18

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

An "indispensable instrument" is defined in Restatement of the Law, Security § 1 comment (e), as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

[FOCUS FOR DETAILED DISCUSSION OF CASE:] The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

EXAMPLE NO. 19

Before:

In *Grodt & McKay* the Tax Court found:

> Additionally, the agreements are clear that petitioners have no right to possess the cattle or to exercise any real control or dominion over them. Cattle Company has complete control over the sale of animals, the sales price, retention of progeny, the incorporation of progeny into the Breeding Herds, the culling and replacing of herd animals, and the location, maintenance, expansion and breeding (including artificial insemination) of the herds. Petitioners' only rights with respect to the possession, control or dominion of the herds are extremely limited and, as a practical matter, valueless.

After:

[CONTEXT:] In this case, the issue of control and its extent plays a key role in determining ownership, as it did in *Grodt & McKay*. There the petitioners had very limited control over the cattle they had purportedly purchased from Cattle Company, as the Tax Court observed:

> [T]he agreements are clear that petitioners have no right to possess the cattle or to exercise any real control or dominion over them. Cattle Company has complete control over the sale and . . . [care] of the herds. Petitioners' only rights with respect to the possession, control or dominion of the herds are extremely limited and, as a practical matter, valueless.

EXAMPLE NO. 20

Before:

DISCUSSION

> In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964). "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be ''appropriate.''' Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); see Staten Island University Hospital v. NLRB, 24 F.3d 450, 455 (2d Cir. 1994); see also American Hospital Assn. v. NLRB, 499 U.S. 606, 610 (1991), interpreting the language of Section 9(a) as suggesting that ''employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit.'' A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless ''an appropriate unit compatible with that requested unit does not exist.'' P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963); accord: Ballentine Packing Co., 132 NLRB 923, 925 (1961).

Overnite Transportation Co., 322 NLRB 723, 723-24 (1996). In Overnite, the Board went on to note that "[e]ven though [it] applies a presumption that a single location unit is appropriate, that presumption is not applicable when a broader multilocation unit is sought by the petitioner." Id. at n.6. Accordingly, it would appear that even though, as the Employer points out, the Board may apply a presumption that a production and maintenance unit is an appropriate unit, the question before me in this case is whether the unit sought by the Petitioner is an appropriate unit.

After:

DISCUSSION

[CONTEXT:] Although the Employer has correctly argued that the Board may presume that a production and maintenance unit is an appropriate unit, that is not the issue to be decided. Instead, as the Board's decision in Overnite Transportation Co., 322 NLRB 723, 723-24 (1996), makes clear, the question is whether the unit sought by the Petitioner is an appropriate unit, regardless of its size or content or any other characteristic:

> In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. . . .

EXAMPLE NO. 21

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession*. First, the lender must take actual "possession" of the vessel or facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Managerial control*. The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ….

b. Strong Introductions

Writing introductions is an art form, and no two should look the same. But it helps to approach them with method as well as inspiration. Here is a framework for thinking about what judges want at the start of a brief, and what you should do to state your case persuasively.

What Judges Want: Clarity

When judges are asked what they would like to see at the start of a brief, they give remarkably similar replies. They want the following:

- If the brief is their first taste of a case, a succinct, simple "big-picture" summary of what the case is all about. How did the dispute arise, and why are the parties fighting? The most common complaint: the brief plunges into the details of its argument before explaining the basics of the underlying dispute.

- If it's not clear from the face of the brief, the specific relief you want.

- A clean, clear statement of the questions they have to resolve to get rid of the case. The most common complaints: issues phrased too vaguely to define the ultimate question, and a scattershot list of more issues than they can remember.

- A clean, clear statement of why you think you should win.

- A clean, clear map of the brief's analytical structure. The most common complaint: a one-thing-leads-into-another approach ("moreover," "furthermore," etc.) that doesn't let the judge focus on specific, distinct arguments.

What Judges Don't Want: Garbage

- Attacks against the opponent that show how strongly you feel, but give the judge no useful information.

- Piling on: a laundry list of issues and arguments.

- Too much boilerplate or inessential procedural detail.

- Clotted prose.

What You Want: Persuasion

The trick to persuasion is to perpetrate it in the same breath as you give the judge what he or she wants, not as a separate act. If you spend much time trying to persuade in language that offers the judge no useful information, you have failed. To pull off this trick, you need to turn the elements listed above to your advantage:

- Although the "big-picture" context should be factual and non-argumentative, it should never be neutral. Seizing control of the context is just as important as seizing control of the issues.

- Themes persuade; arguments alone seldom do. An argument should create a chain of syllogisms so inexorable that readers are compelled to accept your conclusion. A theme should make them want to accept it. As you draft your clean, clear statement of why you should win, your goal should usually be to create a memorable, one- or two-sentence theme as well as an argument. But cases vary: some lend themselves to equitable themes, some to syllogistic inevitability.

- Details persuade; generalizations and conclusory statements do not. Although introductions must be concise, they are often much more persuasive if they deploy a few carefully selected details.

  Note: There is a tension between the last two points. Writing introductions often requires striking the right balance between a strong, concise, uncluttered theme and enough detail to flesh out what would otherwise be abstract, conclusory, and therefore unconvincing propositions. In different cases, the balance is struck in different places: the examples that follow range from half a page to five pages in length.

- If an argument is a sure winner on its face, simplicity is best. Few things beat a simple, impeccable syllogism. If it's not such a sure thing, however, you may persuade best if you summon more than one reason to support your conclusion. This strategy does not justify arguments in the alternative. It just makes the common-sense point that two or three reasons may be more persuasive than one

If you follow all the advice above too literally, it will tie you in knots—and lead you to write introductions that are much too long. The advice is intended to be a framework for thinking about introductions, not a formula to be applied to every one.

STRONG INTRODUCTIONS

To apply the Principle 1's ideas of "focus before detail" to a document's Macro-Organization, the writer must consistently do three things throughout a document: make the reader (i) smart, (ii) attentive, and (iii) comfortable. In the introduction of a long document, you will have to make the reader smart enough to cope with all the complexities that will follow. Here are the basic ingredients to include in the introduction and any place in in the document that addresses new material:

SMART—provide information about your information.

- *Label*: What is the topic? How can it be described so that it triggers a reader's "old" information—the knowledge he or she brings to the document?

- *Map*: What is the document's structure?

- *Point*: What should readers look for or think about as they read? Legal significance?

Even if your introduction does a superb job of making readers smart, however, it may still fail unless it succeeds at two other tasks: capturing their attention and making them comfortable. To do this, the introduction will have to answer three questions that every reader brings to every document:

ATTENTIVE—specify the information's relationship to the reader.

- "*Bottom line":* How will this help me—in concrete, practical terms?

- *Efficiency:* Will you waste my time?

COMFORTABLE—establish common ground.

- *Language:* Are we from the same planet? Do we speak the same language? Share the same assumptions? Want the same things?

How you respond to these challenges depends upon your audience, and the more you know about its expectations and assumptions the better your introductions will be. Although the chart below is greatly over-simplified, it illustrates the kind of analysis that can help you think about how to capture your readers' attention and make them comfortable:

	Clients	*Judges*	*Senior Lawyers*
Bottom Line	Make/save money; complete/block project	Do justice; dispose of case quickly	Help to advice client' protect from error
Efficiency	Get to the point quickly; omit marginal details	Explain the case's big picture; zero in on the legal jugular	Provide all relevant information; explain analysis thoroughly
Comfort	Avoid pomposity and legalese; think like a business person	Write to help the judge, not to attack your opponent	Match format, length, and style to the task

EXAMPLE NO. 22

This introduction (to a motion to dismiss) has its heart in the right place: it sets out to describe the case's context, and to focus on the issues. But it lacks the patience and discipline to do a good job at either task: it rushes through the "big-picture" context at the same time as it tries to describe the personal jurisdiction issue. And it has other flaws:

- It relies on broad, conclusory statements unsupported by any convincing detail.
- It lacks thematic flair: nothing in it makes the reader want to join the writer's side.
- The long list of rules is classic piling on of a kind judges dislike.

The revision, though not perfect, tries to:

- Create a big-picture "frame" that is both lucid and persuasive. It implies—or, at least, leaves open the possible implication—that the other side is scrambling to recover through the courts money it lost as the result of bungling a simple commercial transaction.
- Be more specific about the issues (not just personal jurisdiction, but minimum contacts), and to avoid piling on.
- Support its arguments with some carefully chosen detail.

Before:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff's alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank which issued a letter of credit in connection with the transaction. Plaintiff's attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6).

FACTS

Plaintiff, a Panacea corporation, sold 1000 metric tons of seed to . . . .

After:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the letter could not be honored by First Citizens Bank ("FCB"), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff's complaint should be dismissed as to FCB because it does not and could not allege that FCB—a Lebanese bank with no office or assets in the State of Panacea—has sufficient minimum contacts with the State for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to . . . .

FACTS

* * *

EXAMPLE NO. 23

The following example is an introduction to an appellate brief. The "before" version commits at least two sins:

- It rushes into its argument before explaining the context: what happened, and why did a quarrel result?

- It fails to create a clear, visible structure for its argument. The first words in the third and fourth paragraphs—"moreover" and "at any rate"—are symptoms of this failing.

Before:

PRELIMINARY STATEMENT

The instant appeal by Plaintiff-Appellant Big Bank, N.V. ("Big Bank") relates to an Order issued by Hon. James Rogers, dated January 30, 1991 (the "Order"), pursuant to which Justice Rogers granted, in part, the motion by Defendant-Respondent Minicorp ("Minicorp") which sought to invalidate Big's assertion of the attorney-client privilege with respect to certain documents and as to testimony concerning communications between Big and its attorneys.

As demonstrated below, however, the applicable legal principles do not support the decision of the lower Court, and instead fully support Big's assertion of the attorney-client privilege. The burden on a party seeking to invalidate the attorney-client privilege is extremely high, and Minicorp has simply not made the requisite showing for the abrogation of Big's attorney-client privilege. Specifically, Minicorp, not Big, has placed the issue of Big's reliance on counsel's advice in issue in this case. As such, and in accordance with the cases discussed in Point B (e.g., Chase Manhattan Bank, N.A. v. Drysdale Securities Corp., 587 F. Supp. 57 (S.D.N.Y. 1984)), there has been no waiver of the attorney-client privilege by Big, and Minicorp's attempted wholesale invalidation of Big's attorney-client privilege should be rejected.

Moreover, Big's indication that it relied on counsel's advice demonstrates only that Big's counsel (in addition to Big itself) did have communications with Minicorp employees. As the court below noted (R. 16), Big has previously agreed that Minicorp is perfectly free to inquire as to these non-protected communications, and Minicorp has already had the opportunity to question Big's attorneys as to their contacts with Minicorp's employees. Minicorp should not, however, be permitted to invalidate Big's attorney-client privilege in its zeal to determine what its employees may or may not have told Big's representatives.

At any rate, Minicorp has itself repeatedly taken the position that only its own actions could create Mr. Smith's apparent authority. As such, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case. Therefore, nothing justifies Minicorp's attempted abrogation of Big's attorney-client privilege.

Accordingly, the decision of the Court below, to the extent that it compelled Big to produce documents as to which it had claimed the attorney-client privilege and had further required Big's representatives to provide testimony concerning communications between Big and its attorneys, should be reversed.

After:

PRELIMINARY STATEMENT

Plaintiff-Appellant Big Bank, N.V. appeals from an Order issued by Hon. Richard Rogers that granted, in part, a motion by Defendant-Respondent Minicorp Securities Corporation to remove the attorney-client privilege from certain documents and from testimony concerning communications between Big and its attorneys.

In the underlying action, Big seeks to recover approximately $6,000,000 in loans to Minicorp. As an inducement to Big to make the loans, an employee of Minicorp executed a letter representing that Minicorp would maintain certain collateral. Minicorp does not dispute that the representation was fraudulent. It does claim, however, that the employee did not have apparent authority to make the representation. In its motion, it asked for a wholesale abrogation of the attorney-client privilege between Big and its attorneys on the basis that Big's attorneys had communicated with Minicorp's employees during the course of arranging the loan and that Big had subsequently relied on counsel's advice in making the loan.

The burden on a party seeking to invalidate the attorney-client privilege is extremely high [*What is the burden?*]. For three reasons, Minicorp has failed to meet this burden.

First, Minicorp has itself repeatedly taken the position that only its own actions could create the employee's apparent authority. As a result, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case.

Second, Minicorp itself—not Big—placed the question of Big's reliance on counsel's advice in issue in this case. Big cannot, therefore, be held to have waived the privilege.

Third, Big has agreed that Minicorp is free to inquire about communications between Big's attorneys and Minicorp's employees, and Minicorp has already questioned the attorneys about these contacts. Minicorp does not need to attack the attorney-client privilege between Big and its attorneys in order to investigate the attorneys' communications with Minicorp.

