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LEGAL WRITING FOR THE "REAL WORLD": A PRACTICAL GUIDE TO SUCCESS

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I. INTRODUCTION

One of the most significant complaints among practicing attorneys is that newly admitted lawyers are not effective writers. Many young attorneys also express concern that their law school experience did not adequately prepare them to be good legal writers. This Article is designed to bridge the gap between the law school classroom and the law firm experience. In so doing, this Article is more practical rather than pedagogical, based on experience rather than theory, and founded upon "real-world" examples rather than abstract constructs. We hope this Article will be a valuable resource not only for law students, but for practicing attorneys, who should work to improve their writing skills throughout their legal careers.

In law school, your goal is to prepare yourself for the "real world." What does that mean? During law school, you should develop familiarity with and expertise at "doing the things that lawyers do." Perhaps the most important skill you will learn and develop throughout your career is the ability to write effectively. In the "real world," writing matters because, whether it is a motion to dismiss for failure to state a claim, a motion for summary judgment, a trial or appellate brief, or an arbitration statement, writing is an important vehicle by which you advocate for your client. Consequently, your ability to write persuasively and convince a court that your position is justified by the facts, consistent with the law, and based upon principles of fairness is critical. Of course, while other skills, such as oral argument,

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negotiation, and trial practice are very important as well, your legal arguments are presented to the court primarily through written advocacy. When you develop outstanding legal writing skills, you evolve as both a lawyer and communicator.

This Article is designed to prepare you for the "real world" and teach you the skills that matter—both inside and outside of the courtroom. The principles below are based upon our experiences as lawyers, litigators, and advocates for our clients. If implemented, they will assist you not only in becoming an effective legal writer, but also by ensuring your credibility and reputation as a lawyer. We hope this Article will be an important resource for you as a new attorney and as your writing skills evolve throughout your legal career. Part II focuses upon principles that will maximize the persuasive value of your legal arguments. Part III concentrates on style, explaining, through examples, and how things such as grammar, tone, and clarity can directly affect the outcome of your case. Finally, Part IV offers additional practical tips for the "real world."

II. MAXIMIZE PERSUASION: MAKE THE COURT WANT TO RULE IN YOUR CLIENT'S FAVOR

Throughout the brief writing[1] process, your goal should be to maximize persuasion. You should strive to create a brief that presents the facts and law in a manner that makes the court want to rule in your client's favor. Your brief should make the court feel that it is doing the "right thing" by granting the relief you are requesting. The court should also believe that it is acting fairly, justly, and responsibly. To accomplish this, your brief needs to present the facts in a compelling, yet balanced way, contain relevant legal authority that supports your arguments, appeal to the equitable principles at issue in your case, and reveal you to be an advocate with the utmost credibility. To write a winning brief, the following principles are important:

A. Make an Excellent First Impression

As the saying goes, "you never get a second chance to make a first impression." This could not be more relevant than in the field of legal writing. You must recognize that there is a psychology to reading and, consequently, to writing as well.[2] Whether you are

1. While this Article primarily discusses brief writing, the principles included here are intended to apply to all legal documents you prepare and submit to a court. For the sake of simplicity, we refer to these documents collectively as briefs.

2. *See* Gregory O'Meara, S.J., *The Name is the Same, but the Facts Have Been Changed to Protect the Attorneys*, 42 VAL. U. L. REV. 687, 720-21 (2008) (explaining the importance of understanding how a reader may interpret a writing through his or her own personal lens).

writing for a senior partner, a law clerk, or a state, federal, or Supreme Court judge, it is critical for your reader, upon initially reviewing your brief, to believe it is of impeccable quality. To make a great first impression, your reader must agree with the arguments you are making and want to rule in your favor. The following are important foundational principles that will make an excellent first impression.

1. Win the Case at the Beginning

An excellent brief starts strong and "wins the case at the beginning." You should, for example, use powerful introductions and opening sentences to your advantage. At the earliest and most important stages, you should present your best arguments compellingly and in a clear, concise, and credible manner. This will make a good first impression and ensure that, in the initial stages of a brief, your arguments are supported by the facts, governing law, and equitable considerations. For example, if you are drafting a 20-page brief, you should not wait until page five to tell the court why it should rule in your favor. To "win the case at the beginning," utilize the following approaches.

Use powerful opening sentences. Do not wait until the meat of your brief to make an impression on your reader—do so from the beginning with a powerful opening sentence. Consider the differences between the following introductory sentences:

> By stating that "Amy cheated her way into law school," and "plagiarized her law review article," Defendant's comments were defamatory.
>
> Versus
>
> In this case, the Defendant made defamatory comments which entitle Plaintiff to damages.

The first sentence is stronger because it is more direct and specific. The first sentence does not just tell the court what happened; it also shows the court what happened, which enhances persuasiveness. Make your opening sentence count.

Use an "Introduction" to your advantage and always give your reader a "roadmap." An "Introduction" section can be very effective because it gives you the opportunity to include a short summary of the factual, legal, and equitable reasons why the court should rule in your client's favor. An "Introduction" section need not be lengthy—the key is to ask yourself, "What is the strongest statement I can make to justify a ruling in my client's favor?" The introduction should include a short summary of the facts and law, the remedy you are seeking, and the reasons why the court should grant that relief. The following is an example of an effective introduction:

> This case centers on the enforceability, or, more particularly, the non-enforceability of an illegal non-compete covenant. In 2001, when Defendant Jason Peters graduated from college and went to work for Plaintiff Digital Valley ("DV") as a software engineer, Peters signed an employment agreement that contained a non-compete covenant. Through the non-compete covenant, Peters agreed that for a period of 36 months after his employment with DV ceased, he would not "directly or indirectly engage in any business . . . in which he performed work for [DV]." After Peters left DV in 2010 to follow his dream of starting his own software company, DV brought suit against Peters to enforce the non-compete covenant.
>
> The non-compete covenant, however, is unenforceable under California law. Section 16600 of the California Business and Professions Code makes "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business . . . void."[3] Because the non-compete covenant is void and unenforceable under California law, Peters is entitled to a grant of summary judgment in his favor and an order from this Court that DV cannot enforce the non-compete agreement as a matter of law.

What makes this a good introduction? Several things:

- It tells the judge—in the first sentence—what the case is about;
- It succinctly outlines the facts using a slight slant (e.g. "illegal non-compete covenant");
- It gives the judge the relevant law; and
- It tells the judge the relief sought.

Additionally, your introduction should give the reader a roadmap of the issues that will be addressed in the document. Without one, the reader does not know where you are going and cannot understand the issues the reader should be considering. Facts are merely facts in the abstract unless the reader knows *why* those facts might be important. Below are two examples of introductory paragraphs. Consider why the second introduction is far more effective:

> Smith sued Jones after Smith was injured in an automobile accident that occurred in California. At the time of the accident, Jones was driving an International tractor owned by Pacific Trucking, Inc. ("PTI"), a company organized under the laws of Oregon. The PTI tractor was registered in the state of Oregon on the date of the accident.

This introductory paragraph is ineffective because it does not provide the reader with the necessary roadmap to explain the issues in the case and why those issues are important. In the abstract, the reader has no idea why the writer believes the

3. CAL. BUS. & PROF. CODE § 16600 (West 2008).

information provided is important. Is the writer arguing that PTI is a necessary party? Is the writer arguing that PTI is vicariously liable for the conduct of Jones? What does the state in which the tractor is registered have to do with anything? Consider this better example:

> There is a dispute between the parties as to whether the law of California or the law of Oregon governs this personal injury action. Smith sued Jones after Smith was injured in an automobile accident that occurred in California. At the time of the accident, Jones was driving an International tractor owned by Pacific Trucking, Inc. ("PTI"), a company organized under the laws of Oregon. The PTI tractor was registered in the state of Oregon on the date of the accident.

The inclusion of the first sentence makes all the difference because it provides the roadmap the reader needs to understand the information the writer is providing.

Be aware that nearly every aspect of your brief presents an opportunity to persuade. Do not wait until the "Argument" section of your brief to start persuading the court that your position is correct. Instead, recognize that many areas of your brief present opportunities to persuade. For example, in an Appellate Brief, your "Question Presented" should be drafted so that the court wants to answer the question in your favor. Consider the following example questions and why the second "Question Presented" is more effective:

> The issue in this case is whether Appellant acted negligently when she was involved in a severe automobile accident with my client.

Versus

> The issue in this case is whether—despite repeated warnings from Appellant's service provider that her brakes needed repair—the injuries sustained by the Appellee, a pedestrian, resulted from Appellant's negligence.

Here, you can see that while both "Questions" raise the same issue, the second one does so persuasively and in a way that makes the reader want to answer "yes." Similarly, the abbreviated name you choose also offers an opportunity to persuade the court. Consider the following:

> Based upon well-settled law, the monument designed by religious artist Raffi depicting the Ten Commandments (the "Ten Commandments Monument") violated the Establishment Clause when it was placed inside a federal courtroom.

Versus

> Based upon well-settled law, the monument designed by religious artist Raffi depicting the Ten Commandments (the "Monument") violated the Establishment Clause when it was placed inside a

federal courtroom.

The first example is more effective because, by choosing the "Ten Commandments Monument" instead of "Monument," you are consistently reminding the court that the monument was designed to promote specific religious beliefs and does not have a secular purpose. When you use an abbreviated name, make sure that you use this term consistently in the entire brief. In this example, do not call the monument different names throughout the brief (e.g., Monument, Ten Commandments Monument, Religious Monument, Raffi Monument). This can lead to confusion. Pick one name and stick to it.

B. Less Is More: Be Concise

At the recent Appellate Judges Education Institute in New Orleans, Louisiana, Justice Antonin Scalia offered several suggestions concerning effective legal writing, the first of which was "be brief."[4] Concise writing garners favor with the court and impacts both your credibility as a lawyer and persuasiveness as an advocate. Courts can—and do—admonish lawyers for submitting pleadings that are verbose and unnecessarily lengthy. For example, in *Belli v. Hedden Enterprises, Inc.,*[5] in denying the plaintiff's request for leave to file a motion that exceeded the page limit as set forth in the relevant rules, the court chastised the plaintiff for, quite simply, bad writing.[6] The court's order stated as follows:

> A review of the proposed, twenty-nine-page motion's commencement confirms that a modicum of informed editorial revision easily reduces the motion to twenty-five pages without a reduction in substance.

Compare this:

> Plaintiffs, ZACHARY BELLI, BENJAMIN PETERSON, ERIC KINSLEY, and LARRY JOHNSON, (hereinafter referred to as "Plaintiffs"), individually and on behalf of all others similarly situated ("Class members"), by and through the undersigned counsel and pursuant to the Fair Labor Standards Act of 1938, (the "FLSA"), 29 U.S.C. § 216(b) files this motion seeking an order [move] (1) [to] conditionally certifying this case as a collective class action; (2) [to] requir[e]ing the Defendant, HEDDEN ENTERPRISES, INC. d/b/a INFINITY TECHNOLOGY SOLUTIONS (hereinafter "Defendant"), to produce and disclose all of the names[,] and last known addresses[,] and telephone numbers of the [each] potential C[c]lass

4. Judith D. Fisher, *Justice Scalia on Advocacy*, LEGAL WRITING PROF BLOG (Nov. 19, 2012), http://lawprofessors.typepad.com/legalwriting/.

5. Belli v. Hedden Enters., Inc., No. 8:12-cv-1001-T-23MAP, 2012 WL 3255086 (M.D. Fla. Aug. 7, 2012).

6. *Id.* at *1.

> M[m]embers so that notice may be implemented; and (3) [to] authoriz[e]ing notice by U.S. First Class mail to all [of this action to each] similarly situated persons employed by Defendant within the past three (3) years[.] to inform them of the pendency of this suit and to inform them of their right to opt-in to this lawsuit. In support of this Motion, Plaintiffs sets forth the following facts and provides this Court with a Memorandum of Law in support of the Motion, and asserts as follows:

To this [as revised by the Court]:

> Plaintiffs move (1) to conditionally certify a collective action; (2) to require the Defendant to produce the name, address, and telephone number of each potential class member; and (3) to authorize notice of this action to each similarly situated person employed by Defendant within three years.
>
> Concentrating on the elimination of redundancy, verbosity, and legalism (see, e.g., BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002)), the plaintiffs may submit a twenty-five-page motion on or before August 15, 2012.[7]

This is just one of many examples where a lawyer's legal writing skills directly affected the court's decision. Be careful, however, to avoid mistaking conciseness for simple writing. There is a difference between simple and simplistic writing. Simple writing is effective because it conveys complex arguments in an easy-to-understand manner while retaining the logic and reasoning essential to those arguments. Simplistic writing, on the other hand, lacks the type of thoughtful, deliberative, and analytical quality that is necessary to successfully advocate for your client. In writing, as in many things, it is quality, not quantity, that matters. While it is important to be comprehensive and attentive to detail, it is equally as important to draft a brief that is short, to the point, and free of unnecessary, irrelevant, or unhelpful information. A concise brief adheres to the following principles:

Avoid overly long sentences. Two sentences may have the same meaning, yet be drafted in ways that undermine (or maximize) persuasiveness. Consider the effect of this overly long sentence:

> When the Defendant repeatedly failed to have her brakes checked prior to the accident in question, and which gave rise to this litigation, she became the causal link that started a chain of events in which the Defendant was, first, hit by her car, second, injured and, now, entitled to damages and other relief the Court may deem necessary, proper, and just under governing legal principles.

