

# 7

## Effective Brief Writing

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### 7.1 Introduction

Every lawyer who ever has to make a written submission to a court—which is to say every litigator—owes it to his or her client to be as effective a brief writer as possible. Good brief writing can win a case, and bad brief writing can lose one. This is what the Chief Justice of the United States has to say on the topic:

We depend heavily on the lawyers. Our chances of getting a case right improve to the extent the lawyers do a better job and when you see something like bad writing, the first thing you think is, well, if he didn't have enough time to spend writing it well, how much time did he spend researching it? How much time did he spend thinking out the ramifications of his position? You don't have a lot of confidence in the substance if the writing is bad.<sup>1</sup>

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<sup>1</sup>Interview by Bryan A. Garner with John G. Roberts, Chief Justice of the United States, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

What are the hallmarks of a good brief? Justice Kennedy has the answer to that: “It must be lucid, cogent, succinct, interesting, informative, convincing.”<sup>2</sup> We will touch on all of these criteria throughout this chapter. But first let us share some general thoughts about the brief writing experience.

It is often said that brief writing is more art than science. We would go further and say that it is all art and no science. Indeed, in describing our work as brief writers to nonlawyers, we often compare it to that of a sculptor, who starts with a lump of clay and continuously kneads it, prods it, and shapes it until eventually it becomes—we hope—a thing of beauty that conveys something powerful to the viewer. A brief can and should do the same thing: It should convey the viewpoint of the authors (and their client) in a forceful way that is most likely to persuade its intended audience—the judge or judges who will be deciding the case.

Like sculpting, brief writing is part inspiration and part hard work. Some lawyers are natural brief writers. They have an instinctive sense of how to convey a point, how to organize their arguments, and how to engage a reader. Other lawyers become successful brief writers by exposing themselves to the good writing of accomplished brief writers, reading what expert brief writers have to say on the subject, and, most importantly, holding themselves to a high standard of excellence whenever they have a brief to write.

One eminent teacher of brief writing, Bryan A. Garner, has suggested that Maslow’s four-stage analysis of skill development applies fully to the art of brief writing.<sup>3</sup> Maslow’s four stages are (1) unconscious incompetence; (2) conscious incompetence; (3) conscious competence; and (4) unconscious competence. The terms pretty much suggest their meaning. Lawyers in the first phase think that they are perfectly fine brief writers, when in fact they are rotten ones. As Garner puts it: “These writers are clueless about their own cluelessness.”<sup>4</sup> Garner believes that a majority of lawyers are in this first category. Lawyers in the second phase are poor brief writers and know it. “As you might suspect, relatively few legal writers are in this category because they either repress their awareness \* \* \* or work to remedy their deficiencies.”<sup>5</sup> The third stage is for lawyers who have made the effort to become strong brief writers and are on their way to accomplishing that objective. As Garner puts it: “These are the ones who trouble themselves to find out what respected authorities say about writing. They don’t leave readily answerable [stylistic and syntactical] questions unanswered.”<sup>6</sup> The fourth category is comprised of lawyers who “have integrated their years of learning so thoroughly into their writing that their accumulated knowledge is like muscle memory.”<sup>7</sup>

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<sup>2</sup>Interview by Bryan A. Garner with Anthony M. Kennedy, Associate Justice, United States Supreme Court, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

<sup>3</sup>Bryan A. Garner, *Legal Writing: Great Lawyers Seek the Highest Level of Writing Competence*, STUDENT LAW., Mar. 2004, at 10.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 11.

<sup>7</sup>*Id.*

Garner believes (and we agree) that far too few lawyers are in the third and fourth categories.

The goal of this chapter is to help readers move up through the Maslowian hierarchy. We will share some practical tips for improving your brief writing. Many of these tips will seem obvious. Yet it is surprising how often lawyers overlook them. (Perhaps it should not be, given Garner's conclusion that a majority of lawyers are "unconsciously incompetent" when it comes to brief writing.) Some of the tips in this chapter may seem idiosyncratic; they reflect "the Mayer Brown way" or, in some instances, simply the preferences of one or both of the authors. We emphasize that there is no one right way to write a brief, just as there is no one right way to depict a landscape in a painting. Just as with good painting, though, there are some general themes of line, form, and color that characterize a well-executed brief, even though much must be left to the style and imagination of the craftsman. We feel quite confident in saying, however, that there are definitely wrong ways to do things. We will try to point out many of those.

## 7.2 Good Brief Writing Starts With Good Writing

It is impossible to become a first-rate brief writer without mastering basic writing skills. As one of our colleagues likes to put it in his annual training program for our new associates: "There is no such thing as good *legal* writing, just *good writing*." A brief to a federal appellate court is a piece of formal writing. While it should not be stilted or pretentious, the brief must convey a tone of polished professional skill in the art of written communication. After all, federal appellate judges make their living as legal writers. They expect that the lawyers who appear before them will show due regard for the craft of good writing when they submit one of the hundreds or thousands of briefs the judges must read each year.