Accordingly, the decision of the Court below should be reversed to the extent that it compelled Big to produce documents as to which it claims attorney-client privilege and required Big's representatives to provide testimony about communications between Big and its attorneys.

EXAMPLE NO. 24

The following example is an introduction to a response to a motion for preliminary injunction. The problems:

- The first paragraph is cluttered with trivia.
- Although the second paragraph has a point to make, it takes far too long to make it.
- The first paragraph of the Introduction relies primarily on invective, not argument.
- As the Introduction proceeds, instead of stating issues and arguments concisely and in a clear order, it plunges into the details of the opponent's claims.

Before:

Nature and Stage of the Proceedings

Plaintiffs preliminary injunction motion challenges the Asset Purchase Agreement, dated June 9, 1990, between Minicorp, Inc. ("Minicorp") and Megacorp, Inc. ("Megacorp"), pursuant to which Minicorp transferred its Green Thumb seed division to Megacorp in consideration for $231 million in cash and Megacorp's stockholdings in Minicorp. Plaintiffs filed their complaint on May 3, 1990, and obtained an Order for expedited discovery the next day.

In accordance with that Order, Minicorp produced five witnesses in four days for depositions. In addition, plaintiffs deposed a person from each of Megacorp, Megabucks and Maxibucks, the investment banking firms that represented Minicorp and Megacorp, respectively, in connection with the deal. All that was done to accommodate plaintiffs' initial request that this Court hear a motion for a preliminary injunction sometime in late December before the Minicorp agreement with Megacorp was consummated. However, by their own choice, plaintiffs then decided not to attempt to enjoin the transaction from going forward; instead, knowing that the agreement would be consummated in the interim, plaintiffs asked the Court for a hearing on July 2, 1990, and filed their motion for a preliminary injunction on June 16. The transaction was consummated on June 22, 1990.

This is the Answering Brief of Minicorp and its individual director-defendants.

Introduction

As will be shown herein, this motion is based wholly upon conjecture, hypotheses and distortions of evidence having no basis in reality whatsoever. Such distortions will be demonstrated in the Statement of Facts by reference to the evidence. Plaintiffs' attack upon the fairness of the transaction to Minicorp, as well as the alleged ulterior "entrenchment" motivation for it, has no basis. Plaintiffs have falsely derived an excessive valuation of Green Thumb, attributable to no person or evidence, to create an argument that it was sold at an undervalued consideration for the purpose of entrenching Minicorp's Chief Executive Officer, Roger Rogers.

Plaintiffs' brief contends that Minicorp sold its Green Thumb division to Megacorp for $57 million less than its worth by extracting a figure of $400 million used by Megacorp's investment banker, Maxibucks, in preliminary and hypothetical analyses of ranges of premium values that might be attributed to Green Thumb in a possible transaction involving a tender for all of Minicorp's stock at a premium over market price. This hypothetical value was never adopted by either party or their investment bankers or any witness as the actual premium value of the assets sold. In fact, plaintiffs themselves in their interrogatory answer explaining the basis for the complaint's allegation of a $28 million shortfall used a $371 million cash premium inflated value for Green Thumb. To exaggerate the alleged discrepancy, plaintiffs value the Minicorp stock given back by Megacorp at an "unaffected" market value of $91, ignoring the premium value placed on all Minicorp stock in the hypothetical.

Alternatively, plaintiffs suggest a discrepancy of $42.8 million using a total value of $390 million which Megacorp's acquisitions director John Smith one time indicated as the most that he "might" be willing to attribute to Green Thumb in a valuation of all of Minicorp at a takeover price of $130 per share. To exaggerate the discrepancy, at a time when the stock was trading in excess of . . . .[THIS "INTRODUCTION" CONTINUES FOR ANOTHER PAGE]

After:

Introduction

Plaintiffs' preliminary injunction motion challenges the Asset Purchase Agreement pursuant to which Minicorp, Inc. sold its Green Thumb seed division to Megacorp, Inc. for $231 in cash and Megacorp's stockholdings in Minicorp. The agreement was signed on June 9, 1990, and the transaction was consummated on June 22.

Through this motion, plaintiffs hope to unravel a completed transaction despite having chosen not to try to enjoin the transaction from going forward before its consummation. Plaintiffs filed their complaint on May 3, 1990, obtained an order for expedited discovery the next day, and initially asked that a motion for a preliminary injunction be heard in late May—well before the Asset Purchase Agreement was to be signed. However, plaintiffs did not file their motion for a preliminary injunction until June 16, a week after the agreement had been signed. They then asked this Court for a hearing on July 2, knowing that the transaction was to be consummated in the interim. It was in fact completed on June 22.

Plaintiffs' motion relies on two assertions, both contradicted by the facts.

First, it claims an inflated value for Green Thumb by relying on preliminary and hypothetical valuations that neither side took to represent the company's true value. [INSERT A SENTENCE STATING DEFENDANTS' AFFIRMATIVE POSITION: THE SALE PRICE REFLECTED THE TRUE VALUE.]

Second, in a tactic often employed by plaintiffs in this type of suit, the complaint tries to portray Minicorp's outside directors as passive and uninformed, despite facts demonstrating that the directors independently conducted a valuation and independently concluded Green Thumb should be sold. [INSERT A SENTENCE ELABORATING ON THE STEPS TAKEN BY THE OUTSIDE DIRECTORS.]

EXAMPLE NO. 25

Motion to dismiss

The draft introduction to a memorandum in support of a motion to dismiss makes a couple of common tactical mistakes:

- It fails to start with a clear, strong theme—a snapshot of why the client should win.
- It becomes too quickly entangled in the other side's arguments, counter punching rather than landing a decisive blow.
- It does not give the argument a structure. In fact, there are at least a couple of distinct reasons why the complaint should be dismissed, and there are three separate counts that have to be addressed.

The revision is by no means perfect (the case settled before the Memorandum was filed), but it sets out to address these problems.

Before:

PRELIMINARY STATEMENT

Defendants Super Communications, Inc., . . . (collectively "Super") submit this memorandum in support of their motion to dismiss plaintiff's Class Action Complaint (the "Complaint") in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

Super Communications, Inc. is and has been an immensely successful manufacturer and distributor of local area networks ("LANs") since the early 1980s. Although not noted in the complaint, since its inception in 1985, Super has posted profits on average of ____ per annum for _____ straight years. Earnings per share rose steadily from $.15 in the third quarter of 1989 to $.46 in the first quarter of 1991. The second quarter of 1991, while still profitable, yielded slightly lower earnings of $.41 per share. Notwithstanding this spectacular performance and solid rate of return, Super's stock price fluctuated from a high of $50 to $26.75 between [dates] after Super's announcement of its second quarter earnings on July 18, 1991.

Plaintiff Henry Jones purports to bring this class action on behalf of himself and a class of investors who purchased stock between October 18, 1990 and July 18, 1991 (the "Class Period"). Mr. Jones, as the puppet of the plaintiff's securities bar, alleges in boilerplate fashion that Super disseminated false and misleading statements and omitted to state certain information to the financial community thereby artificially inflating the market price of Super stock and causing the plaintiff an unspecified amount of harm. Plaintiff further alleges that Super officers who sold some of their stock prior to the drop in price failed to disclose material adverse facts known to them and had positions of control and authority as officers and/or directors of Super.

In his recitation of supposed wrongs committed by the defendants, plaintiff ignores the fact that Super made no untrue statements or otherwise participated in the dissemination of false information. Instead, the Complaint assumes—and asks the Court to assume—that because Super reported decreased earnings in one of six quarters, defendants knew about the decline in earnings for the second quarter 1991, disclosed negative information in a non-significant manner, continued to make optimistic predictions about the future while knowing these to be false, and otherwise conspired to keep all of this hidden. Plaintiff s assumption is just that—an assumption. No facts are alleged in support of plaintiff s theory that the price of Super stock declined because of defendants' statements or omissions; plaintiff is simply attempting to extort a large settlement from a successful company. This case exemplifies the kind of abusive litigation to which corporations and their officers are increasingly subjected any time the price of their stock suddenly declines.

STATEMENT OF FACTS

Super, incorporated in 1985, is the leading . . . .

After:

Defendants Super Communications, Inc., . . . (collectively, "Super") submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(1) and 9(b), to dismiss the Complaint in its entirety.

PRELIMINARY STATEMENT

Plaintiff is represented by experienced counsel in among the best-known firms of the plaintiff securities bar. Yet, with the assistance of that counsel, plaintiff has filed a Complaint that is devoid of the factual allegations necessary to plead, let alone allow him to pursue at considerable expense to Super, a claim for securities fraud. Indeed, unless the securities laws are expanded to provide redress every time a successful company announces quarterly earnings that, while positive, fall slightly short of analyst expectations (which Super has never adopted or endorsed), there are no facts—pleaded or unpleaded—that could support this Complaint. As Justice White has noted, the securities laws are not "a scheme of investor's insurance." Basic. Inc. v. Levinson, 485 U.S. 224, 252 (1988) (White, J., concurring in part, dissenting in part). If this Complaint is sustained, that is exactly what the securities laws will become.

Super is and has been an immensely successful manufacturer of local area computer networks. Since its inception as a public company in 1986, Super's revenues have grown at an average annual rate of 253%. In each of those years, Super's yearly earnings per share have also grown at an impressive rate, with the average annual increase equaling 468%. During the putative class period of October 18, 1990 (the date on which Super announced its results for the third quarter of 1990) to July 18, 1991 (the date on which it announced results for the second quarter of 1991), this impressive pattern was equally present.

In the third quarter of 1990, revenues were $48,355,000 and earnings per share were $.41 (compared to $20,912,000 and $.15 for the prior year's comparable quarter). In the fourth quarter of 1990, revenues were $56,256,000 and earnings per share were $.45 (compared to $25,546,000 and $.19 for the comparable quarter). For fiscal 1990, overall revenues were

$175,957,000 and earnings per share were $1.42 (compared to 1989 levels of $77,289,000 and $.61). In the first quarter of 1991, revenues were $61,1 1 1,000 and earnings per share were $.46 (compared to $30,092,000 and $.22 for the comparable quarter). In the second quarter of 1991, revenues were $64,067,000 and earnings per share were $.41 (compared to $41,254,000 and $.34 for the comparable quarter). Although this pattern is undeniably impressive, it was the 11% decrease in earnings per share from .$0.46 in the first quarter of 1991 to .$.41 per share in the second quarter—and nothing more—that drew this lawsuit.

As impressive as Super's business has been, its public disclosures are even more impressive. Although plaintiff quotes passages from Super Form 10-Qs, Form 10-K and Annual Report, plaintiff does not allege that these documents contain a single misrepresentation of fact. Nor could he. These documents set forth concededly truthful historical facts, and make no predictions—let alone promises—of future performance. To the contrary, Super's public filings expressly caution that its past results, including the results for any particular quarter or year, may not be indicative of future results.

Super's carefully prepared cautionary disclosures are disregarded by plaintiff's Complaint, which instead seeks to criticize Super's public statements because purported "material facts" referred to in paragraphs 54(a)-(g) of the Complaint were allegedly "omitted." As we show below, however, many of these "omitted" facts are expressly disclosed in Super's public filings. The remaining "omissions" are either insufficient as a matter of law, or naked conclusions unsupported by a single alleged fact, or both. Even ignoring these fundamental defects, the Complaint is devoid of allegations that could legally support an inference of scienter on the part of defendants, who are also improperly referred to as an undifferentiated mass. Accordingly, Count I of the Complaint, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), and Rule l0b-5 promulgated thereunder, should be dismissed pursuant to Rule 12(b)(6) and, as to the conclusory allegations, Rule 9(b).

Similarly, the state law claims for common law fraud (Count II) and negligent misrepresentation (Count III) should be dismissed. In addition to the foregoing defects, plaintiff has failed to plead individual reliance necessary to state a claim for fraud and negligent misrepresentation. Plaintiffs negligent misrepresentation claim further fails because it is based on after market statements. Courts in this district have refused to recognize such claims.

Facts

A. The Company

* * *

EXAMPLE NO. 26

This introduction has several virtues:

1. Because this is a responding brief, it does not set out to explain the case—but it does tactfully remind the reader of some basic facts that are crucial to its argument.

2. It gives the reader several interwoven reasons to support its position:

   - It would be unfair to give the appellant what it wants.
   - The appellant cannot meet the legal test applied by the court below.
   - The appellant is trying to move the boundaries of the playing field, by asking for substantive consolidation in circumstances in which it has never before been granted.

   These themes are all variations on the same basic argument—but they make the argument more persuasive by suggesting more motives for supporting it.

3. Though only a paragraph long, the introduction provides some detail: the amount owed to the secured creditors (to show how much they stand to lose) and the previous treatment of intercompany debt (to show how outrageous it would be to impose substantive consolidation).