Versus

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7. *Id.*

> By failing to adequately maintain her brakes—despite knowing that immediate repairs were necessary—Defendant acted negligently and directly caused Plaintiff to suffer severe injury.

The first sentence is long and convoluted, and by the end, the reader has forgotten the excellent point made in the first line—that the defendant knew there was a problem with her brakes and did not have them checked! This is an important point that is completely lost in the morass of that 76-word sentence. An attorney was once admonished for submitting to the court a sentence that contained 345 words![8] Do not make this mistake. As a general rule, avoid sentences that are longer than three-and-a-half lines. Also, if you cannot figure out how to punctuate a sentence, it is probably too long and convoluted.

Surprisingly, many lawyers do not appreciate the value of short sentences. These sentences can be brutally effective because they are the equivalent of putting bullets or holes in your adversary's argument. Consider the following example:

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8. Stanard v. Nygren, 658 F.3d 792, 802 (7th Cir. 2011). The entire 345-word sentence, including all original errors, is quoted below:

> That pursuant to the RICO Act, Defendants extortive activities constituted a Pattern of Racketeering activity and conspiracy involving violations of 1956(a)(1)(B)(ii), and 18 U.S.C. § 1341 (wire fraud—the use of interstate mail or wire facilities, here telephone and facsimile transmissions), or the causing of any of those things promoting unlawful activity), and 18 U.S.C. § 1951 (interference with commerce and extortion by using and threatening to use legitimate governmental powers to obtain an illegitimate objectives under color of official right by wrongful plan, extortion, intimidation and threat of force and/or other unlawful consequence and through fear and misuse of there [*sic*] office to obstruct, hinder, interfere with, and/or affect commerce and the use and enjoyment of Plaintiffs' property and obtaining, as uniformed public officials payment for unwanted services to which they were not entitled by law, attempting to conceal from the United States of America their true and correct income and the nature thereof so obtained from Plaintiffs in order to attempt to evade paying lawful taxes thereon in violation of 26 U.S.C. § 7201, et. seq., thereby using the governmental powers with which they have been entrusted to gain personal or illegitimate rewards and payments which they knew or should have known were made and/or obtained in return for the colorable official acts as aforesaid, and knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity all in violation of RICO and the other laws set forth herein, inter alia, as well as acts chargeable under any of the following provisions of the laws of the State of Illinois 720 ILCS 5/33-3(d) (official misconduct); 720 ILCS 5/12-11 (criminal home invasion); 720 ILCS 5/19-4 (criminal trespass to a residence) 720 ILCS 5/19-4); (theft 720 ILCS 5/16 (a)(1) & (2) by knowingly obtaining or exerting unauthorized and/or through threat control over Plaintiff's property as aforesaid.

Id. at 798 n.7.

> The averments in Jones's affidavit reflect statements made to Jones by other people. They are hearsay. Hearsay is not admissible.

As you can see, peppering your arguments with short and powerful sentences will make a big impact on your reader.

Avoid overly long paragraphs. Paragraphs should generally be no longer than 3-5 sentences. Additionally, make sure that a single paragraph does not occupy an entire page because this is aesthetically difficult to follow. A reader may skip all or part of an overly long paragraph. Ensure this does not happen by drafting short, readable paragraphs. Remember that there is a psychology to reading, and your writing should reflect an understanding of this fact. Consider the following example:

> The Defendant intentionally inflicted emotional distress upon Plaintiff when—in a crowded restaurant—she repeatedly shouted that Plaintiff was "a horrible person," an "incompetent lawyer," and "someone that everyone despises." To succeed on a claim for the intentional infliction of emotional distress, Plaintiff must demonstrate that Defendant's conduct was: (1) intentional or reckless; (2) extreme and outrageous; (3) the cause of; (4) severe emotional distress.[9] To begin with, Defendant acted with the requisite intent. During the two weeks following the termination of their business relationship, Defendant was heard saying that she wanted to "humiliate" Plaintiff in "the worst way possible," so that "everyone can know her the way I do." In fact, one hour before she arrived at the restaurant, Defendant was seen inquiring about Plaintiff's whereabouts, and was told that Plaintiff made a reservation "at a restaurant downtown." Defendant traveled to the restaurant shortly thereafter. Additionally, Defendant's comments were extreme and outrageous. They were made in a crowded restaurant where Plaintiff was celebrating her birthday with family and friends. Furthermore, the specific comments—made with the intent to "humiliate"—attacked Plaintiff's character, reputation, and professional standing within the community. The fact that Defendant's comments were shouted repeatedly throughout the restaurant only underscores their outrageousness. Finally, Defendant's comments caused—and continue to cause—Plaintiff to suffer severe emotional distress. Shortly after the incident, Plaintiff was hospitalized for two days due the sheer embarrassment, hurt, and humiliation that resulted from Defendant's conduct. Plaintiff was treated for, among other things, conditions stemming from severe anxiety and shock. Plaintiff could not consume any food for over three days. She received threatening and harassing phone calls from both current and former clients. Stated simply, the severe distress caused by Defendant's conduct has been both emotionally and physically debilitating.

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9. Hyatt v. Trans World Airlines, Inc., 943 S.W.2d 292, 297 (Mo. Ct. App. 1997).

This paragraph makes some effective points in support of Plaintiff's emotional distress claim, but it is far too long. To begin with, the claim itself has four distinct requirements. As such, each paragraph should deal with only one of the elements (or two, if they are closely related). Breaking up the paragraphs in this way allows the writer to highlight each argument in a concise, manageable, and well-organized fashion. Long paragraphs threaten to dilute the persuasive force of the arguments contained in them. Readers may lose interest or attention when faced with reading a paragraph that is nearly, or over, a page in length. The writer may make very persuasive arguments, but if some of them are on line 17 of a paragraph, they likely will lose force.

Shorter paragraphs maximize persuasion because they are not only more manageable to the reader, but afford the writer the opportunity to separate arguments and focus more acutely on the precise points that most strongly support the writer's arguments. Below is an example of one way the above paragraph could be better organized:

> The Defendant intentionally inflicted emotional distress upon Plaintiff when—in a crowded restaurant—she repeatedly shouted that Plaintiff was "a horrible person," an "incompetent lawyer," and "someone that everyone despises." To succeed on a claim for the intentional infliction of emotional distress, Plaintiff must demonstrate that Defendant's conduct was: (1) intentional or reckless; (2) extreme and outrageous; (3) the cause of; (4) severe emotional distress.[10]
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> To begin with, Defendant acted with the requisite intent. During the two weeks following the termination of their business relationship, Defendant was heard saying that she wanted to "humiliate" Plaintiff in "the worst way possible," so that "everyone can know her the way I do." In fact, one hour before she arrived at the restaurant, Defendant was seen inquiring about Plaintiff's whereabouts, and was told that Plaintiff made a reservation "at a restaurant downtown." Defendant traveled to the restaurant shortly thereafter.
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> Additionally, Defendant's comments were extreme and outrageous. They were made in a crowded restaurant where Plaintiff was celebrating her birthday with family and friends. Furthermore, the specific comments—made with the intent to "humiliate"—attacked Plaintiff's character, reputation, and professional standing within the community. The fact that Defendant's comments were shouted repeatedly throughout the restaurant only underscores their outrageousness.
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> Finally, Defendant's comments caused—and continue to cause—Plaintiff to suffer severe emotional distress. Shortly after the incident, Plaintiff was hospitalized, for two days, due to the sheer embarrassment, hurt, and humiliation that resulted from

10. *Id.* at 297.

> Defendant's conduct. Plaintiff was treated for, among other things, conditions stemming from severe anxiety and shock. Plaintiff could not consume any food for over three days. She received threatening and harassing phone calls from both current and former clients. Stated simply, the severe distress Plaintiff continues to suffer has been both emotionally and physically debilitating.

When drafting your brief, remember to compose short, readable paragraphs that are easy to understand.

Omit unnecessary words. Recognize that every word should serve a purpose. Do not use double and triple words when one will suffice. Instead of "cease and desist," or "hold harmless and indemnify," pick one. Legal writers use "that" too often as well. Giving yourself sufficient time to proofread and revise will ensure your brief is no longer than necessary.

C. The Facts Are Critical

Most cases are won or lost on the facts. When rendering a decision, courts place extraordinary weight on the specific facts of each case. Of course, while the governing law is very important, it is often how you present the facts that will determine your likelihood of success. Why? Because, in many situations, prior case law is distinguishable. A court may determine that a prior case contains distinguishable facts and does not control or mandate a particular ruling. In addition, the facts are what appeal to a court's sense of fairness, justice, and common sense. Courts want to "do the right thing," and not just mechanically apply the law. Consequently, your "Statement of Facts," as well as your "Analysis" section (where you apply your facts to the relevant legal authorities), can be decisive. The following principles are very important.

Tell the story of why you should win. To maximize persuasion, you should not just present the facts in an objective, rigid, or removed manner. Be persuasive when describing the factual background of your case. Use your facts to "tell the story" of why you should win. When you tell your client's story in your "Statement of Facts," you should emphasize those facts that are favorable to your client's position while explaining why unfavorable facts do not undermine that position. Focus, as a general matter, on presenting your facts chronologically or by topic to ensure flow and clarity.

Importantly, how you choose to present the facts will depend upon their strength, relevance, and perceived persuasive value. For example, if your client suffered a breach of confidence in the doctor-patient relationship, you may choose to describe the relationship in chronological order, detailing its evolution and, ultimately, when and how the alleged harm occurred. Alternatively, if you are litigating a breach-of-contract case, you

may want to take a topical approach by focusing on the relevant transactions that were most injurious to your client. Sometimes, it is effective to combine both approaches. The important thing to remember is that there is no rigid formula by which you must present your facts. Each case may call for an individualized approach and, sometimes, when you "dare to be different," you maximize persuasion. Consider which of the following factual statement tells the story of Jennifer Martin more persuasively.

> On April 19, 2007, Jennifer Martin's ("Jennifer") parents tragically died in an automobile accident. Six months later, her fiancée ended their engagement. Due to these events, Jennifer became severely depressed and sought medical care from Dr. Jones ("Jones"), a psychiatrist. During their initial consultation, Jones assured Jennifer that "she was going to be ok" and "find peace and happiness in her life again." At the conclusion of their meeting, Jones prescribed for Jennifer an anti-depressant medication, and they agreed upon weekly therapy sessions.
>
> Initially, the relationship between Jennifer and Jones appeared to be beneficial. Jennifer felt that Jones understood and could relate to the feelings of "despair and anguish" that arose from the traumatic events in her life. Additionally, Jennifer felt that the homework assignments she was given by Jones—such as writing in a journal and going to a yoga class—helped to reduce her depression and "allowed [her] to find some measure of peace during the darkest time of [her] life." Jennifer also felt that the anti-depressant medication prescribed by Jones-Prozac-seemed be helping.
>
> As their therapy sessions continued, Jones began to focus more intrusively upon Jennifer's personal life. For example, during one of their sessions, Jones stated that "you dress too conservatively, and should really buy some clothes that might attract someone into your life." Jennifer was taken aback by these comments and felt uncomfortable. Jones explained, however, that he was simply trying to get Jennifer to "be more social and perhaps meet someone, so that [she] could have a support structure during this difficult time." While Jennifer found Jones's suggestion inappropriate, she nonetheless followed his advice and purchased, in her words, "less conservative" outfits. Shortly thereafter, Jennifer accompanied her friends to a local bar, where, she met an individual with whom she is now close friends. Thus, while she was initially surprised by Jones's suggestion, she ultimately "came to trust him more because of the good things that came out of it."
>
> Soon thereafter, Jones's encroachment into Jennifer's personal life became more alarming. During one of their sessions, Jones asked Jennifer about the inheritance she received from her parents' death. Reluctant to discuss this, Jennifer attempted to change the subject. Jones insisted. Jennifer told Jones she inherited approximately $950,000 from her parents, which she had, due to her fear of the stock market, invested conservatively. Upon hearing this, Jones became agitated, stating that "you are only going to get better if you

take risks, step out of your comfort zone, and truly express yourself." Jones referred to Jennifer's wardrobe change as evidence of this fact. While still hesitant, Jennifer asked Jones about the kinds of investments she should be considering.