This means that, however graceful or "challenged" your own personal writing style, at a minimum you must either know the rules of grammar, punctuation, and usage or have a finely honed intuitive understanding of them. You simply cannot afford to have a court distracted or confused by grammatical errors, which at best suggest sloppy thinking and at worst can change the meaning of your sentences. As Chief Justice Roberts explains, "it's like music. If you're listening to music and somebody \* \* \* hits the wrong note, it kind of detracts from it and you hear it. \* \* \* [Y]ou notice it, and if you notice it, you're not noticing the argument, you're noticing the words and that's unfortunate."<sup>8</sup> Indeed, distracting the reader could be the least of your problems. As Justice Stevens warns, "it's perhaps unfair, but if someone uses improper grammar you begin to think well maybe the person isn't as careful about his or her work as he or she should be \* \* \*."<sup>9</sup>

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<sup>8</sup>Interview by Bryan A. Garner with John G. Roberts, Chief Justice of the United States, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

<sup>9</sup>Interview by Bryan A. Garner with John Paul Stevens, Associate Justice, United States Supreme Court, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

We regularly see briefs that contain whopping grammatical errors. For example, in a case in which we recently were asked to take over the appeal, the briefs in the trial court *repeatedly* used the invalid conjunction “neither \* \* \* or” instead of “neither \* \* \* not.” Of course, no one would suggest that the outcome of the case turned on that, but there is a good likelihood that this glaring error caused the district court to start thinking about the lack of basic grammar training in modern secondary education instead of the arguments the party was trying to make. Another example involves the increasingly pervasive “wrongly suppressed *that*.”<sup>10</sup> This error involves dropping the word “that” from sentences in what can only be assumed to be an effort to sound more conversational. Doing so often creates ambiguities, distracting the reader from the point being made. Here is an example of this error from a recent Supreme Court brief: “the addressee-signature provisions require delivery retailers to ensure over-the-doorstep delivery is to the purchaser \* \* \*.” The omitted “that” injects ambiguity into the sentence, causing at least some readers to believe that the retailers are ensuring the delivery rather than that they are ensuring that the package is delivered to the purchaser.

A third error worth mentioning is misplacement of the adverb “only” within a sentence, so that it is far removed from the word or phrase it is supposed to limit. This clumsy writing leaves the reader in doubt about the intended object of the limitation. As one expert on style observes, “only is perhaps the most frequently misplaced of all English words.”<sup>11</sup> Moreover, this is not simply a matter of grammatical correctness. “The more words separating *only* from its correct position, the more awkward the sentence” and the greater the likelihood of ambiguities in meaning.<sup>12</sup> Again, the point is not that dropping “that” from sentences or misplacing “only” will cause a judge to rule against you, but rather that it could distract the judge and cause her to lose the thread of your argument.

Another common flaw in brief writing is the use of the “run on” sentence, a sentence with several clauses. Different clauses begin with signals such as “and,” “or,” “but,” “however,” “because,” “since,” “although,” and the like. Lawyers tend to be smart. They can think about several thoughts in sequence, even if not simultaneously. They also appreciate nuance and qualification. That is why it is possible to build several different thoughts into a single sentence by using several clauses. The problem comes when a busy reader—such as a federal appellate judge—is skimming a brief that contains lengthy sentences packed with several distinct thoughts. It is hard enough to convey a single important thought to a busy reader. The odds of getting a point across effectively decline dramatically when the brief writer tries to force too many thoughts into a single sentence. No later than the editing process, chop those sentences into intellectually bite-sized morsels, so that the busy reader can absorb and digest each

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<sup>10</sup>BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 649 (1998).

<sup>11</sup>*Id.* at 469.

<sup>12</sup>*Id.*

distinct thought before sampling the next one. Any sentence that runs more than four lines should raise a caution flag.

Then there is the overuse of the “passive voice,” where the subject of the sentence is being acted upon rather than doing the acting. This construction either is ambiguous or requires additional words to clarify the action. It also is generally a less forceful way of conveying a point. (They call it “passive” for a reason.) Compare “Jones was misled by Apex’s misrepresentation that its product could cure the common cold” with “Apex misled Jones by representing that its product could cure the common cold.”

Fortunately, for those who are “consciously incompetent” in this area (as well as those who are “consciously competent”), there are many useful and well-written guides to good, contemporary American writing style. The Court of Appeals for the Eleventh Circuit mails a copy of Strunk and White’s *The Elements of Style* to newly admitted attorneys. For half a century, the Strunk and White book has been the most user-friendly and compact guide to basic rules of good and proper writing. We also have found Bryan Garner’s *A Dictionary of Modern American Usage* to be an invaluable resource. Find several writing-style books that you like and read them cover to cover; then keep them on hand for reference.

Your colleagues are another important source of knowledge. When you have the opportunity to have your work edited by more senior writers, pay very close attention to the changes they make. This is an opportunity to raise your consciousness about what you are doing right and what you may be doing wrong.