Introduction

Ames and the Unsecured Creditors Committee asked the Bankruptcy Court to adopt an extraordinary measure—substantive consolidation—that would, in effect, have deprived the secured creditors of all or part of the security that they bargained for when they lent Ames $900 million. Accordingly, since a bankruptcy court is fundamentally a court of equity, Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934), the movants needed to establish that there were sufficient equitable considerations to override the creditors' legitimate and substantial interest in protecting their security. The movants failed to make such a showing. Indeed, to our knowledge, no court has ever ordered substantive consolidation in a case such as this, where repeated representations were made as to the separate existence of the various debtors, and where the intercompany debt, which would be wiped out by the substantive consolidation, is itself an integral component of the security agreement between the parties.

EXAMPLE NO. 27

This introduction has several virtues:

- In the Preliminary Statement's first paragraph, it provides a lucid, brief "big-picture" summary of the case's background. This summary isn't neutral, of course: without being argumentative, it creates a context that favors the client's position.

- It states a simple theme—"This case is an attempt to turn the bond market collapse into a litigation windfall."—but also provides enough supporting detail to make its argument factual and specific.

- It avoids becoming embroiled in the details of the other side's argument. Instead, in the Preliminary Statement's second paragraph, it adopts a much more effective technique: it re-defines the essence of the opponent's allegations. In effect, it takes control of the opponent's own terrain.

- It creates a clear structure, with separate paragraphs (the fourth and the fifth) devoted to separate, clearly defined arguments.

For the sake of contrast, look at the first paragraph of the Introduction to the Opposing Memorandum appearing next. It's largely boilerplate. As a result, it's irritating to read, and it misses an opportunity to persuade.

Defendants submit this memorandum of law in support of their motion to dismiss the consolidated class action complaints of _____ and _____ (attached as Exhibits 1 and 2, respectively; collectively, the "Complaint") pursuant to Fed. R. Civ. P. 12 (b) (6).

PRELIMINARY STATEMENT

This case attempts to turn the bond market collapse of 1994 into a litigation windfall. In 1993, plaintiff _____ bought shares of defendant _____ Term Trust 2003 ("Trust 2003"), and plaintiff _____ bought shares of defendant _____ Term Trust 2000 ("Trust 2000", and, collectively with Trust 2003, the "Term Trusts"). In 1994, shares of both Term Trusts declined as the Federal Reserve Board took the unprecedented action of raising interest rates six times in a single year. These serial interest rate hikes triggered the bond market's most precipitous drop in decades. Particularly hard hit was the market for mortgage-backed securities (including so-called "inverse floaters"), in which the Term Trusts had heavily invested.

Plaintiffs assert that the prospectuses for the Term Trusts failed to disclose their concentration in mortgage-backed securities, the risk of decline in the event of interest rate rises and the potential volatility of inverse floaters. But plaintiffs' allegations really boil down to a claim that defendants did not describe graphically enough the "magnitude of the interest rate risk" to the Term Trusts' portfolios—as plaintiffs now perceive that risk with the benefit of hindsight.

In fact, the prospectuses (i) disclosed that the Term Trusts planned to invest as much as 85% of their assets in mortgage-backed securities, (ii) discussed in detail the volatility and other risks of investing in such securities, (iii) explained that 25-30% of Trust 2003's assets and 25-40% of Trust 2000's would be invested in "inverse floaters," and (iv) described at length the characteristics of inverse floaters and their potential volatility in the face of interest rate shifts. The prospectuses also specifically drew attention to the risk of a decline in the Term Trusts' net asset value because of interest rate moves and other market forces. Read as a whole, and not in the selective and misleading fashion quoted by plaintiffs in the Complaint, the prospectuses "bespoke caution" about the specific risks plaintiffs say have now caused their shares to decline in value. Because nothing material was either misstated or omitted, the complaint must be dismissed. See pp. 9-22, infra.

The Complaint is also deficient because it does not set forth facts from which it could be inferred that, at the time the prospectuses were issued in 1993 (and, thus, before the 1994 bond market collapse), any defendant knew, or had any basis to believe, that the risks and characteristics of the securities in the Term Trusts' portfolios were different from what the prospectuses disclosed. Plaintiffs thus violate Fed. R. Civ. P. 9(b) and the general rule that they may not plead "fraud by hindsight." The prospectuses did not purport to predict future market conditions, and defendants' supposed failure to foresee a market crash does not violate the securities laws. See pp. 22-23, infra.

Plaintiffs further allege that the Term Trusts deviated from their stated fundamental policies with respect to investment objectives. The Term Trusts had two, and only two, fundamental policies relating to investment objectives: (i) to provide a high level of current income, and (ii) to seek to return $10 a share (the initial offering price) at the expiration of each Term Trust. Plaintiffs do not and cannot allege that either Term Trust has departed from these fundamental policies, nor do they dispute that the prospectus repeatedly explained that they were not assured that their investment objectives would be achieved. Instead, they attempt to manufacture an additional "fundamental policy" that is not identified in the prospectus and then claim it was not followed. Such an attempt simply fails to state a claim. See pp. 23-25, infra.

BACKGROUND

The Term Trusts

The Term Trusts are "closed-end" investment companies registered pursuant to the Investment Company Act of 1940. Unlike . . . .

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs submit this memorandum in opposition to defendants' motion to dismiss the consolidated class action complaints.

INTRODUCTION

This is a class action brought by plaintiffs on behalf of all persons (the "Class") as described below, other than defendants and related parties, who purchased shares in Term Trust 2003 ("Trust 2003") during the period from its inception on or about April 22, 1993 to July 19, 1994 and/or shares in Term Trust 2000 ("Trust 2000") during the period from its inception on or about December 22, 1993 to July 19, 1994, inclusive (the "Class Period"), for violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "1933 Act") and Section 13 of the Investment Company Act of 1940 (the "1940 Act"). The gravamen of the federal securities claims is that defendants made false and misleading misrepresentations and omissions concerning the Trusts in violation of the federal securities laws in prospectuses issued on the offering of the Trusts (the "Offering Materials") and in the marketing of the Trusts.

Plaintiffs have also asserted 1940 Act claims that allege that defendants' deviations from "fundamental policies" of the Trusts, without the shareholder approval required by the 1940 Act and the Trusts' own stated procedures, injured the Trusts' purchasers who, accordingly, have a private right of action under the 1940 Act. The non-disclosures and misrepresentations in the Prospectuses centered on the following areas:

1) Misrepresentation of the maturities of the portfolio;

2) Misrepresentations concerning the amount of borrowing by the Trusts;

3) Failure to disclose the Trusts' interest rate risk;

4) Failure to disclose the Trusts' vulnerability to rising interest rates;

5) Failure to disclose the risk of the lack of liquidity of the Trusts' investments;

6) Failure to disclose that the initial structures of the Trusts' portfolio were biased towards a declining interest rate scenario and that such bias ensured that the Trusts would suffer severe losses when interest rates rose;

7) Failure to disclose the risk that due to the lack of liquidity of the Trusts' investments and the bias of the portfolios' structure towards a declining interest scenario, a rapid rise in interest rates would trap the Trusts in investments which would suffer massive losses when interest rates rose; and

8) Failure to disclose that the price volatility of inverse floaters rises at an accelerating pace as interest rates rise.

Recently discovered admissions by a managing director of defendant Funds Management Inc., Jarvis Pendgergast, demonstrate the misleading nature of the Trusts' Offering Materials. In describing the risks of inverse floaters, a material component of each of the Trusts' portfolios, Pendergast made the following admission:

> A couple of years ago, inverse floaters were among the cheapest thing in the history of American financial markets.
> ….
>
> Now, they're probably one of the best sales in history. The best case is that you get 12% or 13%. But they can only go down." [Emphasis supplied.] See, Exhibit l, Affidavit of Lee Squitieri dated March 8, 1995 (the "Squitieri Affidavit"). Barrons, November 29, 1993, "Inverse Floaters."

FACTUAL BASIS OF PLAINTIFFS' CLAIMS

The basic investment proposition marketed to investors in Trust 2000 and Trust 2003, through false and misleading prospectuses and sales brochures, was that the Trusts were . . .

CRAFTING AN INTRODUCTION: EXAMPLE NOS. 28-30

The next three introductions—from the parties' briefs to the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, do an expert job of controlling situations that, in less skillful hands, could have produced chaos—either because they involve many facts and issues or because the issues lead quickly and inevitably into dense thickets of detail. These examples demonstrate the importance of stepping far enough back from the details to provide a bird's-eye view of the terrain.

EXAMPLE NO. 28
(Petitioner)

INTRODUCTION

Jack Phillips's love for art and design began at an early age. Discovering that he could blend his skills as a pastry chef, sculptor, and painter, he spent nearly two decades in bakeries owned by others before opening Masterpiece Cakeshop twenty-four years ago. Long before television shows like *Cake Boss* and *Ace of Cakes,* Phillips carefully chose Masterpiece's name: it would not be just a bakery, but an art gallery of cakes. With this in mind, Phillips created a Masterpiece logo depicting an artist's paint palate with a paintbrush and whisk. And for over a decade, a large picture has hung in the shop depicting Phillips painting at an easel. Since long before this case arose, Phillips has been an artist using cake as his canvas with Masterpiece as his studio.

Phillips is also a man of deep religious faith whose beliefs guide his work. Those beliefs inspire him to love and serve people from all walks of life, but he can only create cakes that are consistent with the tenets of his faith. His decisions on whether to design a specific custom cake have never focused on *who* the customer is, but on *what* the custom cake will express or celebrate.

At issue here is whether Phillips may decline requests for wedding cakes that celebrate marriages in conflict with his religious beliefs. The First Amendment guarantees him that freedom because his wedding cakes, each one custom-made, are his artistic expression. Much like an artist sketching on canvas or a sculptor using clay, Phillips meticulously crafts each wedding cake through hours of sketching, sculpting, and hand-painting. The cake, which serves as the iconic centerpiece of the marriage celebration, announces through Phillips's voice that a marriage has occurred and should be celebrated. The government can no more force Phillips to speak those messages with his lips than to express them through his art.

The Colorado Court of Appeals and the Commission have conceded that some cakes are artistic expression protected under the First Amendment. Pet.App.34a-35a; Colo. Opp. Br. at 15. But Phillips's custom wedding cakes, they have told us, are not among them. Thus, the Commission ordered him either to create custom cakes that celebrate same-sex marriages or to stop designing wedding cakes altogether. But just as the Commission cannot compel Phillips's art, neither may the government suppress it. The Commission's order violates First Amendment freedoms at every turn.

The Commission's actions have also devastated Phillips and his family. By effectively forcing him to stop designing wedding cakes, the Commission stripped Phillips of roughly 40% of his family income, which caused him to lose most of his employees. As if this were not bad enough, the Commission also ordered Phillips to reeducate his remaining staff, nearly all of whom are his family members, by essentially teaching them that he was wrong to operate his business according to his faith. Moreover, the Commission imposed intrusive reporting requirements that force Phillips to give a running tally to the government detailing how he exercises his artistic discretion.

The Commission dismisses the First Amendment when it is most needed - to help people in a pluralistic society navigate through sincere differences on matters "that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Marriage does just that, functioning as a "keystone of our social order" and holding a "sacred" place in the lives of many. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2601 (2015). The Commission must respect Phillips's freedom to part ways with the current majority view on marriage and to create his wedding cakes consistently with his "decent and honorable" religious beliefs. *Id.* at 2602. Instead, the Commission punished him, demeaned his beliefs, and marginalized his place in the community.

Equally important, a ruling against Phillips threatens the expressive freedom of all who create art or other speech for a living. Respondents Charlie Craig and David Mullins argued below that the Commission can force fine-art painters to create paintings celebrating ideas that they deem objectionable. Pet.App.332a-33a. It is difficult to imagine a view more at odds with the First Amendment and our nation's pluralistic values.

There is a better way - one that allows the Commission to ensure that businesses do not refuse to serve people simply because of who they are, but protects individuals like Phillips from being forced to create expression about marriage that violates their core convictions. The path to civility, progress, and freedom does not crush those who hold unpopular views, pushing them from the public square. It allows free citizens to determine for themselves "the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (plurality opinion)). That is the path this Court should take; it is the only one consistent with the First Amendment.

EXAMPLE NO. 29
(Individual Respondents)

Five years ago, David Mullins and Charlie Craig were planning their wedding. When they visited Masterpiece Cakeshop (the "Bakery") to inquire about a cake for their reception, what should have been a happy occasion became a humiliating one. Before Mr. Mullins and Mr. Craig could even begin to discuss what kind of cake they would like, the Bakery's owner made clear that he would bake no cake for their wedding reception because he objects to same-sex unions. The Bakery has repeatedly refused to provide any baked goods - even cupcakes - for wedding receptions or commitment ceremonies of same-sex couples.