Jones explained that he was operating a bed and breakfast in town designed to "provide a temporary getaway for people going through difficult times in their lives." He told Jennifer that the business was doing "extraordinarily well" and that if Jennifer made a substantial investment, she would make "tons of money." When Jennifer asked Jones if he was confident that she would make a significant return on her investment, Jones said, "this is one of the best decisions you will ever make." Based upon Jones's representations, Jennifer invested $800,000 in the bed and breakfast.

Jennifer will never recover that money again. Unfortunately, Jones's representations regarding the bed and breakfast's financial health were false, misleading, and inaccurate. In fact, the business was on the verge of bankruptcy. Jones was aware of this months before he approached Jennifer regarding the investment. When Jones began to discuss the bed and breakfast with Jennifer, the business was not even able to meet its operating expenses. In the two years that it was in operation, the bed and breakfast never made a profit. Despite this knowledge, Jones knowingly made false representations that induced Jennifer to invest nearly all of her inheritance in his failing business enterprise. Because of the bed and breakfast's financial decline, Jennifer will not recover this money. Jones's actions consist of materially false representations within the context of the psychiatrist-patient relationship.

Versus

Jennifer Martin ("Jennifer") tragically lost her parents in an automobile accident, and her fiancée broke up with her six months later. Jennifer is 28-years old and lives in Knoxville, Tennessee, which is about four hours from Memphis. She is a nurse and works full-time at the University of Tennessee Medical Center. In a state of depression, Jennifer sought the help of Dr. Jones ("Dr. Jones"), a neighborhood psychiatrist. After their first session, she was given Prozac, and they agreed to have weekly therapy sessions. Dr. Jones is licensed to practice medicine in Tennessee and Alaska. He has been practicing for seventeen years and, last year, gave a speech to the American Psychiatric Association.

At the start, their therapy sessions went well. Jennifer liked Dr. Jones, and they had pleasant conversations. At Jones's suggestion, Jennifer changed her behavior and started to engage in different activities, which made her start to feel better. For example, she changed her wardrobe, which many found attractive. She was also able to go back to work, which is something that she finds rewarding and fulfilling. Jennifer graduated from nursing school in 2005.

As the weeks progressed, Jennifer also believed that she was being helped by an anti-depressant medication Dr. Jones prescribed. She was initially skeptical of medication due to the risk of certain side

> effects. However, Dr. Jones assured her that, if there were any serious side effects, they could change medications. In any event, Dr. Jones began to say and ask inappropriate things of Jennifer. For example, during one session he asked about Jennifer's financial situation. He wanted to know how much money Jennifer inherited from her parents. She told him that she inherited $950,000. This was very significant for Jennifer because at her job, she was not making as much money as she desired. The money gave her an opportunity to experience more financial freedom. When he heard of Jennifer's financial situation, Dr. Jones asked Jennifer if she would like to invest in a bed and breakfast that he was operating. While she was initially hesitant, Dr. Jones told Jennifer that she would make money. After thinking about it, Jennifer invested $800,000. She was excited about the investment because she hoped to someday move from Tennessee to California.
>
> Unfortunately, this was not a good investment. The bed-and-breakfast went bankrupt. Due to its poor financial condition, Jennifer eventually lost her money. Now, Jennifer is seeking damages for Dr. Jones's wrongful behavior.

Do you see the difference in these two examples? Both examples contain the same facts, but tell a very different story. The first example is far more detailed and persuasive. It does not include irrelevant facts and includes specific statements from the parties illuminating Jones's state of mind when soliciting Jennifer's investments. The second example not only includes irrelevant facts, which disrupt flow, but it omits critically important information that demonstrates how truly misleading Jones was when asking Jennifer to invest nearly all of her inheritance in his failing business. In these examples, therefore, you can see the impact on the persuasive value of the statement of facts when the same facts are told in a different way.

Have a common theme. If you could tell the court, in one sentence, why your client should prevail, what would you say? That sentence represents the theme of your case. Your brief must reflect a common and unified theme that connects all your arguments together into a cohesive and compelling story. Assume that you represent a client who was injured by negligent conduct when a grocery store failed to properly remove snow from its parking lot. Your theme might be as follows: "Had the defendant acted reasonably to ensure that its customers were not exposed to hazardous conditions, the plaintiff's injury would never have happened." Be sure to choose a theme that connects, unites, and re-enforces both the factual and legal arguments in your brief.

In some jurisdictions, for example, an HIV-positive individual has a legal duty to disclose this status to a prospective sexual partner.[11] Assume your client is a young woman who would like to

11. *See*, *e.g.*, John B. v. Superior Court, 137 P.3d 153, 161-62 (Cal. 2006)

sue her ex-boyfriend for the negligent transmission of HIV. Unfortunately, your client contracted HIV from repeated acts of sexual intercourse with an ex-boyfriend who knew, but did not disclose, that he was HIV-positive. In this case, what will your theme be? What is the one point you want to emphasize, that will unite all your arguments into a cohesive and compelling theme? Consider the following theme sentences:

> Had Defendant made the necessary disclosure, Plaintiff would never have contracted HIV.
>
> Despite knowing that he was HIV-positive, Defendant intentionally concealed this information from Plaintiff throughout the entirety of their relationship, which included repeated acts of unprotected sexual intercourse.
>
> If the Defendant exercised even a minimal amount of care, Plaintiff would not have contracted HIV.

These sentences all speak to a common theme: Defendant was the only person in a position to prevent Plaintiff from contracting HIV, and he failed to take the necessary precautions and failed to disclose his HIV-positive status. This theme focuses solely on Defendant's negligence as the direct cause of Plaintiff's injury. As you can see, a common theme focuses the reader on the strongest argument and the reasons why your client should prevail.

Do not "fudge" the facts. Be honest and forthright in your discussion of the facts. At the Appellate Judges Education Institute, Justice Scalia emphasized that attorneys must be "unfailingly accurate,"[12] because he's "listening to you because you're an expert—so you must know the law and the facts."[13] The facts "are what they are," and, while you cannot change what happened in the past, you can effectively "play the hand you are dealt." To maximize persuasion and maintain credibility, you must never misrepresent, misstate, or otherwise manipulate the facts. Additionally, do not hide unfavorable facts. Instead, include unfavorable facts in your brief for the purpose of showing why they do not detract from the strength of your arguments. By remaining faithful to the facts, you enhance your credibility and trustworthiness. Your goal is to be a zealous advocate while maintaining balance and objectivity.[14]

(imposing a duty of care to disclose HIV positive status); Deuschle v. Jobe, 30 S.W.3d 215, 218-19 (Mo. Ct. App. 2000) (imposing a duty of care to disclose HIV positive status); Doe v. Johnson, 817 F. Supp. 1382, 1389 (W.D. Mich. 1993) (imposing a duty of care to disclose HIV positive status).

12. Fisher, *supra* note 4.

13. *Id.*

14. *See*, *e.g.*, Jasso v. Money Mart Exp., Inc., 879 F. Supp. 2d 1038, 1052 (N.D. Cal. 2012) (stating that "[Z]ealous advocacy does not include misstatement of the record"); S.E.C. v. Smith, 798 F. Supp. 2d 412, 442 (N.D.N.Y. 2011) (directing clerk to forward public admonishment of attorney

For example, assume your client is a pedestrian who was hit by a driver who traveled through a yellow stoplight that turned red when the driver was midway through the intersection. Arguably, your client may have been struck because she began to cross the street too early, and this is a point of contention. Consider the following statements:

> Plaintiff was severely injured when Defendant negligently drove through a red light and struck Plaintiff at a speed of 35 mph.
>
> Versus
>
> Plaintiff was struck when, rather than stopping, Defendant negligently chose to drive her vehicle through a yellow light that turned red momentarily thereafter.

The difference between these two examples is that the second example is true. The first example is not. It is a misrepresentation of the facts. The light was not red when Defendant first drove through the stoplight—it turned red while Defendant was midway through the intersection. Thus, if you wrote the first sentence in a brief, you would be "fudging" the facts and, if the court discovered this misrepresentation, as it almost certainly would, your credibility would be severely damaged.

D. Know the Law and Use It Effectively

To begin, you must know the law and know precisely what law applies to your case. Be sure to thoroughly research your position before sitting down to write your brief. Many practitioners try to research as they go or, even worse, write a brief and then try to find authority to support the arguments they want to make. These are mistakes. Why? Because trying to research as you go can result in muddled organization and cloudy writing. Research, in addition to outlining the law, will often help guide you in organizing your arguments.

Furthermore, in order to persuade the court that your position is well supported in law, you have to know which law actually applies. This seems simple, but sometimes it is not. You must know whether federal or state law applies and whether there is a potential "choice of law" question." Your analysis of which law applies should follow this pattern:

Does state or federal law apply? For a case filed in federal court involving federal questions, federal procedural law applies, and the court will apply federal common law choice of law rules to determine which substantive law will apply.[15] For a case filed in

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for filing false statements with the court to professional standards committee); Astro-Med, Inc. v. Plant, 250 F.R.D. 28, 35 (D. R.I. 2008) (stating that counsel has obligation to correct misstatements).

15. Gluck v. Unisys Corp., 960 F.2d 1168, 1179-80 (3d Cir. 1992); Wells

federal court on the basis of diversity of citizenship, state substantive law applies and federal procedural law applies.[16] For a case filed in state court involving a federal issue, federal substantive law and state procedural law applies.[17] For a case filed in state court involving a state statute or state common law, both state substantive and procedural law applies.[18]

Choice of law. You also must consider whether there is the potential for a choice of law question. If so, do your research at the beginning and be prepared to take a position on which state's law applies. Know, however, that the procedural law of the state in which the action is filed generally will apply, regardless of whether the substantive law of that state or another state applies.[19]

Use the law to maximize persuasion. You should never simply "state" the law or present legal principles in a rigid manner. Legal authority can be used to support your factual assertions and re-enforce your theme in a way that maximizes persuasion. You will often find both favorable and unfavorable law. Your goal should be to use the applicable law to "tell the story" about why you should prevail and, in doing so, emphasize law that favors your position while explaining why unfavorable law should not affect the outcome of your case. Again, credibility is very important: while you should present the law in a manner that is favorable to your side, be certain to provide the court with an accurate and comprehensive analysis of the governing legal principles. The

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Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723, 726 (2d Cir. 1991); Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991); Edelman v. Chase Manhattan Bank, N.A., 861 F.2d 1291, 1294 (1st Cir. 1988). Many courts follow the Restatement (Second) of Conflicts for guidance on choice of law issues. *See*, *e.g.*, *Schoenberg*, 930 F.2d at 782-83 (following the Restatement); *Edelman*, 861 F.2d at 1296 (following the Restatement).

16. 28 U.S.C. § 1652 (West 1948); Hanna v. Plumer, 380 U.S. 460, 465 (1965); Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 749 (7th Cir. 1988) ("The law to be applied in a diversity case is the law that would be applied by the state courts in the state where that suit is brought."). It is not, however, always easy to determine whether a particular law is substantive or procedural. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 416 (1996).

17. St. Louis S.W. R.R. Co. v. Dickerson, 470 U.S. 409, 411 (1985). A state may not, however, alter the rights of parties under federal law through the application of the state's procedural rules. Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942).

18. Willey v. Bracken, 719 S.E.2d 714, 721 (W. Va. 2010).

19. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (2012); Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983); White v. Crown Equip. Corp., 827 N.E.2d 859, 863 (Ohio Ct. App. 2005); Ferraro v. McCarthy-Pascuzzo, 777 A.2d 1128, 1137 (Pa. Super. Ct. 2001); Brooks v. Engel, 207 N.W.2d 110, 113 (Iowa 1973); Istre v. Diamond M. Drilling Co., 226 So.2d 779, 799 (La. Ct. App. 1969); Horvath v. Davidson, 264 N.E.2d 328, 333 (Ind. Ct. App. 1970); Smithco Eng'g, Inc. v. Int'l Fabricators, Inc., 775 P.2d 1011, 1018 (Wyo. 1989); Ashland Oil, Inc. v. Kaufman, 384 S.E.2d 173, 179 (W. Va. 1989); Roberts v. Home Ins. Indem. Co., 121 Cal. Rptr. 862, 865 (Cal. Ct. App. 1975).

court should not feel compelled to do additional research because it questions the reliability or legitimacy of the authority upon which you have relied.

Do not "fudge" the law. Never misrepresent, misstate, or otherwise manipulate legal authority. Do not hide unfavorable, binding precedent. Judges' clerks and opposing counsel perform research too, and the precedent you are trying to conceal will eventually come to light.[20] Just as "the facts are what they are," the law "is what it is." Instead of concealing unfavorable authority, you should focus your efforts on showing the court why that authority does not warrant a ruling in your adversary's favor. Your goal is to strike the proper balance: advocate for your client, but be a credible author who garners the trust of both the court and your adversary.