The importance of taking the time to improve your overall writing skills cannot be overstated. As Chief Justice Roberts recently explained during an interview conducted by legal writing guru Bryan Garner, bad writing can lose a case:

Because [the judges] may not see your strong case. It’s not like judges know what the answer is. I mean we’ve got to find it out. \* \* \* And so, when you say can bad writing lose a strong case, if it’s bad writing, we may not see that you’ve got a strong case. It’s not that this is poorly written so you’re going to lose. It’s so poorly written that we don’t see how strong the precedents in your favor really are because you haven’t conveyed them in a succinct way, or we don’t see exactly how the statutory language works together to support you because you haven’t adequately explained that.<sup>13</sup>

Justice Alito agrees that bad brief writing can lose a case “because you may totally fail to convey the point that you want to make to the court,” while good brief writing can win a marginal case because “[a] marginal case by definition is one where you are pretty close, and good writing may persuade the judge that an argument should be accepted.”<sup>14</sup>

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<sup>13</sup>Interview by Bryan A. Garner with John G. Roberts, Chief Justice of the United States, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

<sup>14</sup>Interview by Bryan A. Garner with Samuel A. Alito, Associate Justice, United States Supreme Court, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

### 7.3 The Goal of Brief Writing

As with any other pursuit, mastering the art of brief writing begins with understanding the goal of brief writing. To state what should be obvious, the goal of brief writing is to persuade the audience—i.e., the judge or judges who will be deciding the case. It is *not* the goal to vent one's spleen about the unfairness or stupidity of the trial judge, no matter how aggrieved the brief writer and/or the client may feel. Nor is it the goal to settle a score with opposing counsel. It also is not the goal of an appellate brief to impress the client or the court with the author's vocabulary or erudition. The sole function of a brief is to assist the court in coming to the conclusion that the brief writer's position is the correct one.

### 7.4 The Brief Writer as Translator

The first step in persuading the court that the brief writer's position is correct is making the facts and law understandable to the judge. A good brief writer sees herself as a translator, explaining complex factual and legal concepts in a way that a reader with limited time and no prior knowledge of the case will easily comprehend. Although that goal frequently entails simplifying—and always involves omitting irrelevant details—the good brief writer is careful not to sacrifice precision or to gloss over important nuances.

Most judges, whether at the trial or appellate level, are generalists. They are called upon to decide a very broad range of legal issues and, as a consequence, seldom have the luxury of becoming an expert on any. By contrast, many lawyers have limited their practices to one or a few areas and can legitimately claim deep expertise in those areas. That expertise can be a double-edged sword. Although the value of an encyclopedic knowledge of a complex area of law (such as tax, patents, government contracts, or antitrust) is obvious, lawyers with such knowledge are sometimes susceptible to omitting necessary background material, bogging down in the minutiae, and/or slipping into jargon that is incomprehensible to someone who has less familiarity with the field. That is not a problem at an ABA section meeting, but can be a very serious problem in a brief that is going to be read by a generalist court. If the judge has to work too hard to understand what you are talking about, there is a very good chance that the force of your arguments will be lost on him.

In his sardonic speech on how to *lose* an appeal, Judge Alex Kozinski of the Court of Appeals for the Ninth Circuit put it this way:

[W]inning arguments should not just be buried, they should also be written so as to be totally unintelligible. Use convoluted sentences; leave out the verb, the subject, or both. Avoid periods like the plague. Be generous with legal jargon and use plenty of Latin. And don't forget the acronyms or the bureaucratese.<sup>15</sup>

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<sup>15</sup>Honorable Alex Kozinski, *How You Too Can \* \* \* Lose Your Appeal*, MONTANA LAW., Oct. 23, 1997, at 5, 22.

One frequent method of confounding an appellate judge is the technique of packing a sentence with arcane acronyms in a misguided effort to save space. Talking in code may be fun as a child's game, but it does not satisfy the goal of communicating with the decision-maker on an appeal. The technique often characterizes the briefs of specialist lawyers who have immersed themselves in the facts of a particular case and in a specific area of law. They know what they are talking about, even if the judge is not in on the secret.

Speaking for a panel of the Seventh Circuit, Judge Posner recently made this precise point. After noting that “[r]einsurance is a dauntingly complex, esoteric field of business and the briefs in this case are correspondingly complex and esoteric,”<sup>16</sup> Judge Posner went on to scold:

A note, finally, on advocacy in this court. The lawyers' oral arguments were excellent. But their briefs, although well written and professionally competent, were difficult for us judges to understand because of the density of the reinsurance jargon in them. There is nothing wrong with a specialized vocabulary—for use by specialists. Federal district and circuit judges, however, with the partial exception of the judges of the court of appeals for the Federal Circuit (which is semi-specialized), are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has demonstrated. The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves.<sup>17</sup>

Here is a too-good-to-be-true example of what not to do provided by Judge Kozinski:

*LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RPT and TIP conformity to SIP.*<sup>18</sup>

An effective brief will describe the law in a way that will be crystal clear to a reader who is sophisticated but lacks specific knowledge of the particular legal question that is being discussed. Effective brief writers take the same approach to the facts, boiling down complex matters to their essential core and explaining the relevant facts with precision and economy.

Here is an example from a Mayer Brown brief written in a case involving a challenge to the Environmental Protection Agency's decision not to require automobile manufacturers to include on-board refueling vapor recovery (ORVR) systems in their vehicles. Our clients were trade associations that had intervened in the D.C. Circuit to defend the EPA's action. Our brief argued that Congress could not possibly have intended to force EPA to require manufacturers to install ORVR systems notwithstanding the safety risks such systems entail. But to do that, we first needed to explain both the ORVR

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<sup>16</sup>Indiana Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc., 513 F.3d 652, 653–54 (7th Cir. 2008).