The Bakery's actions violated Colorado's Anti-Discrimination Act, a civil rights statute whose origins date to 1885. Like the public accommodation laws of nearly every state in the Union, the Anti-Discrimination Act bars businesses that are open to the public from refusing service based on certain aspects of a person's identity - including, in Colorado, their sexual orientation. While many citizens take for granted equal access to goods and services in the commercial marketplace, members of minority groups often cannot. For those who are lesbian, gay, bisexual, or transgender ("LGBT"), these laws ensure equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). This Court has recognized our country's long and painful history of discrimination against LGBT people. Well into the twentieth century, "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

There is no question that Colorado has the authority to prohibit discrimination in sales by businesses that choose to operate in the State. The Bakery argues, however, that because its cakes are "expressive," and because its owner objects to marriage for same-sex couples on religious grounds, the First Amendment exempts it from Colorado's requirement that all businesses treat heterosexual and LGBT customers equally. In essence, the Bakery seeks a constitutional right to hang a sign in its shop window proclaiming "Wedding Cakes for Heterosexuals Only."

This is not the first time a business open to the public has sought to avoid an anti-discrimination law by invoking the First Amendment. In every prior case, this Court has rejected such claims, whether framed as involving the freedom of expression, association, or religion. Discriminatory conduct by business entities " 'has never been accorded affirmative constitutional protections.' " *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. United States*,379 U.S. 241, 258-60 (1964).

While the particular facts of this case involve a bakery refusing to sell a cake for the wedding reception of a same-sex couple, the implications of the Bakery's (and the United States') arguments are not limited to sexual orientation discrimination or weddings. If the First Amendment bars a state from applying an anti-discrimination law to the sale of wedding cakes because they involve artistry, then bakeries could refuse to provide cakes for an interracial or interfaith couple's wedding, a Jewish boy's bar mitzvah, an African-American child's birthday, or a woman's business school graduation party. And, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. The Bakery's free exercise claim presents the same problem. There is no doubt that the Bakery owner's religious objections are sincere, but granting such a religious-based exemption would allow every business owner "to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions:

> A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889). To recognize either of the Bakery's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people, regardless of status, should be able to receive equal service in American commercial life.

EXAMPLE 30
(Respondent Colorado Civil Rights Commission)

When members of the public walk into retail stores in Colorado, they bring with them a basic expectation: they will not be turned away because of their protected characteristics - including race, sex, religion, or sexual orientation.

This case arose because a gay couple was referred to a retail bakery, where the couple hoped to buy a wedding cake. Within moments, however, the couple was denied service. The bakery would sell them neither a custom-designed cake nor a cake identical to one the bakery had sold to its other customers. In the past, the bakery had even refused to sell cupcakes to a lesbian couple for a family commitment ceremony. These denials of service are based on the claim that the bakery's wedding cakes are "speech," and selling them to gay couples would infringe the First Amendment rights of the bakery's owner, who objects to the marriages of same-sex couples on religious grounds.

Everyone agrees that the government cannot force people or entities to "speak." School children cannot be punished for refusing to say the pledge of allegiance. A newspaper cannot be compelled to print a politician's editorial. But those scenarios are nothing like the circumstances here, in which a state law has merely prohibited discriminatory denials of service by businesses open to the public. If a retail bakery will offer a white, three-tiered cake to one customer, it has no constitutional right to refuse to sell the same cake to the next customer because he happens to be African-American, Jewish, or gay.

Creating an exemption from this basic principle for "expressive" businesses would dramatically weaken anti-discrimination laws. If forbidding discrimination by these businesses is constitutionally equivalent to the forced transmission of a government-favored message, a wide range of commercial entities would have a license to discriminate, whether motivated by religious belief or raw animosity. Under this unprecedented interpretation of the First Amendment, a racist baker could refuse to sell "Happy Birthday" cakes to African-American customers, a screen printer could refuse to sell a banner announcing a Muslim family's reunion, and a tailor could refuse to sell a gay man a custom suit for a charity gala.

This case has nothing to do with the artistic merits of wedding cakes. It is instead about the integrity of a 150-year-old principle: when a business opens its doors to the general public, it may not reject customers because of who they are.

c. Macro-Editing Exercise: The Argument

EXAMPLE NO. 31

MEMORANDUM OF LAW IN SUPPORT OF

MOTION TO DISMISS WITH PREJUDICE

MAY IT PLEASE THE COURT:

Defendant Mario Bauza respectfully submits that, under the provisions of the Speedy Trial Act, the information against him should be dismissed with prejudice.

I

The Speedy Trial Act provides, in pertinent part, that

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161 (b) (emphasis added). If this time limit not be met, the mandatory sanction is clear:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3162(a)(1). Where the thirty-day filing provision is violated, dismissal is mandatory, and the only determination to be made is whether the dismissal must be with prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

II

The factors in § 3162 as they apply here are as follows:

1. Seriousness of the offense. Mr. Bauza is charged with theft of $26 worth of merchandise from the Base Exchange at Brooks Air Force Base. The offense is a misdemeanor. It is not a serious offense. Defendant does not claim he should not be prosecuted, but merely that he should have been prosecuted in a timely fashion and the government should not be allowed a cavalier disregard of the clear requirements of the statute.

2. The facts and circumstances surrounding the delay. There is no explanation given for the delay in the filing of this case. Defendant appeared before the Magistrate on the complaint on December 27, 1988. Counsel was appointed and the undersigned first met Mr. Bauza in the Public Defender Office on January 6, 1989. On January 9, 1989, the date scheduled for the preliminary examination, the undersigned contacted the Special Assistant U.S. Attorney at Brooks Air Force Base, advised that the preliminary examination had been waived, and suggested that the case be resolved by Pretrial Diversion. Two days later, the undersigned was informed that the case would not be recommended for Pretrial Diversion. Nothing more was heard from the government until the motion to dismiss count one of the complaint. In that motion, the government conceded that more than thirty days had elapsed since the summons was served and implied that the date of the initial appearance was somehow relevant to the determination of the motion. Even so, the dismissal was not entered until more than thirty days had elapsed following the initial appearance. The only reference in the Speedy Trial Act to an appearance by a defendant before a judicial officer's being a factor in calculating time, is in calculating the time for trial to begin after an indictment or information has been filed. 18 U.S.C. § 3161(c)(1). The government supported its plea for a dismissal without prejudice by stating a need for "effective plea negotiations" to continue. However, the undersigned had informed the government that there would not be a plea of guilty on January 11, 1989, when the Special Assistant U.S. Attorney advised that there would not be a Pretrial Diversion recommendation. There was no further contact from the government until March 3, 1989, when, again, the Special Assistant U.S. Attorney asked if a plea agreement could be reached and was informed that one could not. Even so, it was one month later that the government got around to filing the Information. Any failure to comply with the Speedy Trial Act is due entirely to the failure of the government to act. Where it is the government that has failed to accord the defendant his rights under the Speedy Trial Act, that fact should weigh against the government and in favor of the defendant, requiring that the dismissal should be with prejudice.

3. Impact of reprosecution on the administration of the Act and the administration of justice. In determining whether a dismissal for violation of the Speedy Trial Act should be with or without prejudice, the legislative history is instructive. In the legislative process, there was much concern over possible abuse in the dismissal-without-prejudice option:

> The Committee believes that permitting the reprosecution of a defendant whose case has been dismissed for failing to meet the speedy trial limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:
>
> > Another area of doubt is that engendered by a consideration of the technique of the bill's (S. 754) dismissal "without

> prejudice." I would think if I were you, of the impact on the grand jury systems of re-indictments and the time requirements of re-indictment.
>
> Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists.
>
> * * *
>
> With respect to the propriety of requiring a permanent bar to future prosecutions, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee in their Commentary on Standards Relating to Speedy Trial.
>
> The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.
>
> Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli, endorsed the ABA position . . . .

1974 U.S. Code Cong. & Admin. News 7401, 7430. While it can no longer be argued that the "with prejudice" dismissal is presumptively favored, United States v. Taylor, 108 S. Ct. 2413, 2418 (1988), where the avowed purpose of the dismissal without prejudice is to coerce a plea by threat of reprosecution, dismissal without prejudice will simply send a message that the courts are determined to ignore the "with prejudice" sanction. That message can only lower the public's esteem for a judicial system by reinforcing the current perception that the system is "rigged."

III

In United States v. Angelini, 553 F. Supp. 367 (D. Mass. 1982), a prosecution was not brought to trial within the seventy-day limit of § 3161 (c)(1), plus exclusions. The defendant's motion to dismiss was granted 25 days after the expiration of the time for trial.

Although Angelini's holding that dismissal is presumptively with prejudice, has been rejected in United States v. Taylor, supra; see also United States v. Caparella, 716 F.2d 976 (2d Cir. 1983); United States v. Russo, 741 F.2d 1264 (11th Cir. 1984), some courts have nonetheless implied a certain preference for such dismissal, even where the offense is a serious one, where the government failed to act through negligence.

> . . . unlike the speedy trial rights of an accused under the Sixth Amendment, see Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2191, 3 L.Ed.2d 101 (1972), the Act's purpose was to fix specific and arbitrary time limits within which the various stages of a criminal prosecution must occur.

United States v. Caparella, 717 F.2d at 981 (emphasis added), citing United States v. Iaquinta, 674 F.2d 260, 264 (4th Cir. 1982).

In United States v. Caparella, supra, cited approvingly in Taylor, 108 S. Ct. at 2418, the Second Circuit discussed the policy implications inherent in the Speedy Trial Act in order to determine whether a criminal complaint, charging the defendant with the misdemeanor offense of opening mail without authority, should have been dismissed with or without prejudice. After a lengthy discussion of the legislative history of the Act, the Court balanced the § 3162 factors and determined that the dismissal should have been with prejudice. The Court found first that the misdemeanor offense was not a serious one and, second, that the prosecutor's negligence was the sole cause of the delay. Focusing primarily in this case on the impact on the administration of the Speedy Trial Act, and on the administration of justice, the Court took the view that a violation of any of the Act's time limitations negatively impacted on the administration of the Act. Id. at 981. As to the effect of dismissal of a prosecution on the administration of justice, the Court found it greatly significant to reaffirm Congress's basic purpose in enacting the Speedy Trial Act. Quoting then Assistant Attorney General William Rehnquist, the Second Circuit stated as follows:

> . . . it may well be Mr. Chairman, that the whole system of federal criminal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Id. This case closely parallels the Caparella case in that it involves a non-serious misdemeanor and the cause of the violation is solely negligence on the part of the government. The result should be the same.

In United States v. Russo, supra, the Eleventh Circuit in a serious drug case dismissed with prejudice for violation of the Speedy Trial Act's time-to-trial provision, citing the reasoning the rationale of Caparella as authority. Finding that delay in the case was the result of the simple negligence of the prosecution, the Eleventh Circuit held that the case should have been dismissed with prejudice although the underlying offenses were of a very serious nature.

The Fifth Circuit considered the with-or-without prejudice issue in United States v. Salgado-Hernandez, 790 F.2d 1265 (5th Cir) cert. denied, 107 S. Ct. 463 (1986), and United States v. Melquizo, 824 F.2d 320 (5th Cir. 1987). A dismissal without prejudice was upheld in both cases. However, mentioned in both Melquizo and Salgado-Hernandez, is the factor of whether the government "regularly or frequently fails to meet the time limits." Melquizo, 824 F.2d at 372.

The record in this district is replete with such failures, starting with the Salgado-Hernandez case. A cursory examination of cases in the office of the Federal Public Defender reveals the following: Most recently this court dismissed without prejudice United States v. Small, SA-89-CR-16 (driving while intoxicated). Cases filed by complaint and still pending, with no information or indictment filed by the government, include United States v. Cano, SA-88-421M-1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Rodriguez, SA-87-605M-1 (driving while intoxicated, complaint filed December 17, 1987); United States v. Hernandez, SA-88-337M-1 (driving while intoxicated, complaint filed August 18, 1988); United States v. Buchanan, SA-88-515M-1 (driving while intoxicated, complaint filed December 23, 1988); United States v. Ayala, SA-88-109M-1 (driving while intoxicated, complaint filed March 18, 1988); United States v. Austin, SA-88-34M-1 (misdemeanor theft, complaint filed February 4, 1988); United States v. Ritter, SA-88-500M-1 (driving while intoxicated, complaint filed December 7, 1988); United States v. Salas, SA-89-2M-1 (felony theft, complaint filed January 5, 1989); United States v. Runkle, SA-88-222M-1 (driving while intoxicated, complained filed June 7, 1988); United States v. Barreda, SA-88-340M-1 (driving while intoxicated and felony destruction of government property, complaint filed August 18, 1988); United States v. Tucker, (driving while intoxicated, complaint filed October 25, 1988); United States v. Ramirez, SA-88-230M-1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Martinez, SA-88-438M-1 (driving while intoxicated, complaint filed October 25, 1988); United States v. Knight, SA-88-482M-1 (driving while intoxicated, complaint filed December 1, 1988); United States v. Asebedo, SA-88-422M-1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Acuna, SA-88-436M-1 (driving while intoxicated, complaint filed October 25, 1988); United States v. Delgado, SA-88-385M-1 (driving while intoxicated, complaint filed September 29, 1988); United States v. Esparza, SA-88-315M-1 (driving while intoxicated, complaint filed August 1, 1988); United States v. Esquivel, SA-88-221M-1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Flores, SA-87-398M-1 (driving while intoxicated, complaint filed August 18, 1987); United States v. Heinrich, SA-88-65M-1 (passing insufficient check, complaint filed March 3, 1988); United States v. Rodriguez, SA-87-268M-1 (driving while intoxicated, complaint filed June 8, 1987); United States v. Moore, SA-87-400M-1 (driving while intoxicated, complaint filed August 20, 1987); United States v. Martinez, SA-87-439M-1 (case dismissed a year after filing when defendant made restitution); United States v. Meye, SA-87-552M-1 (driving while intoxicated, complaint filed November 10, 1987); United States v. Maldonado, SA-88-130M-1 (misdemeanor theft, complaint filed April 5, 1988); United States v. Perry, SA-88-220M-1 (uttering worthless checks, complaint filed June 7, 1988); United States v. Lacy, SA-88-220M-1 (driving while intoxicated, complaint filed June 7, 1988). A more thorough search of the files in the Public Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many, many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement, revealing a continuing pattern of failure to bring formal charges within the time permitted by the Act. The government in this district does indeed "frequently fail to meet the time limits." . . .