Quote holdings, not dicta. You must be able to distinguish between a holding and *dicta*. Why? Because it is a court's prior holding, not *dicta*, that is binding. Holdings are powerful because they establish governing legal principles. *Dicta* is not binding, and while it may, in certain circumstances, add persuasive value to your case, it does not constitute or have the force of law.[21]

How do you tell the difference between holdings and *dicta*? Generally, as noted by Judge Posner, "'[t]he basic formula [for distinguishing the holding from dicta] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them.'"[22] A dictum[23] is "a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication."[24]

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20. Numerous courts have felt compelled to sanction attorneys who have "fudged" the law. *See* Jewelpak Corp. v. U.S., 297 F.3d 1326, 1333 (Fed. Cir. 2002) (stating that "[O]fficers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand—both good and bad—of which they are aware"); Cousin v. D.C., 142 F.R.D. 574, 576 (D. D.C. 1992) (holding that an award of attorney fees to plaintiff was warranted where defendant failed to cite adverse controlling authority); Tyler v. State, 47 P.3d 1095, 1108 (Alaska Ct. App. 2001) (fining attorney for failure to cite authority adverse to position raised on behalf of criminal client); *In re* Colonial Pipeline Co., Texaco Inc., 960 S.W.2d 272, 273 (Tex. App. 1997) (stating that a party is subject to sanctions for failure to cite directly adverse authority).

21. U.S. v. Garcia, 413 F.3d 201, 232 (2d Cir. 2005) (stating that "[h]oldings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not.").

22. U.S. v. Crawley, 837 F.2d 291, 292 (7th Cir. 1998) (quoting Local 8599, United Steelworkers of Am. v. Bd. of Educ., 209 Cal. Rptr. 16, 21 (Cal. Ct. App. 1984)).

23. Dicta is plural. Dictum is the singular of dicta. *Black's Law Dictionary* 366 (9th ed. 2009).

24. *Crawley*, 837 F.2d at 834.

Do not change quotations unless you tell the court you have done so. Avoid changing, altering, or manipulating language in authority unless: (1) you tell the court that the alteration has been made; (2) the alteration does not change the meaning of the cited authority; and (3) the alteration does not create the potential for misinterpretation, misapplication, or ambiguity. If you do change a quotation, use ellipses to show that you have removed material, and use brackets to show that you have changed language.

Also, be mindful that there is a difference between emphasizing law that is favorable to you (e.g., using holdings, statutory language, and legislative history), and presenting the law in an inaccurate or incomplete manner.[25] Often, the best way to present the law is to quote language from a statute, regulation, or case. As stated above, in doing so, you are showing, not merely telling, the court why the law supports your position, and you are providing the court with the exact language of a prior decision or statute to support your position. If you choose to paraphrase, instead of quote directly, do so in a way that fully and accurately depicts the authority you are citing—both in content and context.

Organize the law effectively. When you effectively organize the legal principles at issue, you make those principles easier to understand. You undermine the persuasive value of your brief if your explanation of the legal principles is muddled, lacks cohesiveness, or fails to adequately explain the law.

The best cases upon which you can rely are ones that constitute binding precedent. Search for cases that: (1) address the same legal issue; (2) contain similar facts; and (3) are from the highest court within your jurisdiction (and, if applicable, contain quotes from or rely upon the most persuasive federal cases from the highest courts, i.e., the Supreme Court of the United States or the Circuit Courts of Appeal).

Sometimes you may need to cite authority from other jurisdictions. Look outside your jurisdiction only if: (1) there is no authority within your jurisdiction on a particular issue and you are urging the court to follow authority from another jurisdiction; (2) you are arguing for a change in the law, and the reasoning outlined by other jurisdictions supports your argument; or (3) you use the foreign authority to support binding authority from your jurisdiction.

Regardless of whether you use binding or persuasive authority, remember that factually distinguishable cases can be relevant if you are relying on them for commonly accepted legal

25. Todd v. City of Chi., No. 96 C 5247, 1999 WL 356293, at *7 (N.D. Ill. May 24, 1999) ("It is frankly an affront for defense counsel to miscite authority in the manner reflected in the quoted portion of the defendants' memorandum—did they somehow believe that this court would not read the cases?").

principles (e.g., the summary judgment standard or elements of a negligence claim). Always make sure, however, that you do not inadvertently cite a case that helps the opposing party.

Also, when researching and presenting the law, be mindful of trends. More recent cases on a particular legal issue are more likely to influence a court. An exception, however, is the "seminal case." If there is an older case that establishes the governing law, (e.g., *Roe v. Wade*[26]), then you must include that case.

With respect to secondary sources, such as law review articles, you can use them if there are no (or few) cases in any jurisdiction that address a particular legal issue. A secondary source can also have value if it was written by a well-known authority or has been a resource upon which courts have previously relied.

Use headings and subheadings. Headings and subheadings enhance the organization, flow, and clarity of your argument. They allow you to show the reader where you are going and to transition from one idea to the next. Thus, in a concise, powerful sentence, you can assert your strongest point(s) and make a compelling argument. Additionally, the relevant law often can be complex, nuanced, or voluminous. Use powerful headings and subheadings to "break down" the law (and accompanying analysis) into manageable sections for the reader.

Of course, avoid overly long headings or subheadings, and avoid ALL CAPS headings or subheadings unless they are short (INTRODUCTION, CONCLUSION, and the like). Generally, headings should be two lines or shorter. Here are a few examples.

> The defendant did not breach any duty owed to the plaintiff.
>
> The plaintiff and the defendant have a valid contract.
>
> The plaintiff is entitled to an injunction.

If you can phrase it concisely, you might also include the strongest reason that supports your position in the heading or subheading. Just remember—avoid long headings and subheadings. The reader will not read them and any good points you make in them will be wasted.

Make sure the law is still "good law" and that your citations are correct. You never want to find yourself in a situation where the court, or your adversary, says "that case was overruled" or "the statute upon which you rely has been repealed." You should always Shepardize the authority you cite.[27]

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26. Roe v. Wade, 410 U.S. 959, 959 (1973).

27. *Gosnell v. Rentokil, Inc.*, 175 F.R.D. 508, 510 (N.D. Ill. 1997) ("It is really inexcusable for a lawyer to fail, as a matter of routine, to Shepardize all cited cases."); Fletcher v. State of Fla., 858 F. Supp. 169, 172 (M.D. Fla. 1994) (plaintiff's failure to Shepardize resulted in misstatements of law in response

Additionally, citation matters and is very important. Often, one of the first things a court will do when reviewing a brief is to examine the citations. If the citations in the brief are incorrect, e.g., fail to comply with the Bluebook or ALWD Manuals,[28] inconsistent, inaccurate, or incomplete (such as lacking a pin cite), the writer's credibility will be undermined. Thus, be sure to double-check your citations. Numerous courts have admonished parties for failing to correctly cite authority.[29]

Some judges also require their clerks to make a list of every case cited in a brief for the purpose of reviewing that authority in greater detail. If you submit a brief that fails to provide the correct citation to a particular case, the court may not be able to locate your authority. Aside from the inconvenience and frustration this will cause, your failure to cite properly will negatively affect both your credibility and the court's willingness to accept your arguments.

In addition, when quoting a case, be sure that you are actually citing the court's words, and not: (1) the underlying words of the trial court (unless adopted by the appellate court); (2) the court's outline of the arguments made by the parties; or (3) headnotes. Also, if you are relying on a statute, cite the statute itself, and not merely cases that refer to, interpret, or apply the statute.

Finally, if you are relying upon a case that has been reversed on other grounds, make sure you indicate that. A proper citation for such a case would be, for example, *Jones v. Jones*, 110 F.2d 564, 566 (3d Cir. 2003), *rev'd on other grounds*, 987 U.S. 654 (2004). The failure to make such a notation will cause the court wonder whether you are aware that *Jones* has been reversed and will lead the court to question your credibility.

Using reported versus unreported cases. Generally, you should avoid citing unreported opinions for legal principles. In many

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to defendants' motion to dismiss).

28. While both are substantially similar, you must be aware of the differences.

29. Trevarthen v. Treadwell, No. COA12-11, 2012 WL 2552324, at *5 (N.C. Ct. App. 2012) ("[C]ounsel appears to be completely unable to properly cite a single authority in the brief. Although . . . counsel provides 47 footnotes of citation, not a single one is in proper Bluebook format and many provide no pinpoint citations."). *See also* Gonzales v. State, No. 14-07-00434-CR, 2008 WL 963045, at *2 (Tex. App. Apr. 8, 2008) stating that "appellant incorrectly cites one addition case for his contention . . . this court is unable to decipher Appellant's incorrect citation, which again violates the Texas rules of Appellate Procedure"); Scott v. Bank of Am., 292 Ga. App. 34, 35 (Ga. App. 2008) (regarding incorrect citations to appellate record); White v. State, 192 S.W.3d 487, 489 (Mo. Ct. App. 2006) (stating that many citations were incomplete and difficult to understand); State v. Brimmer, 876 S.W.2d 75, 81 (Tenn. 1994) (stating that a brief was hard to following because of incomplete citation).

jurisdictions, unreported opinions are given no precedential value.[30] Instead of citing an unreported opinion for a proposition or law, cite reported opinions that are discussed in that unreported opinion.

For example, the following use of an unreported opinion is inappropriate:

> Based on *Santa v. U.S.*,[31] federal courts have limited subject matter jurisdiction and may only hear cases "where authorized by the Constitution and by statute."[32]

There is no reason to cite *Santa* for this proposition, which comes from a reported Supreme Court of the United States case, *Kokkonen v. Guardian Life Ins. Co. of Am.*[33] Cite to *Kokkonen* instead.

This is not to say, however, that unreported cases have no value. An unreported case can be helpful, for example, if the court has analyzed a similar factual situation and applied established precedent to reach an outcome that you seek.

Remember to attach hard-to-find citations in your brief. If you cite authority that is not readily accessible to the court, attach a copy of that authority to your brief. For example, information on websites frequently changes or disappears. It is extremely helpful to the court if you attach a copy of the relevant information from websites. Copies of cited material from, for example, obscure hornbooks, foreign cases, and unreported cases (when there is no other relevant law), should also be attached. As a rule of thumb, if you believe the court might have trouble finding a source that you cite, attach a copy.

E. The "Analysis" Section—Effectively Applying the Law to Your Facts

In your "Legal Argument" section, do not make the mistake of failing to thoroughly analyze the law in light of your facts. Often, after drafting a detailed Statement of Facts, attorneys will, in the "Legal Argument" section, simply summarize or present the facts

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30. 9TH CIR. R. 36-3(a) (2012); 2D CIR. R. 32.1.1(a) (2009); 5TH CIR. R. 47.5.4 (1996); U.S. v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004); Diesel Mach. Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 830 (8th Cir. 2005); ILL. SUP. CT. R. 23 (West 2011); TEX. R. APP. P. 47.7 (2008); S. Gen. Ins. Co. v. Cotton St. Mut. Ins. Co., 176 Ga. App. 140, 142 (Ga. App. 1985); Action Const. Co. v. Comm'r, 391 N.W.2d 828, 835 (Minn. 1986); Howard v. State, 738 P.2d 543, 545 (Okla. Crim. App. 1987). *But see* DEL. SUP. CT. R. 14(b)(vi)(4) (2011) (permitting citation to unreported decisions).

31. Santa v. U.S., No. 11-14540, 2012 WL 5233564 (11th Cir. Oct. 24, 2012).

32. *Id.* at *1.

33. Kokkonen v. Guardian Life Ins. Co. of Am, 511 U.S. 375, 377 (1994).

in a conclusory manner. This is a mistake.[34] Your "Legal Argument" must contain an "Analysis" section where you directly and in sufficient detail apply the relevant law to the facts of your case. You may ask, "Won't this make my brief repetitive?" No.

First, you need to be mindful that the court will likely refer back to various portions of your brief when making its decision. If, for example, the court focuses its attention heavily upon the "Legal Argument" section of your brief, you want to make sure that every relevant fact is included and discussed in the "Analysis" section. However, you should never cut and paste your "Statement of Facts" into the "Analysis" section, and you should not include additional facts in your "Analysis" section that were not included in the "Statement of Facts."

Additionally, you should not engage in an overly lengthy discussion. The key is balance: you need to include every fact that, when viewed together with the governing legal principles, supports your argument and justifies the relief you are seeking. As a general rule, your "Analysis" section should comprise approximately 15-20% of the brief.

When drafting the "Analysis" section, you need to explain why: (1) a particular case, statute, or regulation applies; (2) helpful cases are analogous; and (3) unhelpful cases are distinguishable or inapplicable. In so doing, you will avoid being conclusory. For example, do not say: "Based on the relevant facts, X was negligent and is liable for Y's damages." You must say why X was negligent. Consider the following example:

> This case is exactly like *Church of the Lukumi Babalu Any, Inc. v. City of Hialeah*[35] and the other cases cited above. Because those cases control, the City's ordinance is an impermissible restriction of religious practice and is void.