<sup>17</sup>*Id.* at 658.

<sup>18</sup>*Id.* (italics supplied by Judge Kozinski).

technology and the alternative in a simple and understandable way. The following is the relevant section from our brief (with citations removed to improve readability):

1. *The Problem of Refueling Vapors and the Two Alternative Means of Addressing it.* When automobiles are refueled, gasoline vapors may escape into the atmosphere and contribute to ozone pollution. There are two alternative methods of reducing the amount of vapor that escapes during refueling.

The first method, known as Stage II, relies upon a specially designed refueling nozzle to prevent the escape of vapors, which are then channeled into a storage tank on the service station premises. Stage II controls were first used in California in the mid-1970s and have since been implemented in numerous other locations throughout the country. During this time, the technology has evolved from a bulky rubber “boot” (still used at some locations in Washington, D.C.) to a lighter, more manageable model that looks and operates just like a conventional refueling nozzle. EPA’s research indicates that Stage II systems are as safe as conventional gasoline dispensing equipment and as effective as ORVR systems in controlling refueling emissions.

The second method of limiting the escape of refueling vapors, known as on-board, or ORVR, relies upon a device installed within the vehicle that captures and stores the vapors and eventually channels them to the engine for use as fuel. The only ORVR technology projected to be available in the foreseeable future utilizes a large, inflexible canister (typically ranging in capacity from 4 to 10 liters) containing activated charcoal to store the vapors. In addition, these devices require a hose that runs from the vehicle’s fuel tank to the canister and a second hose that runs from the canister to the engine. The versions that have shown potential to achieve the necessary reduction in emissions also contain complicated mechanical nozzle seals and vapor control valves located near the top of the fuel filler pipe.

Note the effort made in this discussion to educate the court about the relevant technologies without becoming mired in unnecessary details or using a lot of technical jargon.

Here is another example (with record citations deleted) from a Mayer Brown brief in a case involving complicated issues of banking law, complex facts, and numerous terms of art. Our co-counsel confided that few if any members of the court had any real familiarity with banking issues. Our task therefore was to try to present the complicated facts in a way that was selective but accurate while also being understandable to generalist judges.

1. *AFMC’s account at CoreStates.* AFMC maintained several demand accounts at CoreStates. The account at issue in this case, although denominated a “settlement account,” was a general deposit account, not a special or restricted one. Pursuant to a “zero balance account agreement” between CoreStates and AFMC, cash accumulated in any of AFMC’s accounts could be used to cover checks drawn on the other accounts. Nevertheless, over time, AFMC ran up a series of overdrafts in its accounts and became indebted to CoreStates for the amount of those overdrafts, totaling approximately \$4.5 million.

2. *The Pioneer loans and purported security interest.* RNG was a company that “originated” mortgages—i.e., loaned money to home buyers. It then sold the resulting notes and mortgages to investors. As a “warehouse lender,” Pioneer advanced money to RNG to fund loans that RNG made. In May 1997, Pioneer and RNG entered into a loan and security agreement governing the grant of a line of credit from Pioneer to RNG. The agreement gave Pioneer a security interest in the notes and mortgages obtained by RNG (the “Collateral”) and in any proceeds obtained therefrom.

Pioneer in turn obtained most of its funding from a consortium of lenders acting through Bank One Texas, N.A. In exchange for the funding it received from the Bank One consortium, Pioneer pledged its security interest in the Collateral to Bank One. To perfect the security interests that RNG purported to confer, Pioneer and its lenders had to obtain possession of the Collateral. Therefore, RNG endorsed the notes in blank and delivered them to Pioneer. Pioneer then passed the Collateral along to Bank One, which, pursuant to the terms of a three-party agreement with Pioneer and RNG, held it as agent for (i) the consortium of lenders; (ii) Pioneer; and (iii) RNG, as the owner of the notes. This arrangement was designed to allow all of the lenders to maintain perfected security interests in the notes and to facilitate RNG's sale of the Collateral to an investor.

3. *RNG's bankruptcy and the ensuing decision to use AFMC as a middleman.* On August 29, 1997, RNG sought bankruptcy protection under Chapter 11 of the federal Bankruptcy Code. AFMC, which was also in the mortgage origination business, learned of RNG's bankruptcy and was interested in acquiring its assets, the most valuable of which was its pipeline of unfunded mortgage commitments—i.e., loans RNG had arranged to make in the coming months. To maintain the value of those assets, it was essential to AFMC that RNG continue to process and fund mortgage loans. This was difficult, however, because investors were unwilling to purchase loans from an originator that was in bankruptcy. For its part, Pioneer also had a strong interest in accomplishing the sale of the Collateral so that it could be repaid and in turn could repay Bank One. Accordingly, to facilitate the sale of the loans, Pioneer, RNG, and AFMC agreed that RNG would assign the loans to AFMC for resale to an institutional investor.

4. *The first transaction: RNG to AFMC to Norwest.* In October 1997, Norwest agreed to purchase from AFMC approximately \$2.3 million worth of RNG-originated mortgage loans (the "First Loan Portfolio"). In connection with that transaction, Pioneer and RNG executed an addendum to their loan and security agreement increasing RNG's credit line and providing for a guarantee from RNG's president. In the addendum, RNG falsely represented that it had obtained authorization from the Bankruptcy Court to enter into the addendum; in reality, it had not obtained the court approval required to enable it to convey a security interest in post-petition assets. Pioneer failed to verify RNG's representation, as could easily have been done by requesting a copy of the Bankruptcy Court order that supposedly authorized the security interest.