B. Implementing Principle 2(a): Avoiding Default Organizations

Our minds are stocked with ready-made organizing patterns that we use more often than we should, especially when we're tired, bored or in a hurry. For example, when we write about facts we turn instinctively to chronology. When we respond to someone else's argument, we're tempted to adopt its structure as our own. When we write about a complicated analysis, it's easiest just to retrace the path we took in thinking through the issue. None of these organizing patterns is necessarily inadequate. But they are overused, and a good writer learns to regard them with suspicion.

1. Organizing A Discussion Of The Law: The Problem Of "Default" (Or "Ready-Made") Organizations

The most common traps:

- Chronology (Example No. 32)
- History of your research or thinking (Example No. 33)
- Someone else's analysis (Example Nos. 34-35)

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

Impose an organization that matches the logic of your analysis, as you look backwards from your conclusion:

- Write a good introduction before each section of the analysis.
- If necessary, reorganize the sequence of topics or authorities.

EXAMPLE NO. 32

Before:

Several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements. None deals with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? But these decisions provide useful guidance.

In the first of these decisions, John Smith v. Jones, the Supreme Court held . . . .

In NLRB v. Acme Manufacturing, Acme had succeeded Superior . . . .

Acme was followed by Clover Valley Packaging Co. v. NLRB, holding . . . .

Finally, in Comfort Hotels v. Hotel Employees, the Court . . . .

In concluding that under the circumstances of the case, the successor employer had no duty to arbitrate, the Court in a footnote made the following illuminating statement: . . . .

After:

Although several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements, none has dealt with our specific question: under what circumstances is an employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? In the absence of direct authority, we must draw guidance from decisions dealing with collective bargaining agreements in general.

As these cases show, the question cannot be answered by deciding whether the new employer satisfies a definition of "successor employer" that always entails the assumption of certain obligations. "There is, and can be, no single definition of 'successor' which is applicable in every legal context." [Citation.] A decision about which obligations a new employer has assumed must rest on the facts of each case.

In the first two decisions discussed below, the facts showed a substantial continuity of identity between the business enterprises of the predecessor and successor employers. As a result, the courts held that the new employers had to assume the obligations at issue. In the other two decisions, there was less continuity, and the courts reached the opposite result.

In NLRB v. Acme Manufacturing . . . .

In Comfort Hotels v. Hotel Employees . . . .

In John Smith v. Jones . . . .

In Clover Valley Packaging Co. v. NLRB . . . .

EXAMPLE NO. 33

Before:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his complaint primarily on Executive Jet Aviation, Inc. v. City of Cleveland. In that case, the plaintiff, whose jet aircraft sank in Lake Erie ....

Callahan suggests that Executive Jet requires a significant relationship to traditional maritime activity in all cases, not just those involving aircraft. Several Courts of Appeal have taken this view....

In Edynak v. Atlantic Shipping, Inc., however, the Third Circuit, assuming that Executive Jet could be read ....

Callahan argues that this discussion in Edynak signals an adoption by the Third Circuit of the "locality plus" test for admiralty jurisdiction ....

After:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his argument primarily on Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). In that case, the Supreme Court held that admiralty jurisdiction does not extend to claims arising from airplane accidents unless they bear "a significant relationship to traditional maritime activity." Callahan argues that this test must be applied to all accidents that would otherwise fall within admiralty jurisdiction, and that accidents involving pleasure craft fail to meet the test. We disagree. Executive Jet's "locality-plus" test applies only to aircraft accidents. Even if it were to apply more broadly, an accident involving pleasure craft meets the test.

In Executive Jet, the plaintiff, whose jet aircraft sank in Lake Erie ....

EXAMPLE NO. 34

Before:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion.

Appellant relies upon E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978). The court there reversed the trial court and relieved the defendant from paying costs where he was not found negligent and had not prolonged the trial. The court held that:

> C.C.P. Art. 1920 gives the court discretion to assess costs but limits this discretion. The general rule is that ....

After:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion. As the court's opinion demonstrates, however, the court correctly based its assessment on the principle that costs must be assessed on the basis of the results at trial.

This principle arises from LSA-C.C.P. Article 1920:

....

The principle is stated even more explicitly in Comment (b) to Article 1920:

....

Although Appellant rightly points to E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978) as an authoritative application of Article 1920, he ignores crucial differences between the facts of that case and of the present situation. ....

EXAMPLE NO. 35

B. The Purported Lease Restrictions Were Not Referred to in the Non-Disturbance Agreement, Nor Does the Amended Complaint Allege Facts Sufficient To Show That Defendants Had Actual Knowledge of These Restrictions

Before:

In an effort to rebut the absence of factual allegations showing actual knowledge, Mitsubishi argues that it "has clearly alleged that Capital Group knew of the Notes, the Mortgages and the Lease Assignments and/or of their material terms . . . ." Mitsubishi Mem., p. 55 (emphasis supplied). Mitsubishi reaches this conclusion by alleging that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage in favor of Mitsubishi covering the subject premises. As a result, the argument continues, Mitsubishi has pled facts sufficient to establish that Capital Group and one of its former officers, as well as an officer of First Boston, who was not even involved in the execution of that agreement, had "actual knowledge" of certain lease restrictions purportedly imposed upon Bailey Tarrytown.

Mitsubishi ignores, however, the fact that the Non-Disturbance-Disturbance Agreement does not refer to restrictions imposed upon Bailey Tarrytown's right to amend or terminate its lease with Capital Group or any other tenant of the Christiana Building. Nor does the Amended Complaint otherwise allege facts sufficient to establish that the defendants had actual knowledge of these restrictions. Mitsubishi has at best alleged facts as to which most commercial tenants have "knowledge". . . .

After:

As a prerequisite to a tortious interference claim, Mitsubishi must allege that defendants had actual knowledge of the lease restrictions at issue. Instead of alleging facts that would show actual knowledge, however, Mitsubishi adopts two tactics: (1) it attempts to establish such knowledge on the basis of inferences drawn illegitimately from the Non-Disturbance Agreement, which does not refer to the restrictions, and (2) it mischaracterizes the kind of knowledge required.

1. The Content of the Non-Disturbance Agreement

Mitsubishi alleges that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage….

2. Organizing Facts

The Basic Methods:

1. Chronology
2. Main actor or other character
3. Geography
4. Issues
5. Witnesses or other sources of information

The Danger:

Relying solely on a chronological organization when some of the facts don't fit into the chronology.

EXAMPLE NO. 36

By Chronology and Protagonist:	J. entered first grade …. In 1981, he was placed in …. Two years later, he was moved to ….
By Issue:	Starting in 1980, J. began to exhibit behavior that …. As a result of this behavior, by 1983 school authorities concluded that ….
By Witness:	On the question of whether his present non-residential program has resulted in significant educational progress, Dr. Jones stated that …. Mr. Smith, on the other hand, stated that ….

EXAMPLE NO. 37

Before:

On August 4, 1983, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of I-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of I-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25 so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

After:

[FIRST, THE CONTEXTUAL FACTS] Jessica Hall was severely injured when a pickup truck driven by her mother, Wendy Hall, collided with a tractor trailer driven by John Jones.

[NEXT, THE GEOGRAPHY] The accident occurred at the intersection of exit 9 from I-84 with routes 6 and 25. At this point, routes 6 and 25 merge into one road as they are joined by the exit spur. According to Wendy Hall's testimony, the view from the exit spur is obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on routes 6 and 25.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 and proceeded east on the exit spur to routes 6 and 25. When she approached the intersection, she attempted to turn left to go north. She testified that because she could not see traffic traveling south, she inched her way onto the highway to obtain a view. She did not see Jones's tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck Wendy Hall's truck.

EXAMPLE NO. 38

Appellant Hann was convicted of criminal trespass after taxiing his airplane from a hangar across part of an airport which the complaining witness, Hyde, leased and had posted with "no trespassing" signs. Appellant argues that two agreements signed as the airport changed ownership over the years constituted effective consent to his crossing of the property, or at least created reasonable doubt about his guilt.

Before:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on thirty-four acres of her land. She later bought more land northeast of the original tract and made additional improvements, including extensions to the runway and taxiways.

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion where the transient area is located. Part of the purchase price was carried by a note from Varner to Whyte and secured by a vendor's lien and deed of trust. In the deed to Varner, Whyte reserved certain easements and rights for access to the runway from her property located in the northeast corner of the airport. In 1982, Hyde-Way, Inc., owned by Hyde, acquired all of Varner's interest and assumed the note owed by Varner to Whyte.

Sometime prior to October 19, 1983, Hyde's corporation purchased 119 acres located west of the runway and referred to as the Northwest Development Addition. Misunderstandings and disputes arose between Whyte and Hyde concerning obligations, rights, and other matters pertaining to the airport. On October 19, 1983, a settlement agreement was entered into between Whyte and Hyde-Way, Inc. and Glen Hyde, individually, and by which Hyde agreed to convey to Whyte certain real property located on the Northwest Development Addition. This conveyance was apparently in payment of the balance owed to Whyte under the 1980 note from Varner. This conveyance also included ten hangars located on the land, one of which was being used by appellant as a tenant of Whyte at the time of his arrest. Whyte was then still the owner of the hangar and told the appellant that he had access to the runway across the transient area under the terms of the settlement agreement between Whyte and Hyde.

Under that agreement, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner:

> [E]xcept that Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport. Whyte agrees, however, that on the sale of any of the hangars granted to her in this agreement or purchased by her in the Northwest Development Addition she or her buyers will execute the Runway License Agreement now required by Hyde from purchasers in the Northwest Development Addition.

On February 5, 1987, Hyde sold whatever property he owned, including the transient area, to a Nevada mining corporation. At the time appellant was arrested for trespassing, on April 20, 1987, Hyde owned only a month-to-month tenancy under a verbal lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde over their airport transactions, and that they had been in civil litigation for over two years before appellant was convicted in this case. This litigation apparently did not involve the interpretation of the above quoted language from the settlement agreement insofar as it was determinative of appellant's right to cross the transient area on April 20, 1987. Appellant urges that as Whyte's tenant he had access across the transient area on that date by virtue of the easement rights which Whyte retained in her agreement with Varner and which she was authorized to convey under the settlement agreement with Hyde.

After:

[FIRST, THE CONTEXT] The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on her land. Over the years, parts of it changed hands several times. Throughout these changes, Whyte retained part of the property, some of which she leased to tenants such as Ham.

[NEXT, THE BACKGROUND NARRATIVE] In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion on which appellant allegedly trespassed. Part of the purchase price was carried by a note from Varner to Whyte.

In 1982, all of Varner's interest was acquired by Hyde-Way, Inc., owned by Hyde. Hyde-Way also assumed the note. Sometime thereafter, it purchased more land located west of the runway and referred to as the Northwest Development Addition.

On October 19, 1983, Hyde-Way, Inc., and Hyde individually entered into an agreement with Whyte in which, among other matters, Hyde agreed to convey to Whyte certain real property in the Northwest Development Addition, in payment of the balance owed under the 1980 note. This conveyance included ten hangars, including the hangar that appellant was renting at the time of his arrest.

On February 5, 1987, several weeks before the arrest, Hyde sold his airport property to a Nevada mining corporation. On the day of the arrest, he owned only a month-to-month tenancy under an oral lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde. The 1983 agreement between them was intended to settle these disputes, but they had been in civil litigation for over two years before appellant was convicted in this case. The litigation, however, did not address the issues raised by this appeal.

[NEXT, THE FACTS ON WHICH THE CASE TURNS] Appellant relies on the terms of Whyte's 1980 sale of the airport to Varner, Hyde's predecessor, and of Whyte's 1983 agreement with Hyde. Based on those agreements, appellant argues, there is sufficient reason to believe that he had effective consent to enter Hyde's property so that the trial court could not have found him guilty beyond a reasonable doubt.