The sentences above are grammatically correct. However, that paragraph is not an adequate analysis. In fact, it's not an analysis at all. The legal conclusions in the above paragraph are

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34. Kosiorek v. Smigelski, 54 A.3d 564, 579 (Conn. App. Ct. 2012) ("We repeatedly have stated that we are not required to review issues that have been improperly presented to this court through an inadequate brief. Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly."); Chandler v. Asture, No. 1:11cv229, 2012 WL 5336216, at *3 (W.D.N.C. Oct. 2, 2012) (briefs must contain legal analysis "explaining how [the] authority supports [the party's] position"); Osman v. Cavalier, 251 P.3d 686, 688 (Mont. 2011) (Parties are required to "present a reasoned argument to advance their position," and the court need not "develop legal analysis that may lend support to [the party's] position."); Houghton ex rel. Johnson v. Keller, 662 N.W.2d 854, 856 (Mich. Ct. App. 2003) (A party "may not merely announce his position and leave it to [the] [c]ourt to discover and rationalize the basis for his claims.")

35. Church of the Lukumi Babalu Any, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

not supported by specific facts, rendering the argument shallow and unpersuasive. The Analysis below, however, effectively incorporates the relevant facts and "tells the story" of why the client should win:

> This case is controlled by *Church of the Lukumi Babalu Any, Inc. v. City of Hialeah*,[36] where the Supreme Court held that a law that is not neutral and does not have general applicability may be upheld only where it serves a compelling government interest and is narrowly tailored to advance that interest. The City's law that prevents the display of statues more than 20 feet in height ("Law") is neither neutral nor a law of general applicability. Furthermore, the Law serves no compelling interest and is not narrowly tailored. The Law, therefore, is void.
>
> The City Council passed the Law in response to the erection by the First Unitarian Universalist Church's ("Church") of a 50 foot statue of Jesus Christ, known to many as "I-75 Jesus." During the emergency session in which the Law was passed, members of the City Council expressed their desire to require "them [the Church] to remove that monstrosity [referring to I-75 Jesus]," and their interest that the City "not be known as a town of religious freaks." In passing the Law, the City specifically targeted the Church and its religious freedom, as the City of Hialeah did in *Lukumi*. Furthermore, the Law has had no impact whatsoever on any organization other than the Church. Since the Law was passed, the Church is the only person or organization that has been forced to remove a statue pursuant to the Law.
>
> The City has offered no compelling government interest that justifies the need for the Law, much less any evidence the Law is narrowly tailored to advance that interest. The City claims the Law is justified because it protects the public interest and lessens the likelihood that drivers will be distracted and cause auto accidents. However, the Law is underinclusive because the City has done nothing to prevent other types of driver distractions—the City specifically permits the erection of billboards and allows drivers to operate cell phones while driving. This leads to the conclusion that the Law "cannot be regarded as protecting any interest of the highest order," because it "leaves appreciable damage to that supposedly vital interest [of public safety] unprohibited."[37] Thus, the Law is not neutral or generally applicable, the City cannot show the Law furthers any compelling government interest, and the Law is not narrowly tailored. Under *Lukumi*, the Law is void, and this court should grant the Church's motion for summary judgment.

This Analysis section strikes the proper balance: it supports the arguments with depth and specificity, is not overly lengthy, and maximizes the persuasive force of the reasoning.

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36. *Id.*

37. *Id.* at 547 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541-42 (1993) (Scalia, J., concurring in part and concurring in judgment)).

Additionally, in preparing your "Legal Analysis," keep in mind that you may frequently have more than one "strong" argument to support your position. Follow your strongest argument or arguments with your second strongest argument and so forth. Be sure to identify and include all non-frivolous arguments in your brief. Why? Because courts often base their decisions on legal arguments the parties did not necessarily believe were the strongest. For example, in *National Federation of Independent Business et al., v. Sebelius*,[38] where the U.S. Supreme Court upheld various provisions of President Obama's healthcare legislation, one commentator explained:

> In the midst of reading SCOTUS blog's live blog of the delivery of the Supreme Court's decision in the health care case (haven't read the opinion itself yet, as it's just been posted), I spy a legal writing lesson in a comment from the blog:
>
> Essentially, a majority of the Court has accepted the Administration's backup argument that, as Roberts put it, "the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to IRS." Actually, this was the Administration's second backup argument: first argument was Commerce Clause, second was Necessary and Proper Clause, and third was as a tax. The third argument won.
>
> Legal writing lesson to be gleaned: In a really important case, always have (at least one!) back-up argument![39]

Of course, if an argument does not pass the "smell test," do not include it. Bad arguments detract from good ones and affect your credibility. In addition, do not be an "ostrich"—always anticipate and effectively address counter-arguments that your adversary or the court might raise. You should not, however, react to counter-arguments by addressing them in a place where you would have otherwise inserted your strongest argument. Also, remember that if you are the moving party, you often have a chance to reply to your adversary's arguments. Thus, you may want to save certain responses until the reply brief, where you will have the last word. Remember, you are in control of your brief, and while it is important to acknowledge and address weaknesses in your argument, you should do so only after you have stated your best case for victory.

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38. Nat'l Fed'n of Indep. Bus. et al., v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

39. Elizabeth Inglehart, *Legal Writing Lesson from Supreme Court's Decision on Healthcare*, THINK LIKE A LAWYER (June 28, 2012), http://thinklikealawyer.wordpress.com/2012/06/28/legal-writing-lesson-from-supreme-courts-decision-on-health-care-3-2/.

Make strategic concessions and acknowledge weaknesses in your argument. Do not be afraid to make strategic concessions and recognize there are weaknesses in your argument. Avoid arguing for the sake of arguing, and recognize that bad arguments detract from good ones.[40] It can be very effective to concede that there are unfavorable facts or law, or both, that impact the strength of your argument. No argument is perfect, and by acknowledging specific weaknesses, you give yourself the opportunity to explain why those unfavorable facts or law do not affect the outcome of your case. An unfavorable case may, for example, be factually distinguishable, and you can argue that "while bad facts make bad law," "different facts make different law." Here is an example:

> Defendant acknowledges that she had a duty to exercise reasonable care by placing a "Beware of Dog" sign near the front her home so that individuals could use caution when approaching the property. While Defendant's signs were placed on only the side and back of the house, it was through the back door that Plaintiff sought entry.

You would not get anywhere by arguing that Defendant did not have a duty to place a "Beware of Dog" sign at her front door if, in fact, she had such a duty. You are better off conceding she had that duty and explaining why her conduct was reasonable under the circumstances.

Do not beat a dead horse.[41] While it is important to re-enforce your theme and highlight the greatest strengths in your arguments, there is a difference between re-enforcing and restating. Do not restate your argument in a way that adds unnecessary redundancy or detracts from the quality, conciseness, flow, and clarity of your brief. Consider the following repetitive paragraph:

> Defendant's grossly negligent conduct caused substantial, life-altering injuries to Plaintiff. Plaintiff suffered great injuries because of Defendant's complete disregard for the consequences of his conduct, which conduct was grossly negligent. Plaintiff should recover for the horrible injuries she sustained due to defendant's gross negligence in causing plaintiff's terrible injuries.

We get the point—the plaintiff suffered terrible injuries because of the defendant's negligence. One of those sentences would have sufficed. The persuasiveness of your argument is not increased and is, in fact, decreased by repeating your position over

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40. *See* Oladeinde v. City of Birmingham, 118 F. Supp. 2d 1200, 1202 (N.D. Ala. 1999) (stating that "[t]he court will continue to express its consternation for City's refusal to quit challenging jurisdiction as long as the City refuses to quit").

41. McGrath v. Chesapeake Bay Diving, Inc., Nos. 06-11413, 08-1475, 08-4044, 2010 WL 1744628, at *1 (E.D. La. Apr. 29, 2010) ("Most reasonable persons do not continue to beat a dead horse.").

and over.[42]

Sometimes, silence says it all. You do not need to respond to every counter-argument that your adversary raises. If you do, you risk inadvertently giving validity to an argument that does not warrant a response and is otherwise without merit. In addition, too much focus on your adversary's argument can affect the presentation and persuasiveness of your own arguments. Remember that you are the architect of your brief. Sometimes it's what you do not say that says it all.

Avoid circular reasoning. Circular reasoning significantly diminishes the quality of your arguments because it lacks depth and fails to explain with specificity why the court should rule in your client's favor. Circular reasoning represents an artificial (and transparent) attempt to persuade the court because it involves nothing more than trying to support a premise by repeating that premise.[43] This adds no persuasive value to your brief, and instead reveals gaps or holes in your logic. For example, do not say, "The President is the best candidate and should be re-elected because she is better than all of the others." You just said the same thing twice without explaining why the President is the best candidate. To avoid circular reasoning, use the "why" test. As you review and analyze your arguments, make sure that you've explained in depth, with reference to the law and facts, exactly why each argument should be accepted. Without sufficient factual and legal support, your arguments will be weak. Stated simply, "saying it's so doesn't make it so."

Use footnotes sparingly and strategically. While footnotes can be effective, you must use them correctly. You should not place important facts or law in a footnote. Instead, footnotes should be used for explanatory or parenthetical-type information (e.g., to explain precedent or clarify an issue that might otherwise cause confusion). Footnotes should not be used to make substantive arguments because many courts refuse to consider arguments made only in footnotes.[44] When deciding whether to insert a

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42. *See* McKinzy v. Interstate Bakeries Corp., No. 08-2649-CM, 2009 WL 2243787, at *1 (D. Kan. July 27, 2009) (expressing frustration with plaintiff's insistence on belaboring position ad nauseum).

43. "Circular reasoning occurs when 'the conclusion mirrors the starting premise.'" D.B. v. Ocean Tp. Bd. of Educ., 985 F. Supp. 457, 515 (D.N.J. 1997). Put another way, "[a]ttempting to demonstrate a conclusion using a premise that assumes the conclusion as true is called 'circular reasoning.'" T.M.H. v. D.M.T., 79 So. 3d 787, 817 (Fla. Dist. Ct. App. 2011).

44. *See*, *e.g.*, Fifth Third Mortg. Co. v. Chi. Title Ins. Co., 692 F.3d 507, 513 (6th Cir. 2012) (explaining that plaintiff waived argument on appeal where it was "mentioned [only] once, in cursory footnote, in its brief" at the trial court); Long v. Teachers' Retirement Sys. of Ill., 585 F.3d 344, 349 (7th Cir. 2009) (explaining that one sentence "unsupported and underdeveloped" assertions in footnotes without citation do not merit review); SmithKline Beecham Corp. v.

footnote, ask yourself this question: "If the information is not important enough to include in a paragraph, does it really need to be included at all?"

F. Respect Your Adversary and the Court

Maintaining credibility and establishing yourself as a reliable and trustworthy advocate extends beyond just the contents of your pleadings. Whether it is failing to comply with the relevant rules or unnecessarily attacking your adversary, your credibility will have a direct impact upon both your persuasiveness and your reputation as a lawyer. Both your writing and conduct must reflect respect for the court, your adversary, and the judicial process. The following principles will help you garner respect and credibility with the court, and enhance the quality of your writing.

Follow the local court rules. In addition to federal and state court rules, jurisdictions often have local court rules that govern the filing of documents. The local court rules, for example, will often set forth a page limitation, font size, and style with which you must comply when submitting your brief. As a practical matter, be sure never to alter font size[45] or use footnotes as a method by which to evade the page limitation requirement—the court will know. Failure to comply with the local court rules can cause the court to return your brief for the purpose of making all necessary corrections. Should this happen, it will damage your credibility.[46]

Apotex Corp., 439 F.3d 1312, 1321 (Fed. Cir. 2006) (explaining that arguments raised in footnotes are not preserved on appeal); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 60 (1st Cir. 1999) (explaining that an argument is waived on appeal where raised only in a footnote); Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) (explaining that an argument on in a footnote does not preserve that argument for appeal under FED. R. APP. P. 28); *John Wyeth & Brother Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (explaining that arguments raised in passing [but] not squarely argued, are considered waived); Johnson v. MetLife Bank, N.A., No. 11-800, 2012 WL 3194405, at *6 n.4 (E.D. Pa. Aug. 7, 2012) (explaining that arguments raised "in passing," "such as in a footnote" are waived); First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F.Supp.2d 929, 945 n.1 (N.D. Cal. 2008) (explaining that substantive arguments may not be made in footnotes); Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1264 (Del. Super. Ct. 2012) (explaining that an issue indirectly mentioned in a footnote is not preserved on appeal); *In re* Eastview at Middlebury, Inc., 992 A.2d 1014, 1020-21 (Vt. 2009) (explaining that citing another document in a footnote does not merit review of that document).

45. *See* Alex Kozinksi, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325, 327 (1992) (changing font sizes and the like "tells the judge that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore will lie about the record or forget to cite controlling authority").

46. *See*, *e.g.*, Abner v. Scott Mem'l Hosp., 634 F.3d 962, 964 (7th Cir. 2011) (threatening to dismiss appeal where an attorney incorrectly certified that a "rambling" brief complied with the relevant word limitation).