As anticipated by Pioneer, RNG, and AFMC, Norwest was unwilling to purchase the loans directly from the bankrupt RNG, which, by definition, lacked sufficient net worth to be able to stand behind any loans that went into default. In order to satisfy Norwest's requirement that the seller be creditworthy, Pioneer, RNG, and AFMC agreed that RNG would assign the loans to AFMC, which would then resell them to Norwest and stand behind them in the event of default. Pioneer approved this structure and allowed AFMC to become the holder of the notes because it knew that RNG could not otherwise sell the loans. AFMC in turn warranted to Norwest that it had unencumbered title to the notes.

Pursuant to this agreement, RNG informed Pioneer on October 17, 1997 that it planned to sell the First Loan Portfolio. It instructed Pioneer to have the notes endorsed and delivered to AFMC. Pioneer consequently issued written instructions to Bank One requesting that it (acting as RNG's agent) complete the endorsements and deliver the notes to AFMC, accompanied by "bailee letters" that purported to maintain Pioneer's perfected security interest in the notes. (As discussed in greater detail below, a "bailee letter" is a legal mechanism that allows a secured creditor to release possession of a negotiable instrument (in this case, the promissory notes) to the prospective purchaser of the notes without losing its perfected security interest in the collateral.) Upon receipt, AFMC endorsed the notes and transferred the First Loan Portfolio to Norwest; it did

not, however, forward the bailee letter (which would have contradicted its representations and warranties to Norwest that its title was unencumbered). With Pioneer's approval, AFMC instructed Norwest to wire payment to an AFMC account at CoreStates. When Norwest completed its inspection of the notes and decided to proceed, it initiated a wire transfer in the amount of approximately \$2.1 million to AFMC's account at CoreStates. CoreStates received the transfer on November 4, 1997, credited it to the designated AFMC account, and notified AFMC. Within a few hours, AFMC instructed CoreStates to wire the funds to Bank One for credit to Pioneer's account there, which CoreStates did.

5. *The debit restraint on AFMC's accounts.* On November 7, 1997, a CoreStates branch manager, Louis Nelson, concluded that large overdrafts in AFMC's accounts were the result of check kiting—i.e., manipulation of AFMC's multiple accounts in a manner that allowed it improperly to draw on funds that it did not have. Accordingly, Nelson placed a debit restraint on—i.e., prohibited withdrawals from—all of the accounts of AFMC and its affiliates. Further investigation revealed that AFMC and its affiliates owed CoreStates approximately \$4.5 million as a result of the check kite.

6. *The second transaction: RNG to AFMC to Norwest.* Meanwhile, Pioneer, RNG, and AFMC were arranging the sale of a second set of mortgage loans (the "Second Loan Portfolio") to Norwest. The second transaction proceeded much as the first one had. Bank One, acting as RNG's agent and in accordance with Pioneer's instructions, endorsed the notes to AFMC and forwarded them to AFMC with a bailee letter. When AFMC conveyed the notes to Norwest, it again omitted the bailee letter. And again AFMC instructed Norwest to wire payment to AFMC's account at CoreStates. Although the Superior Court was under the impression that Norwest had been instructed to wire payment for both loan portfolios to Pioneer's account at Bank One, the evidence places it beyond dispute that AFMC—the seller and endorser of the notes, and the only party with the legal power to direct the payment—instructed Norwest in writing in each instance to wire payment to AFMC's account at CoreStates. Although Pioneer and RNG would have preferred to have the funds wired directly to Bank One, changing the routing instructions would have caused an unacceptable delay. They therefore agreed to employ the same routing instructions as had been used for the First Loan Portfolio. In accordance with those instructions, Norwest wired the funds to AFMC's account at CoreStates.

7. *CoreStates' receipt of the wire transfer and retention of the proceeds as a partial offset against AFMC's debt.* The wire transfer covering the Second Loan Portfolio, in the amount of \$1,454,699.80, reached CoreStates on November 12, 1997, and was duly credited to AFMC's account. On November 13 and 19, CoreStates received two additional wire transfers, bringing the total of the three wires to \$1,779,519.99. At the time of each wire, CoreStates had no notice that any party other than its depositor, AFMC, claimed or could claim any right in those funds. As a result of the debit restraint on its accounts, AFMC was unable to forward the funds to Bank One, as planned.

Meanwhile, on November 21, CoreStates retained Walter Weir, a prominent Philadelphia banking lawyer, to advise it in connection with AFMC's overdrafts. On November 25, AFMC's counsel wrote to Weir, asserting that the three wire transfers from Norwest to AFMC's account at CoreStates should have been sent to Pioneer's account at Bank One, and requesting "that all three wires be reversed to the account of Norwest Bank." The letter attached a copy of the bailee letter from Pioneer to AFMC. On December 1, Pioneer's counsel in California, Robert Izmirian, wrote a letter to Weir, again claiming that the transfers to CoreStates had been a "mistake" and asserting that "the funds should \* \* \* be immediately returned to Norwest pursuant to its demand." Weir subsequently obtained more information about the transaction from Izmirian and from personnel at Norwest and AFMC. On the basis of that information and his firm's research of the pertinent Pennsylvania and federal law, Weir advised CoreStates that it had the right to retain the funds on the authority of (i) Section

4A-502 of the Pennsylvania UCC; (ii) Pennsylvania's common law, pursuant to which a bank's valid right of setoff has priority over a third party's security interest; and (iii) Section 606 of the Pennsylvania Banking Code. CoreStates accordingly declined to reverse the wire transfers. On December 18, 1997, CoreStates "swept" and closed AFMC's accounts, making a corresponding entry in its books.