In 1980, when Whyte sold part of her land to Varner, the deed reserved to Whyte certain easements and rights for access to the runway from her property. In relevant part, the deed states:

> [NOTE: IN THIS FORM OF ORGANIZATION, IT BECOMES CLEARER THAT A CRUCIAL ITEM—THE RELEVANT LANGUAGE FROM THE 1980 DEED—IS MISSING.]

Under Whyte's 1983 agreement with Hyde, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner, with the following exceptions:

> Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport.

EXAMPLE NO. 39

The following example contains excerpts of the briefs to the United States Supreme Court in BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)*

STATEMENT OF FACTS
(Petitioner)

1. The BMW Quality Control Process.

Bayerische Motoren Werke, A.G. (BMW AG) manufactures automobiles in Germany. BMW purchases newly manufactured vehicles from BMW AG, imports the cars into the United States, and prepares them for distribution and sale throughout the United States.

Occasionally the finish of a vehicle suffers damage between the time the vehicle rolls off the assembly line in Germany and the time it arrives in the United States. The damage could be dents or scratches that occur during the trans-Atlantic voyage or it could be blemishes caused by environmental conditions, such as acid rain.

When newly manufactured automobiles arrive in the United States, their first stop is one of BMW's vehicle preparation centers (VPCs). The VPCs are staffed by technicians, who have been trained to factory standards, and are stocked with the same equipment found in BMW AG's factories in Germany. At the VPCs, the vehicles are prepared for delivery to dealers and inspected for transportation damage as well as any other imperfections.

If a vehicle has been damaged or is otherwise flawed, it is returned to factory quality at the VPC (or, in some past instances not pertinent here, at the facility of an independent contractor under the supervision of BMW employees). Refinishing takes place in a specially designed paint booth, in which the paint is applied and baked until hard. The paint booth provides constant air filtration and utilizes a down draft-a forceful air flow from ceiling to floor-

to minimize the presence of dust in the painting area. The booth also contains controls for regulation of heat and humidity levels.

The refinishing process-which is essentially identical to that used by BMW AG when it detects an imperfection in a car's finish as it comes off the assembly line—involves numerous steps and quality-maximizing safeguards. First, all moldings and emblems are removed from the surface that is to be refinished. Then the entire vehicle is cleaned with silicone and dirt remover. Next the flaws in the surface of the paint (whether from acid rain or other causes) are removed by lightly sanding the affected surface with a wet sander-a sanding machine with a hose producing a steady stream of water to wash away dust. Then a technician performs additional light sanding by hand. The sanding process removes no more than the top coat of paint. It is not necessary to remove any of the protective coatings beneath the top coat.

After sanding, the vehicle again is thoroughly cleaned and wiped off with silicone and dirt remover. Next, masking tape is placed around the surfaces that are to be refinished and the vehicle is put in the paint booth, where it is wiped a final time with silicone and dirt remover and blown dry with air pressure. Once the vehicle is in the paint booth and fully cleaned, the paint is applied to the affected surfaces and the booth is heated to a temperature adequate to harden the paint, but low enough to avoid damaging the other components of the vehicle. BMW does not merely repaint the spots that had sustained damage; instead, it repaints the entirety of any panel that has some damage or noticeable imperfection. After the paint has dried, the refinished vehicle is inspected to ensure proper gloss and texture and the absence of imperfections.

2. BMW's Disclosure Policy.

During the period relevant to this case, BMW had a formal policy relating to vehicles that required refinishing or repairs upon arrival in the United States. If the cost of the repairs exceeded 3% of MSRP, the vehicle would be placed into company service and driven for up to six months or ten thousand miles. BMW then would sell it to a dealer at auction as a used vehicle, with whatever disclosures were required by applicable law.

If the cost of VPC repairs performed on a vehicle did not exceed 3% of the vehicle's MSRP, however, BMW considered the car to be new and sold it to a dealer without disclosure of the repairs. This policy was adopted in 1983 to satisfy the strictest of the various state statutes then in effect governing disclosure of repairs performed on vehicles sold to consumers as new.[1]

3. Dr. Gore's Car.

[1] At the time it adopted the policy (and subsequently), BMW was confronted with a patchwork of state disclosure requirements. Some states required disclosure of repairs exceeding 3% of MSRP, while others did not require disclosure unless the cost of the repairs exceeded 6% of MSRP. Among the states regulating the subject, some required disclosure only by dealers, while others required disclosure by manufacturers. Many of the statutes permitted the entity with the disclosure obligation to exclude from the calculation the cost of glass, tires, bumpers, and welded parts. To simplify matters, BMW adopted the 3% threshold without exception for any kind of parts-i.e., the strictest statutory requirement then in existence-as its nationwide policy.

In January 1990, Ira Gore, a medical doctor specializing in oncology, purchased a 1990 BMW 535i from German Auto in Birmingham, Alabama, for $40,750.88. Dr. Gore drove his car for approximately nine months before taking it to Slick Finish, an independent automobile detailing shop. He was not dissatisfied with the car's overall appearance; nor had he noticed any problems with, or flaws in, the car's paint. He simply wanted to make the car look "snazzier than it normally would appear." The proprietor of the detailing shop, Leonard Slick, informed Dr. Gore that his car had been repainted.

It turned out that the automobile purchased by Dr. Gore had sustained superficial paint damage (presumed by the parties to have resulted from acid rain) and that the horizontal surfaces had been refinished at the VPC in Brunswick, Georgia. In keeping with its nationwide policy, BMW had not disclosed the repairs to German Auto because the cost of those repairs-$601-was substantially less than 3% of the MSRP for the vehicle.

* * *

STATEMENT OF FACTS
(Respondent)

A. The Lowering of a BMW's Value Due To Repainting

BMW markets its cars as "the ultimate driving machine," with "flawless body panels" that retain "their original luster" even after many miles of wear. As one of BMW's top paint experts testified, fulfilling this promise requires "one of the best paint jobs of any automobile in the world." Unlike other parts of a BMW, however, if the original paint job is damaged, BMW's objective-"to supply the consumer a perfect vehicle," is unattainable. The paint job can never be restored to the level of perfection achieved on the original factory paint line.

BMW's paint expert explained that the reason "you can't get it as good" is that "you can't use the same process that was originally used." On the original paint line, "a straight enamel" paint is electrostatically applied, then baked, and the process repeated twice more. This is the optimal painting procedure, but it comes with a key constraint: to adequately harden each coat of enamel paint, it must be baked at approximately 285 degrees Fahrenheit. A repainted BMW cannot be baked at anything near this high temperature-if it were, the non-metal components of the already assembled car would melt. Thus, BMW is forced to "make do the best that [it] can," replacing electrostatically applied enamel with a spray-on, acrylic-based paint that dries at low temperatures.

BMW's paint expert testified that a repainted BMW initially "looks better than it does when it originally comes off the factory floor" because the acrylic-based paint "has a little bit better shine." Over time, however, the repainted areas "wear[ ] differently" than areas with the original paint. For example, one consumer testified at trial that he chose "the nicest looking car ... on the showroom floor" when he purchased his red BMW 535i; neither he nor the dealer knew that the paint had been previously damaged and that BMW had repainted the car. But over the next two years the repainted areas wore much differently than the finish on BMWs with original

factory paint jobs. Within a year the repainted "hood and trunk started fading." Ultimately, the car's finish exhibited several noticeably different shades of red.[2]

Not surprisingly, given the adverse effects, a BMW suffers a sharp drop in value if repainted-both in initial purchase value and in subsequent trade-in or resale value. Because a BMW is a luxury car, marketed to appeal to consumers who desire a car engineered, built and finished to perfection, one expert (John Cox, a long-time BMW dealer who had been in the automobile business for 43 years, and whose dealership was a co-defendant in this case) estimated that even if the repainting is done as well as feasible, the repainted BMW is still "diminished in value approximately ten percent." As Cox testified, "[t]hat's the way the market works."

Given the impact of repainting on the value of a BMW, Cox testified, it is "imperative that the customer be told" if the car has been repainted. As another BMW dealer put it, this disclosure is simply a "good rule of ethical business": "If I'm aware of the fact that a car has been [re]painted, absolutely, we would disclose it." Even BMW's paint expert agreed, consistent with his frank admission that in repainting a BMW "you can't get it as good" as the original, that he would "want to know if [his] car had been repainted if [he was] going to spend forty thousand dollars of [his] hard-earned money for it."

B. BMW's Nationwide Nondisclosure Policy

In 1983, the Executive Board of BMW adopted a written, unitary, nationwide policy concerning cars that become damaged in the course of manufacturing or transportation. Damaged cars were fixed and sold to consumers without any disclosure at all of past repairs, regardless of how much the repairs cost, and regardless of whether the cars were marketed as "new" or "used." BMW admits that if the damage could be repaired for less than 3 percent of the manufacturer's suggested retail price (MSRP), the car would be sold "to a dealer without disclosure of the repairs"; contrary to BMW's assertions to this Court, however, even where repairs cost more than 3 percent of the MSRP, BMW did not disclose the repairs. BMW's witness on its disclosure policy, David Cordero (its in-house attorney in charge of vehicle damage repair), was asked at trial: "Do you tell the customer, look, this car has been damaged more than three percent"? Cordero's answer, in full, was: "No, that we don't do. We do sell it as a used car, though." This bare representation that a car is "used"-without any disclosure that even before it was first driven it had been damaged and repaired-was the only "form of disclosure" ever made by BMW to consumers.

Notably, BMW did not follow this policy with respect to its executives who were furnished "company cars." For "a company car or a brass hat car," every item of damage was listed on computerized records detailing repairs or replacements made after the cars left the

[2] An increasingly mottled finish is not the only consequence of BMW's repainting its cars. Other problems include "buckling" paint, to the point that it will peel away from the car, or chip off; small bubbles in the paint that cannot be buffed out; paint color lacking the deep luster of an original factory finish; and other miscellaneous problems.

plant. By contrast, for cars sold to the public, the computer system that BMW made available to dealers did not contain information about paint damage.

Contrary to BMW's bold assurances to this Court, there is no evidence that when BMW formulated its nondisclosure policy in 1983, it intended to comply with the law of any State.[FN5] In particular, BMW adopted its policy without any attention to Alabama's statutory prohibition on fraudulent suppression, the basis for the fraud finding against BMW in this case and for the punitive damages award, and without attention to the hornbook commonlaw rule, applicable in all States, that selling products as "new" without disclosure of known defects is actionable fraud.

C. BMW's Routine Application of Its Nondisclosure Policy to the Vehicle Sold to Gore

In January 1990, respondent Ira Gore went to an authorized BMW dealer in Birmingham, Alabama and "told them [he] was looking for a new car." Gore selected what appeared to be a brand-new BMW 535i. Having seen BMW's advertisements touting the "flawless body panels" that retain "their original luster" even after many miles of wear, and "no one [having] told [him] of any [paint] damage," he paid $40,750 "with the expectation that it was an undamaged vehicle." Price-conscious, Gore testified that he was focused on "what I was going to have to pay for the car," and certainly "would not have bought at that price" had he known it had been repainted.

Nine months later, Gore learned from an auto detailing expert that BMW had repainted virtually his entire car-the top, hood, trunk and quarter panels-because of acid rain damage. Gore "was disgusted"; as he testified: "I felt that I had been cheated and misled by people who were supposed to be selling me a new car." Believing that he would get nowhere complaining to those who had already cheated him, Gore contacted an attorney about his complaint and ultimately filed this fraud suit against both BMW and the dealership.[3]

D. The Magnitude of BMW's Nondisclosure Policy

The evidence showed that BMW's nondisclosure policy was a decade-long fleecing of consumers on a large scale. At the time of trial, Gore was able to identify, through work orders, 983 other repainted cars regarding which BMW, pursuant to its nondisclosure policy, had concealed paint repairs costing at least $300 each. At least 14 Alabama consumers (including Gore) had been defrauded. Nor was BMW's nondisclosure policy limited to repainting. At trial, the record showed that, in addition to the 983 repainted cars whose work orders were placed into evidence, BMW had sold at least 5,856 other repaired cars as "new" without disclosing the repairs to consumers.

These figures proved to be substantial underestimates. In the post-verdict hearing in the trial court on BMW's motion for new trial or remittitur, BMW filed a document stating that paint repair is required on 2 to 3 percent of all new vehicles sold in the United States.

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[3] All the testimony presented at trial supported the view that customers who did give BMW a chance to address their complaints over repainting were deeply dissatisfied with BMW's inaction. [Discussing specific examples.]