Comply with deadlines. The rules will also set forth deadlines governing, for example, the date by which an appellant must file her appellate brief, the time period within which the appellee must respond, and the deadline (if allowed), for appellant to file a reply. If you do not comply with these deadlines, the court may refuse to consider your brief and your client may ultimately file a malpractice action against you.[47]

Do not the attack your adversary or the court. Never personally attack your adversary, and always be respectful to the court. A disrespectful and combative tone will severely damage your credibility and could cause you to lose a case (even if you otherwise might have prevailed).

For example, do not say, "Counsel's meritless argument represents nothing more than a pattern of lying that has persisted throughout this litigation." Instead, say, "Counsel's arguments are without merit and based upon inaccurate facts." Similarly, never say, "The Plaintiff's argument is absurd." You should say, "The Plaintiff's argument is without merit."

Additionally, "over the top" language will diminish your credibility and risk alienating the court. For example, avoid saying, "The Defendant's conduct represented a horrific and shocking attempt to defraud Plaintiff into investing $250,000 in a failed business enterprise." A proper sentence might read something like: "The Defendant's behavior–based on material misrepresentations and omissions–fraudulently induced Plaintiff to invest $250,000 in a failing business enterprise"

Attempting to "over-persuade" the court with this type of language also will detract from the strength of your arguments. A court might ask, for example, "Why does this attorney need to use such inflammatory language? Does she believe her arguments are weak, and therefore has resorted to these tactics?" Stated simply, arguments are strong based upon your discussion of the relevant law and facts, not upon incendiary word usage. Thus, do not say,

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47. *See*, *e.g.*, *Papadopoulus v. Mylonas*, No. 11-4163, 2011 WL 5237312, at *3 (E.D. Pa. Oct. 31, 2011) (sustaining a malpractice action for an attorney's failure to comply with a 30 day filing deadline); Capitol Specialty Ins. Corp. v. Sanford Wittels & Heisler, LLP, 793 F. Supp. 2d 399, 403 (D.D.C. 2011) (failing to comply with 90 day deadline for class certification gave rise to a malpractice claim on behalf of attorney's clients); *In re* Dickhaus, 425 B.R. 827, 832 (Bankr. E.D. Mo. 2010) (explaining that, although no an intentional or malicious tort, missing a client's filing deadlines according to federal rules is malpractice and a violation of the professional rules of conduct); Brito v. Gomez Law Group, LLC, 658 S.E.2d 178, 181-82 (Ga. App. 2008) (filing a client's complaint after the statute of limitations had passed presented a triable issue against attorney for malpractice); Estate of Hards v. Walton, No. 93185, 2010 WL 3035995, at *3 (Ohio App. Aug. 5, 2010) (holding that attorney's failure to timely respond to opposing counsel's motions may constitute malpractice).

"Clearly, the Defendant's conduct, which consisted of publicly humiliating my client in the most abusive manner, was not only unlawful, but immoral and very much against the social standards that human beings should obey." Instead, you should say, "The Defendant acted unlawfully when she targeted Plaintiff for humiliation and ridicule."

Never attack the court. You may irreparably damage your case, your credibility, and your reputation.[48] Do not say, "The lower court's decision represented a bizarre approach to the merits of our case, and surprisingly revealed blatant ignorance by the judge." Instead, say, "The lower court's decision was inconsistent with governing precedent, and the court did not adequately consider both the relevant facts and important equitable principles."

Finally, when arguing in favor of a certain remedy, never tell the court what it "must" do. Instead, "respectfully request" the relief you seek and, if possible, offer alternative remedies from which the court may choose. A proper request for relief, for example, would be: "Jones respectfully requests that this court dismiss Smith's complaint or, in the alternative, transfer this case to the United States District Court for the Middle District of Florida."[49]

III. STYLE MATTERS JUST AS MUCH AS SUBSTANCE

It is not just what you say; it's also how you say it. While substance is extremely important, style matters too. A brief with excellent style signals to the court that the brief also is likely to be highly substantive, i.e., persuasive, reliable, and accurate. The following principles will help you create a brief with excellent style.

Maintain consistency in verb tense and tone. Consistency in verb tense and tone is indicative of a skilled and mindful writer. Consistency also avoids needless confusion in both the presentation of your arguments and the manner in which they are interpreted by the court. To begin with, avoid writing interchangeably between the past and present tense. Make sure

48. *See*, *e.g.*, Sanchez v. Carrollton-Farmers Branch Indep., 647 F.3d 156, 172 (5th Cir. 2011) (attacking a magistrate judge was "unjustified and most unprofessional and disrespectful").

49. *See The People's Court: Judge Milian "Flips Out" on Defendant* (WCIU television broadcast), *available at* http://www.youtube.com/watch?v=vnJnA_mt_UA (showing the litigant, a second-year law student at the University of Miami, being chastised by the judge for being disrespectful and confrontational); *see also*, U.S. v. Venable, 666 F.3d 893, 904 n.4 (4th Cir. 2012) (warning U.S. Attorneys that language used in appellate brief describing district court judge as "crabby and complaining," and poking fun at the defendant's lacking mental abilities would not be tolerated).

you do not inadvertently use both the past and present tense when describing a particular situation or event. Pick one and stick to it. There are, however, instances where there is a correct tense. Generally, you should use the past tense to describe events that happened in the past and present tense or future tense to describe the relief you are requesting from the court. Here's an example:

> Because the plaintiff refused to turn over the discoverable materials, this court should grant the defendant's motion to compel and order the plaintiff to produce copies of her medical records.

Additionally, a contract is a living, breathing document and should be referred to in the present tense. Thus, say, "The contract defines the term 'insured' to include the named insured and the named insured's resident spouse." Do not say, "The contract *'defined'* the term insured."

You also must be consistent with your tone. The tone of your argument directly impacts the persuasiveness and credibility of your brief. While you are always striving to maximize persuasion, you want to avoid being overly confrontational, emotional, or abrasive. You should write in a manner that reflects respect for your adversary and the court, demonstrates objectivity and fairness, and uses the facts and law (not extraneous or artificial words), to maximize persuasion. To ensure a consistent and proper tone, you should: (1) make sure that you start strong and finish strong, by drafting sentences and paragraphs that show energy, clarity, and effective word choice; (2) give yourself sufficient time to review and revise your brief; and (3) choose some of your favorite sentences and paragraphs and refer to them often as a model for writing the remainder of your brief.

Use strong, descriptive words. Word choice is a powerful tool because words have different meanings and degrees of force. Strong words strengthen arguments, and weak ones detract from arguments that would otherwise be powerful. Your words should be direct and descriptive. Using strong adjectives, for example, can be very effective. By using "scalding" instead of "very hot," and "frigid" instead of "very cold" you are allowing the court not only to see, but to feel what you are saying. You are also omitting unnecessary words.

There is a difference, however, between strong adjectives and inappropriate adjectives, which affect the quality and professionalism of your brief. For example, avoid adjectives such as "horrific," "awful," "filthy," "disgraceful," and "despicable." Also, remember that phrasal adjectives should be hyphenated, e.g., a run-of-the-mill negligence case.

Avoid weak word choices, including nominalizations. Weak words can detract from what would otherwise be a strong argument. If possible, avoid using nominalizations, that is, abstract nouns and words ending in "-ion." When you turn a verb

into a noun, you create a nominalization, and nominalizations lead to cloudy writing. For example, say, "This article examines the reasons for the judges' overloaded dockets," instead of "This article contains an examination of the reasons judges have overloaded dockets." Other examples of nominalizations include "executed an analysis of" (as opposed to analyzed), "performed an interrogation on" (as opposed to interrogated), and "made an objection to" (instead of objected). One way to avoid nominalizations is to carefully examine every word ending in "–ion" in your brief and determine whether the sentence in which the word is contained could be re-worded to have greater impact.

Additionally, do not use superfluous or unnecessary words. The words "clearly," "indisputably," and "unmistakably" add no value. They only add length needlessly and undermine the force of your argument. Similarly, do not use words that suggest you are hedging your position. Phrases like "it can be argued that," "one may argue that," and the like suggest tentativeness. Never be tentative. Pick a position and stick to it.

Do not use Latin, fancy words, and legalese. As Justice Scalia explained at the Appellate Judges Education Institute, lawyers should "use the English language."[50] The court should enjoy reading your brief and not be forced to consult a dictionary or use an interpreter to understand what you are saying.[51]

"Fancy words" hinder readability. Consider the following sentences:

> The plaintiff's claim that she was injured in the accident is nothing more than a taradiddle. The plaintiff was not injured in the accident and her subsequent medical issues bear no relationship to the accident. Plaintiff's claim that the accident caused her stroke is post hoc, ergo propter hoc.

In this example, the use of "fancy" words undermines the writer's argument. The reader is focused on trying to understand what the sentence means, rather than focusing upon the substance of what it says. Consequently, do not say something like, "The accident exacerbated Plaintiff's injury." Simply say, "The accident worsened Plaintiff's injury."

Additionally, do not say, "The Defendant's financial security is due primarily to Plaintiff's largesse." A more effective sentence

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50. Fisher, *supra* note 4.

51. Lawyers are not the only ones who sometimes have trouble drafting understandable sentences. In Miss. Bluff Motel, Inc. v. Rock Island Cnty., 420 N.E.2d 748, 751 (Ill. App. Ct. 1981), the court explained its ruling as follows: *"Parents patriae* cannot be *ad fundandem jurisdictionem*. The zoning question is *res inter alios acta*." The authors think, though even we are not entirely sure, that the sentences mean: "The State's inherent power to protect others cannot serve as the basis for standing. The zoning issue is not the business of the State."

is, "Defendant's financial security is due primarily to Plaintiff's generosity." An author once encountered a brief that utilized the term "farding" (which means "to apply makeup"). While the drafter of that brief may have thought he was being cute or clever in the use of the word "farding," its use served the opposite effect—it completely detracted from the substance of the drafter's argument. As general rule, choose words that convey your arguments in the simplest and most straightforward, manner. If there is a simpler way to say it, say it.

Likewise, when you are drafting a brief, do not say:

> As stated *supra*, the plaintiff's claim should be dismissed because, *inter alia*, it was not filed with the applicable statute of limitations period which, *a fortiori*, warrants dismissal of plaintiff's claim with prejudice.

The sentence above is confusing, even for lawyers. Keep it simple:

> Plaintiff's claim should be dismissed with prejudice because it was filed after the statutory limitations' period lapsed.

The difference in the readability of these two sentences—which say the same thing—is amazing. Through the use of easy-to-understand sentences, you increase both your persuasiveness and credibility as an advocate. Generally, you should avoid using legalese such as *infra*, *supra*, *inter alia*, *ipso facto*, *arguendo* and *a fortiori*. Of course, you should continue to use substantive legal phrases such as *voir dire* and *pro hac vice*.

Similarly, avoid words like "*herein*," "*therein*," "*wherein*," "*hereinafter*," "*heretofore*," and "*thereunder*." Also, try to eliminate the word "such" and other extraneous clauses. These words generally add nothing to legal documents and are the equivalent of verbal miscues such as "like" and "umm." For example, do not say, "The defendant is not in possession of any such documents." A better sentence is "The defendant possesses no responsive documents." Similarly, do not say, "Until such time as the parties reach an agreement." Keep it simple by saying, "Until the parties agree." You also must also be careful about your use of infinitives. Instead of saying, "In order to purchase this item" you should just say "To purchase this item."

Also, make sure that if you use a word, you know its proper definition. Avoid using words that are capable of more than one interpretation, commonly misunderstood, vague or imprecise. Do not say, for example, that "The plaintiff was weary not to underestimate her more experienced challenger." This is incorrect because weary means "tired." The correct sentence is, "The defendant was wary not to underestimate her more experienced challenger." Wary means "cautious," or "careful." Likewise, do not say "The Defendant did not understand the enormity of the

situation." The word "enormity," is commonly misunderstood–the primary definition is an "outrageous, improper or immoral act," not "large in size."

Finally, do not use colloquialisms (unless quoting from a brief), informal, or politically-incorrect words. Choosing these words will affect the quality of your brief and detract from its professionalism.[52] For example, instead of using "kid," use "child." Choose "elderly," not "old," "overweight," not "fat," and "economically disadvantaged" rather than "poor."

Use "artificial" emphasis sparingly. Underlining, bolding, and italicizing can be effective to emphasize a single word or short phrase. These techniques, however, should be reserved for the strongest and most important words and phrases you want to highlight.[53] Additionally, if you use these types of emphasis, be consistent. Avoid, for example, using both bold and italics in your brief, and do not use more than one type of emphasis on a single word or phrase. Finally, do not use emphasis excessively within a sentence. Consider this example:

> *In her deposition testimony, the defendant acknowledged that "although I knew that the failure to immediately repair my brakes would likely cause an accident, I thought that I would take a chance since I was getting them fixed in the morning."*

Versus

> In her deposition testimony, the defendant acknowledged that "although *I knew* that the failure to immediately repair my brakes would likely cause an accident, I thought that I would take a chance since I was getting them fixed in the morning."