Note some of the techniques used in this excerpt. First, the authors break the facts into digestible pieces by using running headings. Second, when introducing a term of art (like "zero balance account agreement," "warehouse lender," or "check kiting"), the authors take care to explain that term simply and concisely rather than either assuming that the court already fully understands the term or providing an overly precise and complicated definition that only a law professor or specialist would care about. Third, the authors keep the jargon to a bare minimum. Although they do use terms that are central to the transactions and/or to the issues of statutory interpretation raised by the case, they have not made matters worse by adding still more jargon in an effort to impress the court with their expertise. To repeat our central theme, the brief writer's job is to present the material in a way that is useful to the court and that ultimately will advance the goal of winning the case, not to show off personal knowledge or vocabulary.

## 7.5 The Brief Writer as Story Teller

We subscribe to the theory that many cases are won or lost in the statement of facts. What this means is that in many cases (perhaps most) the statement of facts is often the most important section in the brief.

Chief Justice Roberts confirms that, as a reader of tens of thousands of pages of briefs each Term, he appreciates a statement of facts that tells a good story. In an interview conducted by Bryan Garner, the Chief Justice explains:

It's got to be a good story. I mean every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something and they're coming together. That's a story. And you've got to tell a good story. \* \* \* [N]o matter how dry it is, something's going on that got you to this point and you want it to be a little bit of a page-turner, to have some sense of drama, some building up to, you know, the legal arguments. \* \* \* [C]ertainly here at the Supreme Court and in the courts of appeals you're looking for a couple of hooks in the facts that hopefully are going to be repeated in one form or another later on in the legal argument, but also are going to catch somebody's interest. It may not have that much to do with the substantive legal arguments, but you want to catch their eyes.<sup>19</sup>

The law generally follows the facts. It is the version of the facts that the appellate court accepts that may control the selection and application of the governing legal principles, which generally are well settled. Where the legal principles may not be settled, judges as human beings are more likely to craft

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<sup>19</sup>Interview by Bryan A. Garner with John G. Roberts, Chief Justice of the United States, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

or adapt legal principles that will provide victory to the side that “ought” to win according to the judges’ notions of a just legal system.

The unskilled brief writer brushes past these fundamental truths of human psychology in a race to brief the legal arguments attacking or defending the decision below. That unskilled writer simply recites what happened at trial, witness by witness and motion by motion, making for a dull and unhelpful presentation. After reading a statement of facts like this, the judge often has little idea of the merits of the arguments, much less any underlying equities. The skilled brief writer, by contrast, uses the statement of facts (and perhaps a one- or two-page introduction as well to set up an overarching “theme” of the case) to tell the client’s side of the story in an engaging way that both captivates and convinces. That is not to say, of course, that a brief writer is free to take license with the facts or to fail to alert the court to facts that are harmful. But without running afoul of the duty of candor to the court, it is almost always possible to present the facts in a way that would make a neutral reader sympathetic to the client’s position.

Consider, for example, the excerpt from the banking case in the preceding section. Before reading this statement of facts, the court might have tended to sympathize with Pioneer. After all, CoreStates had retained \$1.8 million of Pioneer’s money as an offset against another entity’s (AFMC’s) debt. But CoreStates had the ability to do so only because Pioneer consciously decided to structure the transaction using AFMC as a conduit. Hence, we drafted the statement of facts to show that Pioneer was responsible for its own predicament. Although we shall never know, we think that this description of the facts gave the appellate court some comfort about holding (as it eventually did) that CoreStates had the right to retain the funds.

Another good example is Mayer Brown’s opening brief in the Supreme Court’s seminal punitive damages case, *BMW of North America, Inc. v. Gore*. In *BMW*, a jury awarded the plaintiff \$4,000 in compensatory damages and \$4 million in punitive damages. The plaintiff complained that BMW of North America had failed to disclose to him that it had repainted some of the surfaces on the car he bought to correct acid-rain blemishes that had occurred during transportation of the vehicle from Germany to the United States. In our merits brief (as in the petition for certiorari), we wanted to explain the facts in a way that would convince the Court both that there was nothing untoward about the nondisclosure and that the plaintiff did not deserve the windfall that the Alabama jury bestowed upon him. The following is our effort to do that (again, with citations deleted to enhance readability):

In their journey from the assembly line to the dealer’s showroom, automobiles occasionally experience minor damage requiring repair or refinishing. The question then naturally arises whether, or in what circumstances, the fact of repair or refinishing should be disclosed to the dealer or to the retail purchaser of the automobile. By 1983, several states had answered this question by statute or regulation. BMW canvassed these laws and adopted the strictest disclosure threshold—3% of the manufacturer’s suggested retail price (“MSRP”)—as its nationwide policy. Since that time, numerous additional states have adopted disclosure thresholds. The vast majority, including Alabama (which enacted its statute after the trial in this case), require disclosure only if any repairs or refinishing cost more than 3% (or some higher percentage) of MSRP.