Moreover, prior to its decision in this case, the Alabama Supreme Court was informed in an interlocutory appeal in another case involving BMW that the company had identified an additional 4,330 vehicles with paint damage and repair that had been sold as new during a recent 13-month period. On an annualized basis, that represents an additional 4,000 repainted cars per year-entirely apart from the 983 vehicles documented by the evidence in the trial court in this case. This additional information provided by BMW was called to the state supreme court's attention in the instant case, see Appellee's Br. in Alabama Supreme Court at 62 n. 5, and no rule of Alabama procedure precluded the state supreme court's taking judicial notice of it. This new information suggests that, each year, an additional 60 repainted BMW cars were fraudulently sold as "new" in Alabama.

The record showed that, by selling each car for more than it was worth, BMW reaped millions of dollars from its nondisclosure policy. John Cox authoritatively testified that paint damage and repair reduces the value of an automobile by at least 10 percent.[4] The trial court concluded, "from the evidence at trial and the post-judgment hearing," that BMW was "deliberately engaging in a scheme of fraud from which [it] derived monetary benefits." The state supreme court agreed that "[t]he evidence shows" that "the conduct was profitable to BMW."

EXAMPLE NO. 40

Morissette v. United States, 342 U.S. 246 (1952).

MR. JUSTICE JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger -- Keep Out -- Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some

[4] In addition, the jury heard the first-hand testimony of: (1) a former BMW owner, who testified that paint damage and repair had reduced the trade-in value of her car; (2) Gore, who testified that, if he had known of the damage, he would not have bought the car or, if he had, it would have been at a reduced price; and (3) BMW's own paint expert, who readily admitted that he would "want to know if [a] car had been repainted" before deciding whether to buy it.

of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 U. S. C. Sec. 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $200. The Court of Appeals affirmed, one judge dissenting.

IV. EXHIBIT CONTROL: THE "MIRCO" SUPER-CLARITY PRINCIPLES

At the "micro" level of paragraphs and sentences, we will divide our advice about persuasive writing into the two categories of "thinking" that we introduced at the beginning of the program: "thinking like a writer" and "thinking like a rhetorician." The former, as we have seen, focuses on the clarity of a writer's presentation; the latter demands something extra, which we call "super-clarity." Thus, for paragraphs and sentences, we will start with the principles underlying straightforward clarity, for without this foundation, other flourishes will be a waste of time. We will then move to principles of rhetorical emphasis that produce the strength in one's prose that persuasion requires.

A. Clear Paragraphs: Focus And Transitions

In the realm of paragraphs, Principle 1 on page 10 translates into the following advice:

1. Make the paragraph's point and structure explicit.

2. Create smooth transitions: put old information before new.

3. Use the paragraph's natural point of emphasis.

All are addressed below.

1. Make the Point and Structure Explicit.

EXAMPLE NO. 41

Before:

In the circumstances of this case, several factors are relevant to the issue of Zallea's liability. In this case, there simply were no general standards of steam quality—that is, of the permissible levels of chemicals or corrodents—upon which Zallea reasonably could have relied. The evidence does not support the conclusion that Zallea did have or should have had knowledge of the likelihood of the joint failures sufficient to justify imposing liability upon Zallea. The evidence instead supports a finding that WEPCO was in a position to have superior knowledge of the actual quality and contents of its steam, and to have expertise and access to knowledge concerning the steam in its pipes. Since there were no general industry standards for levels of chemicals or corrodents in light of which Zallea could have designed the expansion joints or issued warnings, and since WEPCO was in a better position to evaluate its own steam quality and chemical or corrodent levels, the loss of the still unexplained failures must fall upon WEPCO rather than Zallea.

After:

In the circumstances of this case, Zallea should not be found liable for two reasons. First, there simply were no general standards . . . . Second, the evidence supports the conclusion that WEPCO, not Zallea, was in a better position . . . .

2. Creating Transitions: Put Old Information Before New

EXAMPLE NO. 42

Before:

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). A passbook that is necessary to the control of the account has been held to be an indispensable instrument. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

After:

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

In Restatement of the Law, Security § 1 comment (e), an indispensable instrument is defined as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

EXAMPLE NO. 43

Before:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

An associate of Dr. Jones also performed a root canal on a tooth at the same time. Dr. Jones then referred Plaintiff to Dr. Skillful, who performed an apicoectomy.

Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, Plaintiff also consulted Dr. Drill, who did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

After:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

During the completion of the bridge, Plaintiff had a root canal on a tooth by an associate of Dr. Jones. In addition, after the placement of the bridge, Plaintiff was referred by Dr. Jones to Dr. Skillful, who performed an apicoectomy.

After these procedures, Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, after the second of these visits, Plaintiff consulted Dr. Drill. He did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

EXAMPLE NO. 44

Before:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county, or municipality, may not be sued without its consent. The purpose of the immunity of public officials is not directly to protect the sovereign, but to protect the public official while he performs his governmental function, and it is thus a more limited immunity than governmental immunity. Courts have generally extended less than absolute immunity for that reason. The distinction between discretionary acts and ministerial acts is the most commonly recognized limitation. The official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment."

After:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county, or municipality, may not be sued without its consent. The immunity of public officials, by contrast, does not protect the sovereign directly, but only the public official while he performs his governmental function. For this reason, courts have generally extended less than absolute immunity. The most commonly recognized limitation arises from the distinction between discretionary and ministerial acts. Under this distinction, the official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment."

3. Use Natural Points of Emphasis

EXAMPLE NO. 45

Our logic is surrounded by a wall of paradox. Inside this boundary, logic resolves informational conflicts to our satisfaction; outside, it does not, leaving contradictions and absurdities. The difference seems to be between sense and nonsense, between logic and illogic. But perhaps this dichotomy is a bit too stark. Perhaps there exists another category between, on the one hand, those phenomena we happily accept because they can be explained by our logic and, on the other, those we comfortably reject because they are in direct conflict with logic. We would arrive at this remarkable middle category, then, by opening our minds to phenomena logic cannot explain. I will call this nonlogical mental process "faith."

Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288, 318 (1984).

EXAMPLE NO. 46

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters.

Winston Churchill, History of the Second World War

B. Clear Sentences: Chunks And Cores

By the time we leave law school, all of us have heads stocked— overstuffed, perhaps— with advice about writing sentences:

- Prefer short sentences;
- Omit needless words;
- Use strong, active verbs; avoid the passive;
- Don't overuse adjectives and adverbs;
- Prefer simple words to fancy ones;

and so on. Much of this advice is intended to help us fight off bad habits, especially habits fostered by reading long-winded, clumsy prose by other lawyers. But professional writers should aspire to something more than staying out of stylistic trouble—even to something more than simple clarity, as fundamental as that virtue is. They should write sentences that are sophisticated and flexible enough to convey the nuances of their thinking and to keep their readers awake. In other words, their sentences should sing a little.

For writers who have assimilated the usual advice and still want to improve their style, the key lies in the second principle introduced at the beginning of the program: Readers absorb information best if they can absorb it in pieces. At the level of the sentence, this principle leads to this advice:

- Break longer sentences into **chunks**.
- Strengthen the words on which readers instinctively focus: the sentence's grammatical **core** (subject, verb and object)

1. Overview: Break a Longer Sentence into Shorter Chunks

EXAMPLE NO. 47

Before:

This case involves the novel issue of whether or not a minor is responsible for damages sustained by a restaurant in lost profits resulting from a liquor license suspension caused when the minor orally misrepresented her age to the owner of the restaurant who thereafter sold liquor to her.

After:

This case involves a novel issue: when a minor orally misrepresents her age to a restaurant owner who then sells liquor to her, and who as a result has his liquor license suspended, is the minor responsible for the damages sustained by the restaurant in lost profits?

or

In this case, a minor orally misrepresented her age to the owner of a restaurant. He then sold liquor to her, and as a result had his liquor license suspended. The issue raised is novel: is the minor responsible for the damages sustained by the restaurant in lost profits?

EXAMPLE NO. 48

Before:

Compensation for the California damage claimants remains a significant public policy concern counseling application of California law in a California forum.

After:

If California damage claimants are to receive adequate compensation, as public policy dictates they should, California law should be applied in a California forum.

or

Public policy dictates that California damage claimants should receive compensation that is adequate by the standards developed in the state's courts. To achieve this end, California law should be applied in a California forum.

2. Overview: Strengthening the Core

a. Where is it?

EXAMPLE NO. 49

Before:

The District Court after evidentiary hearings last held in August 1977 found that the Department had failed to follow the procedures laid out in its own regulations.

After:

After evidentiary hearings last held in August 1977, the District Court found that the Department had failed to follow the procedures laid out in its own regulations.

EXAMPLE NO. 50

Before:

Thus, an interpretation that the proof of disability could be given at any time the Insured was still living would require ignoring clear and repeated language establishing a cut-off date for claiming a waiver of premium.

After:

Thus, to find that proof of disability could be given at any time the Insured was still living, this court would have to ignore clear and repeated language establishing a cut-off date for claiming a waiver of premium.

b. What Does it Say?

EXAMPLE NO. 51

Before:

The reason for there having been less utilization by corporations of funded programs than unfunded programs is . . . .

After:

Corporations used funded programs less often than unfunded programs because . . . .

EXAMPLE NO. 52

Before:

There is a tendency among novice litigators to use hyperbole in their briefs . . . .

After:

Novice litigators tend to use hyperbole in their briefs . . . .Clarify the Actor: Whose Story Are You Telling?

EXAMPLE NO. 53

Before:

This case involves the novel issue of whether or not a minor is responsible for damages sustained by a restaurant in lost profits resulting from a liquor license suspension caused when the minor orally misrepresented her age to the owner of the restaurant who thereafter sold liquor to her.

Revision if you represent the restaurant owner:

This case involves a novel issue: when a minor induces a restaurant owner to sell her liquor by lying about her age, and the restaurant as a result has its liquor license suspended, is the minor responsible for the damages sustained by the restaurant in lost profits?

Revision if you represent the minor:

This case involves a novel issue: when a restaurant owner sells liquor to a minor who has misrepresented her age, and serves her six jello shots in the next hour, is she responsible for the damages sustained by the restaurant in lost profits after its liquor license was suspended?

3. "Super-Clear" Sentences: The Rhetorician's Tool of Arranging Chunks to Emphasize Key Information

Rhetorical emphasis at the level of sentences requires attention to these five issues:

- what information goes into the grammatical core;
- what information goes into its own chunk;
- whether that chunk should a big one (for example, an independent clause) or a small one (for example, a phrase);
- which chunks move to the beginning and end of the sentence, the spots of maximum emphasis; and
- whether the rhythm will encourage readers to speed up or slow down.

As the examples on the following pages will show, these techniques form the bedrock of a style that is clear, direct, and forceful. They also lead to an even more important end: if intelligently used, they can transform your prose into a supple instrument for capturing and communicating the nuances of your thinking. This happy result comes about because the principles allow you, in a passage composed of many bits of information, to adjust the emphasis you give each bit.

Use the Structure of a Sentence to Clarify its Content: The Hierarchy of "Chunks"

1. *Independent clauses:* Jane is an overworked lawyer, but ....
2. *Dependent clauses:* Although Jane is an overworked lawyer, ...
3. *Prepositional phrases:* As an overworked lawyer, Jane ....
4. *Modifying phrases and words:* Jane, an overworked lawyer, ... Jane, overworked, ...

EXAMPLE NO. 54

Harrigan was the manager of the marina. She testified that the boat was delivered to the marina on January 7, but she did not see it there again after January 8.

Harrigan, the manager of the marina, testified that she last saw the boat on January 8, the day after it was delivered.

Harrigan was the manager of the marina. She testified that she last saw the boat on January 8, the day after it was delivered.

Harrigan, the manager of the marina, testified that the boat was delivered to the marina on January 7. She last saw it on January 8.

EXAMPLE NO. 55

Before:

The implementation of the proposal would require Widget Corp. to breach existing contracts because it would have to change its source of raw material.

After:

To implement the proposal, Widget Corp. would have to change its source of raw material, and therefore to breach existing contracts.

or

The proposal would force Widget Corp. to change its source of raw material, and thus to breach existing contracts.

or

The proposal would force Widget Corp. to change its source of raw material. This would breach its existing contracts.

BUT WHEN CHUNKING GOES AWRY . . . . .

From a set of CLE materials, with apparently a very non-traditional topic:

Corporate and finance practitioners often encounter puzzled looks when they try to describe what they do to lay persons, including their spouses.

From a state appellate opinion, where courtrooms are more interesting than usual:

Defendant Joe Smith was convicted of driving while intoxicated, contrary to [state statute] and other driving related offenses during a bench trial.

During cross-examination of Officer Martinez, defense counsel introduced the video recording of Defendant's performance on the field sobriety tests, and Defendant himself admitted to consuming two beers when he took the stand.

4. Persuasive "Cores"

a. Active Voice v. Passive Voice

EXAMPLE NO. 56

The union filed a complaint.

The complaint was filed by the union.

The complaint was filed.

EXAMPLE NO. 57

Johnny tried to steal my marbles.

An attempt at stealing my marbles was made by Johnny.

EXAMPLE NO. 58

The police investigated the incident.