Italicizing the entire sentence does nothing to add persuasive value to your argument. Accordingly, be strategic in your use of emphasis.

Beware of over-using block quotations. Some judges do not read block quotes; they skip them. For example, Judge Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit, has famously stated that he does not read block quotes.[54] If Judge Kozinski does not read block quotes, chances are

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52. *See* Baier v. Jersey Shore State Bank, No. 4:07-CV-2236, 2009 WL 2843325, at *1 n.1 (M.D. Pa. Aug. 31, 2009) (overusing colloquialisms detracted from the "formalism necessary to communicate [counsel's] argument efficiently"); *Grady v. Commonwealth*, 325 S.W.3d 333, 343 (Ky. 2010) (holding that Defendant was not adequately apprised of the risks of representing himself because the court's use of colloquialisms was "insufficient to satisfy the minimal requirement that a defendant be warned of the dangers he face[d] [by representing himself]").

53. McCrief v. Wachovia Bank, No. 2:12-CV-72, 2012 WL 3023174, at *1 (D.S.C. June 5, 2012) (advising the plaintiff to avoid bolding and italicizing excessively).

54. Interview by Bryan Garner of Judge Alex Kozinski, Chief Judge of the

many other judges do not either. Thus, if you are placing your best arguments in block quotes, you may be doing your client a tremendous disservice.

Block quotes are difficult to follow aesthetically, and the longer the block quote, the lower the chances the reader will understand its importance. Try to phrase ideas in your own words and use block-quotes sparingly, if at all.[55] Of course, while sentences over 50 words should be included in a block quote, block quotes with approximately 100 or more words should be separated into smaller sentences. Remember that, as outlined above, shorter sentences can be extremely effective.

Passive voice can be effective. Contrary to what you may have heard, using the passive voice can be effective. Passive voice is particularly effective when: (a) the identity of the acting party is unimportant (e.g., A bill clarifying Georgia's punitive damage statute was proposed.); (b) you do not know the identity of the acting party (e.g., The documents were destroyed.); or (c) you want to de-emphasize a particular fact by, for example, distancing the actor from the conduct (e.g., The victim was killed.) Remember, however, that passive voice is appropriate only in limited circumstances and even under those circumstances, you should use passive voice sparingly.

Bulleted and numbered points are helpful for emphasis. Bulleted and numbered points are especially helpful when outlining factors or elements of a claim or defense. For example, consider the following:

> The Age Discrimination in Employment Act ("AEDA")[56] prohibits an employer from refusing to hire an individual, firing an individual, or otherwise discriminating against an individual solely on the basis of that person's age.[57] There are several defenses to a claim of discrimination under the AEDA, including bona fide occupational disqualification, differentiation on the basis of factors other than age, and discharge or discipline for good case.[58]

Versus

> The Age Discrimination in Employment Act ("AEDA")[59] prohibits an

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U.S. Court of Appeals or the 9th Cir., available at http://www.lawprose.org/interviews/judges-lawyers-writers-on-writing.php?vid=kozinski&vidtitle=Hon._Alex_Kozinski_On_Over_Quoting (last accessed Feb. 24, 2013).

55. O-Grady-Sullivan v. Nev., No. 2:11-cv-00839, 2011 WL 6301047, at *4 (D. Nev. Dec. 15, 2011) (noting that the court "does not like reading long block quotes when counsel can summarize the law with their own, more concise language.).

56. 29 U.S.C. § 623 (West 2008).

57. *Id.* § 623(a).

58. *Id.* § 623(f).

59. *Id.* § 623.

> employer from refusing to hire an individual, firing an individual, or otherwise discriminating against an individual solely on the basis of that person's age.[60] There are several defenses to a claim of discrimination under the AEDA, including:
>
> - bona fide occupational disqualification;
> - differentiation on the basis of factors other than age; and
> - discharge or discipline for good cause.[61]

It is much easier for the reader to see these defenses to a claimed AEDA violation when they are separated from the rest of the paragraph rather than buried in the middle. Thus, when there are several facts or legal principles that strongly support your argument, you should consider using bullets or numbers to highlight them (be consistent). By doing so, you are emphasizing your best arguments in a direct, straightforward, and powerful manner that is easier to see and understand. Using bullets and numbered points is, in essence, letting the facts speak for themselves. Consider the following:

> In firing Plaintiff, DB Enterprises, Inc. ("DB") did not violate the AEDA. DB fired Plaintiff not because of her age, but for good cause. As outlined above, Plaintiff was fired because:
>
> - Plaintiff had been "written up" 7 times in 2011 and 3 times in 2012 for failing to timely report to work;
> - On 3 occasions, Plaintiff's supervisor had witnessed Plaintiff sleeping at Plaintiff's desk during business hours;
> - Plaintiff met only 56% of her sales goal for the 2011 fiscal year; and
> - On numerous occasions, in violation of the policies outlined in DB's employee handbook, Plaintiff sent political-themed emails to other DB employees.

Laying out the reasons the plaintiff was fired in bulleted sections makes a much more powerful impression on the reader than would be made if that information were put in the text of a paragraph.

Punctuate properly. It is essential to punctuate properly. End every sentence with a period and generally avoid using exclamation points[62] or question marks in your brief. These

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60. *Id.* § 623(a).

61. *Id.* § 623(f).

62. Angiolillo v. Bates, No. 2:08-CV-606, 2010 WL 916377, at *1 (M.D. Fla. Mar. 11, 2010) (use of exclamation points and other "unnecessary rhetorical devices" diminished plaintiff's arguments; he would be better served "focusing his submission on the legal merits to be determined"); E.E.O.C. v. Aaron Rents, Inc., No. 3:08-CV-683, 2009 WL 4068008, at *5 (S.D. Ill. Nov. 24, 2009) ("The Court is particularly dismayed by the excessive use of exclamation points in the supporting legal memoranda."); State v. Gallentine, 795 N.W.2d

punctuation marks are commonly used as artificial attempts to "over-persuade," and will not add merit to your argument.[63]

Use transition words to ensure flow and clarity, but be careful of overuse. Words such as "furthermore," "additionally," and "moreover," are helpful in ensuring flow, clarity, and transition. Be careful, however, to avoid overusing transition words. If every sentence, or most of your sentences, begin with a transition word, you likely are using these words excessively. Remember, your writing should have a natural flow and clarity–transition words enhance, but do not create, effective flow. Here is an example:

> In *Tinker v. Des Moines Indep. Community School Dist.*,[64] the Supreme Court held that the First Amendment to the United States Constitution gives citizens broad rights to freedom of speech. Those rights "applied in light of the special characteristics of the school environment, are available to teachers and students."[65] Moreover, students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[66] However, the First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings."[67] Furthermore, students' First Amendment rights are "applied in light of the special characteristics of the school environment."[68] Additionally, a school may regulate speech that is "inconsistent with its 'basic educational mission,'" even if that same speech could not be regulated in a non-educational setting.[69]

Here, the transitions are overused and, by the end of the paragraph, have become distracting. Consider the more appropriate use of transitions in the same paragraph below:

> The First Amendment to the United States Constitution gives citizens broad rights to freedom of speech.[70] Those rights "applied in light of the special characteristics of the school environment, are available to teachers and students," who "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[71] The First Amendment rights of students, however, "are not automatically coextensive with the rights of

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63, 63 (Wis. Ct. App. 2010) ("Exclamation points aside, we do not find [the defendant's] arguments persuasive.").

63. "Despite the plethora of exclamation points and question marks in plaintiff's complaint, nothing in either the complaint or the motion reveals that any of the judges acted outside the scope of their judicial capacity." Spencer v. McNamara, No. 10-1678, 2010 WL 3168435, at *1 (E.D. La. July 16, 2010).

64. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

65. *Id.* at 506.

66. *Id.*

67. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

68. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

69. *Id.* (quoting *Fraser*, 478 U.S. at 685).

70. *Tinker*, 393 U.S. at 506.

71. *Id.*

> adults in other settings."[72] Students' First Amendment rights are "applied in light of the special characteristics of the school environment."[73] Therefore, a school may regulate student speech that is "inconsistent with its 'basic educational mission,'" even if that same speech could not be regulated in a non-educational setting.[74]

As you can see, you can use transition words in a way that increases the flow of your brief. Remember to use, but not overuse, transition words.

Be careful of cloudy pronoun usage. If there is any room for confusion regarding the subject to which a pronoun refers, do not use that pronoun. If, for example, you say, "The defendant struck the plaintiff, injuring his hand," the court might ask: Whose hand was injured? The plaintiff's hand? The defendant's hand? Avoid this common mistake. Do not say that "The defendant told the judge he was sorry. He then sat down." This begs the question: Who sat down? The judge? The defendant?[75] You should always strive to make your writing as clear as possible. While conciseness is very important, so is clarity. Replace pronouns that are confusing, even if doing so makes your sentences longer.

Use gender-neutral language. Non gender-neutral language can be distracting and even confusing.[76] In the abstract, always strive to use gender-neutral language. Avoid using "he" throughout your brief, unless you are referring to a specific person. Instead of saying, "Please state the name of any expert witness and provide a copy of his curriculum vitae," change the sentence to "Please state the name of any expert witness and provide a copy of that expert's curriculum vitae." Use words such as "chairperson"

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72. *Fraser*, 478 U.S. at 682.

73. *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 363 U.S. at 506).

74. *Id.* (quoting *Fraser*, 478 U.S. at 685).

75. Cloudy pronoun usage can result in confusion. *See* U.S. v. Lighte, 782 F.2d 367, 375-77 (2d Cir. 1986) (noting questions asked of defendant during grand jury testimony were ambiguous because of imprecise use of pronoun "you" and could not form basis of later perjury conviction); Bourn v. Geo Group, Inc., No. 11-cv-02628-BNB, 2012 WL 764478, at *1 (D. Colo. Mar 7, 2012) (finding use of pronouns "I," "me," "my," and "we" in complaint resulted in confusion about which plaintiffs were asserting certain claims); Upjohn Co. v. Am. Home Prods. Corp., 598 F. Supp. 550, 557 (S.D.N.Y. 1984) (finding that use of pronouns in consumer survey was "so confusing as to be almost 'grammatically untrue"); Leehaug v. St. Bd. of Tax Comm'rs, 583 N.E.2d 211, 212 (Ind. Tax 1991) (noting relative pronoun placed at end of group of words in Indiana tax statute rendered court unable to determine which word or words pronoun modified).

76. Probst v. State, 547 A.2d 114, 120 (Del. 1988) (Delaware Supreme Court reversed defendant's conviction because trial court's use of masculine pronouns in its jury instruction when referring to defendant-sister could have confused the jury about whether it was evaluating sister's conduct or conduct of her co-defendant-brother).

instead of "chairman," "flight attendant" rather than "stewardess," and "police officer" in lieu of "policeman." When referring to a specific person, however, it is completely appropriate to use gender-specific terms.

Do not use the same word twice in one sentence. Using the same word twice in one sentence reflects poor word choice, and you risk having the court be distracted by your writing style rather than focused upon the substance of your argument.

The "little things" are important. The "little things" matter and can often have a direct impact on the outcome of your case. While nobody is perfect, throughout your career you will continue to evolve and discover new ways to enhance your writing. Legal writers often overlook the importance of spelling and grammar.

Spelling and grammar. Your credibility with the court is essential and can be affected at a very early stage. If, upon initially reviewing your brief, the court notices spelling errors and grammatical mistakes, your credibility–and ability to persuade–will be substantially diminished. The court might ask itself, "If this attorney cannot properly proofread her document, how can I (we) trust that her use of relevant case law is accurate?" The court might also ask, "If there are so many grammatical errors, how can I trust that this attorney's representation of the facts is truthful, not misleading, and otherwise accurate?" In other words, what you might think are "small" mistakes can, in fact, be the big mistakes that impact the outcome of your case.

Thus, it is critical to: (1) proofread and revise (do not simply rely upon spell-check); (2) print and read your brief for spelling and grammatical errors (proof-reading on your computer screen enhances the likelihood that you will miss something); and (3) double-check small and similar words, such as "is," "it," "if," "in," "too," "to," "two," "of," "or," and "on."

For example, you want to avoid mistakes such as "Plaintiff went to the grocery store and purchased too items." Also, do not make the "your" v. "you're" mistake. Do not say, for example, "I went to the grocery store and saw you're mother." Also, know the difference between "affect" and "effect." Be careful not to say, "Defendant's words severely effected Plaintiff's reputation." When you are harmed or directly impacted by something, you are "affected" by it. Also, be sure not to make the "their" v. "there" mistake. It's not, "I went to there house," it's "I went to their house."

To ensure a brief of excellent quality, do not wait until the last minute—be sure to give yourself sufficient time to comprehensively, thoroughly, and reflectively proofread the brief. This also applies to proofreading for content. Remember, if you have too little time, the chance that you will produce your best work is small. In one case, an attorney who ran out of time to draft

a brief passed off mass sections of a hornbook as his own work.[77] Avoid this problem and, ideally, give yourself at least one day after the document is complete to proofread and revise.