In this case, a jury found that BMW's 3% disclosure policy constituted fraud under Alabama common law. It then proceeded to award \$4 million in punitive damages (later reduced by the Alabama Supreme Court to \$2 million) to plaintiff Dr. Ira Gore, not just for BMW's application of that policy to him but also for its application of the policy to hundreds of cars sold outside of Alabama—despite the absence of any showing that those sales were unlawful where they occurred.

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

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

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

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

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

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

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

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

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

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

4. *Proceedings Below.* Dr. Gore never contacted BMW to complain about the refinishing or to ask for any kind of recompense. Instead, he simply filed suit in Alabama state court. The complaint alleged that BMW's failure to disclose to Dr. Gore that it had performed some refinishing on his vehicle prior to selling it to German Auto constituted fraud, suppression, and breach of contract.

At trial, it was undisputed that the only flaw in the refinishing of Dr. Gore's car was a three or four-inch tape line on the rear fender that the technicians inadvertently had failed to remove. There was no evidence that the paint had faded, chipped, or bubbled or that it was likely to do so in the future. The colors of the refinished surfaces matched the colors of the rest of the car. There was no unusual film build-up, and the gloss was exactly what would be expected of a vehicle that had come straight off the assembly line. In short, with the exception of the tape line, which could have been buffed out without damage to the car's finish, Dr. Gore's vehicle was indistinguishable from one that had not undergone refinishing. Although these facts raised serious doubt about the materiality of the non-disclosure, the case was submitted to the jury on the strength of the uncorroborated testimony of the former owner of German Auto that even perfectly refinished vehicles suffer a 10% diminution in value.

During his closing statement, Dr. Gore's counsel requested compensatory damages of \$4,000—representing 10% of the approximately \$40,000 purchase price of Dr. Gore's car—and punitive damages of \$4 million. The closing statement made clear that the latter figure represented a penalty of \$4,000 per car for each of the approximately 1,000 cars that BMW had refinished at a cost of more than \$300 and sold as new anywhere in the United States over a ten-year period:

"They've taken advantage of nine hundred other people on those cars that were worth more—the damage was more than three hundred dollars. If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.

\* \* \*

"I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it."

The jury did precisely what Dr. Gore's counsel requested, awarding Dr. Gore \$4,000 in compensatory damages and \$4 million in punitive damages. BMW then filed a combined motion for judgment notwithstanding the verdict, new trial, and remittitur. The trial court denied the motion in all respects.

The Alabama Supreme Court affirmed the judgment against BMW, conditioned upon a remittitur of the punitive damages to \$2 million. The court acknowledged that the verdict violated BMW's due process rights and impinged upon the sovereignty of other states by punishing BMW for sales that took place entirely outside of Alabama and that were not even shown to be illegal where they occurred. Having said that, however, the court did not grant a new trial. Nor did the court apply the jury's \$4,000 per car penalty either to Dr. Gore's car alone or to the total number of cars sold in Alabama, for which, in its view, the jury presumably could lawfully punish; that approach would have resulted in a punitive award of no more than \$56,000. Instead, the court merely articulated its usual \* \* \* standards for determining whether a punitive award is excessive and arbitrarily cut the punitive damages in half.

Note how this statement of facts tells the story of why refinishing is sometimes needed, the means by which BMW goes about ensuring that the refinishing process restores vehicles to assembly-line condition, and the circumstances under which the plaintiff came to sue BMW. Note also how the statement weaves in a pattern of state statutes that appeared to permit the very same conduct about which the plaintiff was complaining, even though none of the statutes directly controlled this case. What the statement does not do is simply rehash what each witness said in the order in which they appeared at trial. Note also the manner in which we refer to the plaintiff throughout the statement: "Dr. Gore" rather than the more anonymous "plaintiff." This was a conscious decision to remind the Court at every opportunity that it was dealing with a wealthy doctor, not an illiterate victim upon whom an unscrupulous wrongdoer had preyed.

Another example of a statement of facts that tells a compelling story comes from another Mayer Brown brief in a product-liability case brought by a plaintiff who had been rendered a quadriplegic in an ATV accident. Our challenge was to set up our claims of error and shift the court's natural sympathies away from the injured plaintiff without further victimizing him through the tone of our advocacy. Here is what we wrote (again with citations deleted):

On March 11, 1989, plaintiff Arthur LaPlante, a vehicle mechanic in the Army, stationed at Fort Carson, Colorado, accompanied some Army friends to ride a three-wheeled off-road all-terrain vehicle ("ATV") on a mountain near Pike's Peak. The particular vehicle that LaPlante rode that day, a 1982 ATC 200, was designed by defendant Honda R&D Co. and manufactured by defendant Honda Motor Co. It was sold by defendant American Honda Motor Co. to a dealer in Colorado, who in 1982 sold it to its first owner. The ATV ultimately went through seven owners, at one point being in such a state of disrepair that it sold for only \$25. By the time it reached its seventh owner, LaPlante's friend Kelly Kallhoff, the ATV no longer had its owner's manual and remained in a severe state of disrepair. Among other things, the left brake lever was broken, rendering the front brake inoperable; the rear brakes were badly out of adjustment and, as a result, barely functioned; and, for one reason or another, the vehicle pulled noticeably from its intended course, causing the rider to need to make adjustments to compensate.