The police conducted an investigation of the incident.

b. The Syntax of Action

Put the Main Action Into the Verb

Put the Main Actor Into the Subject

Actor	*Act*	*Recipient*
Man	bites	dog
(subject)	(verb)	(object)

EXAMPLE NO. 59

Before:

The failure of Megacorp to provide Interbank with useful information prevented its determination of the project's status.

After:

Because Megacorp failed to give Interbank useful information, it prevented the bank from determining the project's status.

Allocating the Responsibility

Because Megacorp failed to give Interbank useful information, it prevented the bank from determining the project's status.

or

Because Megacorp failed to give Interbank useful information, Interbank could not determine the project's status.

or

Because Interbank did not receive useful information from Megacorp, Interbank could not determine the project's status.

Hiding the Ball

EXAMPLE NO. 60

The document was not produced in April as the result of an oversight by a legal assistant. As soon as we discovered the error, we promptly notified the plaintiff and produced the document.

EXAMPLE NO. 61

Of the four claims that went to the jury, the jury found in Wildenstein's favor on three: fraud and breach of express and implied warranties of title. The only claim on which a verdict was returned in Van Rijn's favor was breach of the implied warranty of merchantability.

Nominalization, Voice, and Story: Choosing the Actor

EXAMPLE NO. 62

Version 1:

The use of § 502(d) against Merrill Lynch at the filing of the Objection would operate to severely penalize Merrill Lynch since its Claim is so great. Such a use would arbitrarily treat Merrill Lynch differently from other creditors of the Debtor, contrary to the intent of § 502(d), which is to assure an equality of distribution of the assets of the bankruptcy estate. Davis, 889 F.2d at 662.

Version 2:

Because Merrill Lynch's claim is so great, it would be severely penalized by the use of § 502(d) against it at the filing of the Objection. If this were to occur, Merrill Lynch would arbitrarily be singled out for different treatment than other creditors. Such a result would be contrary to the intent of § 502(d), which is to assure [an equality of distribution of the assets of the bankruptcy estate.] Davis, 889 F.2d at 662.

Version 3:

Section 502(d) is intended to assure an [equality of distribution of the assets of the bankruptcy estate]. Davis, 889 F.2d at 662. If § 502(d) were used against Merrill Lynch at the filing of the Objection, however, the result would be to penalize Merrill Lynch because of the size of its claim—and thus to single it out for different treatment than other creditors. Section 502(d) is intended to prevent, not to promote, such unequal treatment.

Making a Concept an Actor

EXAMPLE NO. 63

Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. It required him first to demand that the corporation vindicate its own rights, but when, as was usual, those who perpetrated the wrongs also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its stockholder . . . .

Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949) (Jackson, J.).

4. Be Concise

"Conciseness" is measured by the time and effort it takes to get through the passage. It is not measured by the sheer number of words. Conciseness is the language of confidence.

EXAMPLE NO. 64

Before:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price for such security. It has never been litigated whether the current independent bid price is the price at the time of the writing of the option or at the time of the exercise of the option. A Rule 10b-7 defense would succeed only if the court interpreted the current independent bid price to be the price at the time of the writing of the option.

After:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price. However, no court has yet determined whether this price is the price at the time of the option's writing or at the time of its exercise. A Rule 10b-7 defense would succeed only if the court chose the first interpretation.

SENTENCE EDITING EXERCISE

1. The failure of plaintiff to produce the relevant documents on time delayed defendant's realization of the importance of the issue until deposition scheduling was complete.

2. A creditor is required under California's one-action rule to foreclose upon collateral before proceeding against the debtor's unsecured assets when a debtor's obligation is secured by real property.

3. Does the Board of Directors of a public corporation registered in New York have the authority to rescind the sale of substantially all the assets of the corporation after the sale has been consummated pursuant to authorization by the shareholders of the selling corporation without their authorization of the rescission?

V. ETHOS AND STYLE: GRACE AND ENERGY THROUGH RHYTHM AND CHARACTER

So far, this program has focused on qualities of writing that should be much the same for all legal writers. But writing is unavoidably individual. Although we may want to believe that our prose is a cloak behind which we can hide, it inevitably reveals something about our attitudes and character. As a result, all writers should pay attention to what the classical rhetoricians called *ethos*: the image of a character, the persona that your writing conveys, whether you want it to or not.

A. Rhythm

EXAMPLE NO. 65 (SAME AS EXAMPLE NO. 46)

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters.

Winston Churchill

EXAMPLE NO. 66

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Palsgraf v. Long Isl. R.R., 248 N.Y. 339 (1928) (Cardozo, C.J.)

EXAMPLE NO. 67

Before:

The conflict, moreover, involves an important question of law on which a uniform nationwide rule is essential. For example, it would be intolerable for the minimum wage provisions to have different applications in different regions of the country. In the same way, it would also be intolerable for there to exist in some states but not others a judge-made exception to the priority of a secured creditor's perfected lien under the UCC. The continuing inconsistency on these matters could have serious economic consequences because creditors would be reluctant to finance businesses in regions where their liens may not enjoy true priority.

After:

Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. It would be intolerable, for example, for the minimum wage provisions to be applied differently in different regions of the country. Similarly, it would be intolerable for courts in some states, but not in others, to grant exceptions to the priority of a secured creditor's perfected lien under the UCC. This inconsistency would do more than inconvenience specific creditors. In a region where creditors are reluctant to finance businesses because their liens may not enjoy true priority, [the region's economy could suffer serious economic consequences].

B. Character: Formality

EXAMPLE NO. 68

This case comes before the Court on the third intermediate accounting of the trust under the will of Jane F. Smith. On a prior accounting, the West Carolina Supreme Court held that a provision in a will leaving property to "issue" of another is presumed not to include the adopted child of the daughter of the testatrix. We are now asked to reconsider the question based on subsequent changes in the decisional law of this State. The case raises a substantial, if not altogether novel, question of the duty of a court to enforce a prior holding, the legal reasoning of which has been undermined by later rulings.

or

In this malpractice lawsuit the issue on appeal is whether the trial judge properly granted the defendant's motion for summary judgment. The defendants filed a motion to dismiss because the complaint failed to state a claim on which relief could be granted. The defendants then filed four affidavits to support their motion and moved the court to treat the motion as one for summary judgment against them.

EXAMPLE NO. 69

1. Prior to plaintiff's purchase of the automobile, defendant's salesman provided him with information about its previous owner that subsequently proved to be false.

2. Before the plaintiff purchased the automobile, the defendant's salesman provided him with information about its previous owner that later proved to be false.

3. Before the plaintiff bought the car, the defendant's salesman gave him information about its previous owner that turned out to be false.

4. The sucker got stuck with the lemon because the salesman fed him some @#$!* about the guy who got rid of it.

C. Character: Distance

EXAMPLE NO. 70

Before:

Dear Mr. Richards:

In reference to your case, please be advised that defendant has agreed to a settlement, the preliminary terms of which are set forth in the document enclosed herein. Prior to the completion of the remaining details of the agreement, this office must be in receipt of the following documentation:

1. A written estimate from Dr. Jones for the completion of therapy in regard to plaintiff's leg injury.

2. . . . .

After:

Dear Mr. Richards:

As we discussed yesterday, Trust Us Auto Sales has agreed to settle your suit against it. The terms are set forth in the enclosed document, which you should review carefully. I believe the terms are favorable, but I urge you to think them through carefully and to phone me if you have questions.

In order to complete the details of the agreement, I will need the following documents by next Thursday:

1. A written estimate from Dr. Jones for the completion of therapy for your injured leg.

2. . . . .

APPENDIX:
BRINGING IT ALL TOGETHER: AN ADVOCATE'S CHECKLIST

Summary

I. Define the battlefield: Think like a lawyer about facts, issues, and outcomes.

II. Develop a battle plan: Think like a rhetorician about how to persuade.

III. Launch the attack: Use the introduction to seize the attention of the overworked and impatient reader.

IV. Control the flow of the battle: Think like a writer about how to create "super-clarity."

V. Keep the initiative: Tell a strong legal and factual "story."

VI. Control every level of combat: Create super-clear paragraphs and sentences.

VII. Dominate every level of combat: Make your clarity compelling through "natural" emphasis.

VIII. Retain the high ground: Gain the reader's respect and confidence by presenting a strong professional character.

BRINGING IT ALL TOGETHER

An Advocate's Checklist

I. DEFINE THE BATTLEFIELD: THINK LIKE A LAWYER ABOUT FACTS, ISSUES, AND OUTCOMES

A. Think like a careful lawyer: Prepare

1. Analyze the facts or the record: Strengths and weaknesses
2. Identify the legal issues: Understand yours and anticipate the other side's
3. Clarify the applicable burden of proof or standard of review, as well as any problems of jurisdiction or judicial authority

B. Think like a pragmatic lawyer: Understand your task

1. Determine your goal: What do you want?
   a. Total agreement vs. sufficient agreement
   b. To establish (or at least not damage) your credibility for later cases
2. Understand what the judge wants
   a. The Basics
      - To do justice
      - To do justice quickly
      - To be legally correct (not be reversed)
   b. The Extras
      - An interesting case
      - A graceful style

II. DEVELOP A BATTLE PLAN: THINK LIKE A RHETORICIAN ABOUT HOW TO PERSUADE

A. Understand the elements of persuasion

B. Understand the right psychological starting points

III. LAUNCH THE ATTACK: USE THE INTRODUCTION TO SEIZE THE ATTENTION OF THE OVERWORKED AND IMPATIENT READER

A. Think like a pragmatic rhetorician: Prove that you will help by focusing on the lynchpins of the decisional process

1. Paint the "big picture": What is the "justice" context?
2. Identify the "jugular": What exactly has to be decided?
3. Show your cards: What is the core of your argument?

B. Begin to persuade

1. Seize the high moral ground
2. Use details selectively
3. Create themes, not just arguments.

C. Make the judge comfortable

1. Be selective in the issues raised
2. Be candid: Face your adversary's arguments squarely
3. Be professional: Don't denigrate your opponent, opposing counsel, or the lower court personally—stay focused on the law

IV. CONTROL THE FLOW OF THE BATTLE: THINK LIKE A WRITER ABOUT HOW TO CREATE "SUPER-CLARITY"

A. Satisfy the reader's need for "super-clarity" (coherence vs. logic)

B. The principles of "super-clarity"

1. Put context before details
2. Put familiar information before unfamiliar information
3. Make the structure explicit, throughout the document (roadmaps and roadsigns)

V. KEEP THE INITIATIVE: TELL A STRONG LEGAL AND FACTUAL "STORY"

A. Crafting the legal analysis: From logic to persuasion

1. Logic and the challenges of legal reasoning: Rules, doctrines, principles, and theories
2. Identifying and using the applicable burden of proof or standard of review (as well as any issues of jurisdiction or judicial authority)
3. Understanding and using authority
    a. The constraints of consistency and legal coherence
    b. Reasoning from the fixed to the uncertain; from the general to the specific
    c. Recognizing hierarchy in legal authority
    d. Methods of distinguishing prior cases
    e. Methods of statutory interpretation
4. Understanding and using justice: The place of policy arguments
5. Avoiding "ready-made" legal stories
6. Sequencing the issues

7. Showing that you know the history of this specific court's thinking about the relevant issues

8. Taking care with citations and footnotes

B. <u>Presenting the facts: From chronology to story</u>

1. The elements of persuasive facts

2. Using and abusing chronology

3. Alternative patterns that clarify stories

4. Tying the factual story into your legal themes

VI. CONTROL EVERY LEVEL OF COMBAT: KEEP THE READER ON TRACK WITH SUPER-CLEAR PARAGRAPHS AND SENTENCES

A. <u>Paragraphs</u>

1. Use topic sentences to establish the coherence of your reasoning

2. Order the paragraph's sentences logically and create smooth transitions between them

B. <u>Sentences</u>

1. Chunk sentences into digestible segments, and put the segments into a logical order

2. Reinforce your "legal story" or themes through the grammatical cores of your sentences

VII. DOMINATE EVERY LEVEL OF COMBAT: MAKE YOUR CLARITY COMPELLING THROUGH "NATURAL" EMPHASIS

A. Structural "natural" emphasis

1. Beginnings and endings of paragraphs and sentences
2. Syntactical contrast

B. Grammatical "natural" emphasis

1. Hierarchy of grammatical containers
2. Action and active voice
3. Action and nominalization

C. Stylistic "natural" emphasis: Rhythm

VIII. RETAIN THE HIGH GROUND: GAIN THE READER'S RESPECT AND CONFIDENCE BY PRESENTING A STRONG PROFESSIONAL CHARACTER

A. Ethos in professional advocacy

B. The elements of a positive professional ethos

1. Care – details
2. Confidence – concision
3. Credibility – reasonableness and controlled emotion
4. Integrity – the requirements of legal ethics and professionalism
    a. Missing facts, precedent, or the record
    b. Distinguish facts and inferences
    c. Revealing adverse legal authority
    d. Limitations of "creative" legal arguments