Understand the distinction between "that" and "which." Use "that" for essential, restrictive clauses. Essential clauses are necessary in that the meaning of the sentence is dependent on the presence of the clause. For example, "Insurers should avoid writing policies that are ambiguous." "That are ambiguous" is a restrictive clause. The sentence takes on a different meaning without it. Insurers should not avoid writing all policies, but should avoid writing policies that are ambiguous.

Use "which" for non-essential clauses. Non-essential clauses generally add additional, descriptive information. If a non-essential clause is removed, the meaning of the sentence will not change. For example, "Trials, which are costly, are rarer today than in years past." "Which are costly" is a non-essential clause. The sentence has the same meaning if the phrase is removed. Therefore, "which" is appropriate.

Avoid contractions. Do not use contractions such as "don't," "doesn't" "can't," and "couldn't." These words give your brief an informal and potentially unprofessional tone.

Use dashes. Dashes enable you to concisely include additional facts that you want to emphasize. When the reader sees dashes, it creates a stronger pause, thus enabling emphasis through short, powerful words. Commas do not have the same effect. Consider these two sentences:

> The plaintiff cannot prove an essential element of contract formation—a meeting of the minds—and therefore cannot recover for breach of contract.

Versus

> The plaintiff cannot prove an essential element of contract formation, a meeting of the minds, and therefore cannot recover for breach of contract.

Notice that in the second sentence, the information you are trying to emphasize—the element that is unmet—is not as clear.

Use an Oxford comma. An Oxford comma, also known as a serial comma, is advantageous because it avoids confusion and misinterpretation. Using a serial comma does not guarantee your sentence will be unambiguous, but it does guarantee the number and descriptions of items in a list will be clear. The case for the serial comma is not just hypothetical, though. Courts across the country have been called on to analyze the meaning of documents

77. Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 757-58 (Iowa 2010).

containing, and lacking, serial commas.[78] Sometimes the serial comma question is a matter of life and death, as it was for Sir Roger Casement who was, quite literally, hanged by a comma.[79] The moral of the story—make the use of a serial comma a habit.

Avoid comma splices. Comma splices run rampant in legal documents. Two independent clauses cannot be connected with a comma—EVER. An independent clause is a clause that can stand on its own as a sentence. To join independent clauses, you need a coordinating conjunction, such as "and," "but" and "so." Thus, for example, do not say "I went to work this morning, it was very boring." Instead, say "I went to work this morning, and it was very boring."

Use semi-colons properly. You should use a semicolon to separate independent clauses (clauses that can stand on their own as sentences) that are not joined by a coordinating conjunction. For example, "Judge Gresham granted the motion to dismiss; the case went to the Court of Appeals." You should also use a semicolon to separate an independent clause from a clause that begins with a transitional phrase, such as "therefore." Here is a good example:

> Judge Gresham appeared to agree with the plaintiff during oral argument; therefore, the plaintiff's counsel felt optimistic that the plaintiff's motion would be granted.[80]

Avoid and/or. Choose one. Why? Using and/or suggests equivocation rather than consistency and clarity. Furthermore, often when writers use "and/or," they do not actually mean "and/or," they mean "or." If you believe "and/or" is appropriate, consider writing it this way: Scalia or Thomas or both.

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78. *Commonwealth v. Silva*, 488 N.E.2d 34, 36 (Mass. App. Ct. 1986) (interpreting criminal statute on trafficking and distribution of cocaine). *See also* Telenor Mobile Commc'ns AS v. Storm, LLC, 587 F. Supp.2 d 594, 607-08 n.11 (S.D.N.Y. 2008) (noting that "the omission of the serial comma in the Shareholders Agreement definition of 'control' accounts for much, if not all, of the confusion here"); *Estate of Braden v. State*, 266 P.3d 349, 352 (Ariz. 2011) (interpreting "enterprise," defined as "any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity"); Trautmann v. Christie, 14 A.3d 22, 26 (N.J. Super. Ct. App. Div. 2011) (interpreting meaning of "personal information," defined as "information that identifies an individual, including an individual's photography . . . telephone number, and medical or disability information").

79. *See* Rex v. Casement, [1917] 1 K.B. 98, 129, 134, 138-39, 144 (Eng.) (holding a man guilty of treason based on the placement of a comma in a statute).

80. *See also* BRYAN A. GARNER, THE REDBOOK A MANUAL ON LEGAL STYLE 12-15 (Owen L. Anderson et al. eds., 2d ed. 2006) (providing several other examples on the proper use of semicolons).

Is it Court or court? Keep in mind that Court (uppercase) should be used when referring to (1) the Supreme Court of the United States; (2) Federal Courts of Appeal; and (3) State Supreme and Appellate Courts. When referring to trial courts, you can choose whether to use "Court," or "court," but be consistent.

IV. PRACTICAL TIPS FOR THE "REAL WORLD"

There is a substantial amount of "real world" advice that just cannot be taught or learned in a law school classroom. This section strives to give you some practical tips to make your transition into law practice easier, enjoyable, successful, and rewarding.

Pursue your passions. During your first-year of law school, or before, read or watch "The Last Lecture" by Randy Pausch.[81] Randy Pausch was a popular professor at Carnegie Mellon University. Sadly, at the age of 45, Professor Pausch was diagnosed with inoperable pancreatic cancer and given six months to live. Prior to his death, Professor Pausch gave what is called "The Last Lecture" at Carnegie Mellon, which is ordinarily reserved for retiring professors. Unfortunately, for Randy Pausch, this was his "Last Lecture."

During his speech, which Professor Pausch entitled "Really Achieving Your Childhood Dreams," he reflected on his life and discussed how, even in the face of death, he was truly happy because he lived the life of his dreams. Professor Pausch's lecture is extraordinarily inspirational because of its message: life is short and you never know when it's going to end. But if you live each day in the moment, and pursue the things that you find rewarding, fulfilling, and meaningful, then you will be at peace.

This is important advice for anyone seeking a career in the legal profession because we all want to find fulfillment as lawyers and people. To this end, do not conform or settle for a job that you do not want. You do not have to follow a certain path. You are the author of your legal career and you will create your own path. By following your passions and dreams, you will not only find happiness, but you also will help others and serve the profession in a truly meaningful way.

One thing you should know about the best brief the Supreme Court of the United States has ever read. Before he was the Chief Justice of the Supreme Court of the United States, John Roberts was a partner at the Washington, D.C. law firm of Hogan and Hartson, L.L.P. During that time, Chief Justice Roberts submitted a brief (on Petitioner's behalf) in *State of Alaska, Department of*

81. *See generally*, RANDY PAUSCH, THE LAST LECTURE (2008) (telling the story of Randy Pausch's life and his last lecture). *See also* Randy Pausch, Randy Pausch Last Lecture: Achieving Your Childhood Dreams, YOUTUBE, http://www.youtube.com/ watch?v=ji5_MqicxSo (last visited Feb. 24, 2013).

Environmental Conservation v. United States Environmental Protection Agency et al.[82] The Supreme Court later said that Roberts' brief was the best it had ever read.[83] And it was the losing brief. It was the best brief despite the fact that it was the losing brief!

The point is that you can write the best brief the Supreme Court has ever read, yet still lose the case. Despite the most effective writing and persuasive techniques, the court will still decide each a case on the merits. The court will examine the facts and law in their totality and make a decision that it believes is correct, just, and fair. Even the "best" brief cannot save a losing case.

Your brief is more important than oral argument. In the vast majority of cases, your brief will be the deciding factor in whether the court rules in your favor. Your brief is more important than oral argument. While oral argument presents another opportunity for you to persuade the court, it is not the ideal forum in which to do so. During oral argument, judges are often seeking merely to clarify any confusion they may have had when reading your brief or to question you concerning specific issues. Most of the time, you will not have the ability to control oral argument and present your strongest points to the court. While you may be able to do so, it will not be in sufficient detail or depth. Thus, while you must always be prepared for and skilled at oral argument, recognize that your brief is more important.

Use common sense. Do not forget that judges are human beings, and they want to reach decisions that are reasonable, fair, and just. As such, always be sure to remember to "see the forest from the trees" and keep the "big picture" in mind. Your brief should not consist merely of hyper-technical legal analysis applied to the facts in an overly removed or rigid manner. When telling the story of why your client should prevail, show the court why it's the "right thing" to rule in your favor. Re-enforce your theme and let your writing have a human element so that the court sees both the legal validity and the common sense reasons it should adopt your position. Judges want to do the right thing. Persuade them that,

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82. The decision can be found at Alaska Dep't of Envtl. Conservation v. U.S. E.P.A., 540 U.S. 461 (2004). *See also* Alaska Dept. of Envtl. Conservation v. U.S. E.P.A., 2003 WL 2010655 (U.S.) (U.S. Pet. Brief, 2003).

83. *See* Ross Guberman, *Five Ways to Write Like John Roberts* (2010), *available at*
http://www.legalwritingpro.com/articles/john-roberts.php (explaining that two Supreme Court insiders considered Roberts' brief to be the best Supreme Court Justices had ever seen); Bruce Carton, *How to Draft Like a Brief-Writing Rockstar*, LEGAL BLOG WATCH (Mar. 2, 2010, 11:21 AM), http://legalblogwatch.typepad.com/legal_blog_watch/2010/03/how-to-write-like-a-brief-writing-rockstar.html (Dec. 11, 2012) (explaining that a brief Justice Roberts submitted was the best brief the Justices had ever seen).

by ruling for your client, they are doing precisely that.

Develop your own process. If you are not sure how to get started drafting your brief, consider starting with an area or a point of law that is easy to explain or address. For example, are there threshold issues? If so, go ahead and draft the paragraph outlining the threshold issues and explaining why they are not, in fact, at issue. Or, do you know the law, but are not sure about how you want to prepare your analysis? Go ahead and draft the "Legal Authority" section of the brief outlining the relevant case law, statutes, or regulations. Often you will find that once you get over the initial writer's block, your thoughts will be easier to get on paper.

Consider using a checklist. It can be very helpful to develop a comprehensive checklist that includes both the substantive and stylistic tips that you need to be mindful of when drafting your brief. A checklist can serve as an important reminder—both while you write and revise—of those things you may have overlooked. Some items you may want to include on your checklist are:

- Does my brief comply with the relevant court rules?
- Do I have a powerful "Introduction"?
- Did I accurately represent the facts and law?
- Do my facts tell the story of why my client should win?
- Did I avoid unnecessary words, "fancy" words, and legalese?
- Did I avoid long sentences and paragraphs?
- Did I accurately cite authority and include pin cites?
- Did I ensure that my authority is still "good law?"
- Did I include a thorough "Analysis" section?
- Did I effectively address relevant counter-arguments?
- Did I acknowledge weaknesses in my own argument and explain why those weaknesses do not affect the outcome of my case?
- Did I proofread for spelling and grammatical errors?

A little more advice on proofreading. It is important to proofread on paper because it increases the likelihood that you will identify all relevant spelling and grammatical errors. When reviewing your brief for substance, ask yourself these questions:

- Have I thoroughly explained the status of the law in a way that is understandable to someone who knows nothing about this particular area?
- Does my document say what I want it to say?
- Have I made all the substantive points I want to make?
- Are there apparent weaknesses in my arguments that I have failed to address?
- Have I failed to discuss threshold issues?

With respect to grammar:

- Is there subject-verb agreement?
- Do I have parallel tenses?
- Is my comma usage correct?
- Is my word usage proper?

Regarding overall impression:

- Are my sentences too long and convoluted?
- Does the order/organization make sense?
- Does the brief "flow"? Is it easily readable?
- Is the font consistent? (Don't laugh—MANY briefs contain multiple fonts.)

V. CONCLUSION

Effective legal writing is not simply about presenting facts, discussing legal authority, applying rules, analyzing arguments, or following formulas. To the contrary, excellent legal writing speaks to the court in a manner that communicates not just what you want, but what is fair, just, and equitable for your case, for the parties, and for the law itself. As such, your writing should not simply tell, communicate, or advocate for a remedy. Instead, it should initiate a conversation that, through clarity and brevity, sets you apart as an advocate whose position makes both good sense and good law. By writing with honesty and forthrightness, using your facts to tell a story, respecting your advocate as well as the court, putting your best arguments first (while acknowledging weaknesses), and appealing to fairness and justice, you will be both persuasive and credible.

Of course, the process of becoming a strong legal writer is an evolutionary one that develops with time and practice. By applying the principles discussed above, you can begin that process and learn to advocate in a way that maximizes your ability to communicate precisely what you want to say in the way you want to say it. Always know, however, that your writing skills will continue to develop and improve throughout your legal career as you both apply these suggestions and work to find your own voice. We hope that this Article can serve as a helpful resource for you, whether as a law student, a lawyer, or in whatever capacity you may be called upon to act as an advocate.