Although LaPlante had never before ridden an ATV, and indeed did not know anything about ATVs, he ignored the specific warnings on the vehicle to wear a helmet and to read the owner's manual. According to his own testimony, "[a]ll I'm thinking about is going for a ride. I'm not thinking about, you know, an owner's manual or anything like that."

Notwithstanding his total lack of experience with ATVs and the obvious dangerous condition of the vehicle, LaPlante did not bother to familiarize himself with the vehicle on a flat smooth surface. Instead, for his first ride ever, he elected to ride down a steep (15 degree) mound, which overlooked an even steeper (30 to 35 degree) cliff. All that was between the mound and the cliff was a 12-foot wide dirt road abutted by a 6-foot shoulder. According to his accident-reconstruction expert, LaPlante, after descending the mound, failed to negotiate a left turn onto the dirt road. Failing also to brake the vehicle, LaPlante drove off the cliff and down the side of the mountain, striking his unprotected head on a rock 45 to 50 feet below the edge of the cliff. As a result of the impact, LaPlante suffered paralysis and brain damage.

Note that parts of this statement of facts are fairly “argumentative.” Contrary to conventional wisdom, a statement can be argumentative so long as it fairly and accurately conveys the relevant facts. The permissible “argument” comes in the way that the facts are introduced and organized. The goal is to depict the facts accurately but with an emphasis, focus, and context that presents the “story” of what happened in as sympathetic a way as possible for the client. The narrative tries to convey to the appellate court that, even if the injured plaintiff is not out of court because of his own contributory negligence, he should not be able to shirk all personal responsibility for the tragedy that brought the parties into court.

## 7.6 Organizing the Brief

Organizing a brief properly is one of the most challenging aspects of brief writing. You should strive to avoid redundancy while making sure that you have sufficiently laid the groundwork for each paragraph and section.

As noted in the Introduction and at various other points in this treatise, the goal of trying to persuade federal appellate judges to rule in your favor requires that they understand your legal arguments and their relationship to the facts. Not only must you decide the overall sequence of the points you want to make, you also must develop each point in some kind of organized way. The chapters in this treatise dealing with the opening brief, the response brief, and the reply brief offer some suggestions about how to decide what organization to use.

There is no single “right” organization. The crucial point, however, is that there must be some organization. You must understand it, and it must be intelligible to your audience—the members of the court into whose hands your brief is committing your client’s fate.

For all but the most innately intuitive of brief writers, it is generally a good idea to prepare and then refine a detailed outline. One virtue of developing and following an outline is that it helps avoid needless duplication or repetition of the sort that can creep in unwittingly when you are not sure whether you have made a point or where it belongs.

To be sure, some repetition is built into the structure of the brief: You may have a Statement of the Case, an Introduction, a Summary of the Argument, and then the Argument itself. Obviously, some of the same points will be made in both the Argument and the Summary of the Argument. Similarly,

you may decide to repeat certain key facts in both the Statement of Facts and the Argument. Nevertheless, even in these circumstances, to avoid the Ground Hog Day effect, you should find different ways of articulating the point. You also should vary the level of detail you employ: If you set out relevant facts comprehensively in your statement, for example, you can discuss them more generally in a subsequent introduction to your argument. This kind of subtle repetition and layering can increase the persuasive force of your brief by creating a recurring theme that unifies your presentation.

There is seldom any justification for repeating the same point *within* the Argument section, however. Typically, redundancy within the Argument section is a function of disorganization and laziness. Many lawyers try to excuse this flaw by claiming that they want to ensure that the court does not miss the point. Making the same point at more than one place in the Argument section, however, does more to confuse than to clarify. You are sure to cause judges and clerks to start asking what the difference is between the two points when, in fact, there may be none. And it should go without saying that busy judges prefer a short nonrepetitive brief to a ponderous one that either repeats the same point or, even worse, makes different arguments in support of the same point in different places within the brief. As Justice Scalia put it, “I want it there in front of me, I want it clear, and I want it fast. And if possible, I want it elegant. But prolixity is probably the worst offense that most unskilled brief writers are guilty of.”<sup>20</sup>

For those lawyers who will admit to having a weakness in this area—i.e., the consciously incompetent in the Maslow/Garner framework—we recommend using a “reverse outline.” Once you have written your draft, break down the Argument section into an outline. Look to see whether the same or related points appear in different places within the outline. If there are any instances of that, try moving them to the same place. Cut the redundant sentences, and smooth the transitions between the remaining sentences. What is left should be a single, coherent, and complete treatment of the issue.

## 7.7 Maximizing Credibility

Of course, even the most engaging story can persuade only if it is believed. Just as important as telling a compelling story is convincing the court that your brief fairly portrays the facts and law. The court is much more likely to adopt your reasoning, if it concludes that you have been an honest advocate for your position. Nothing undermines the effectiveness of a brief more than statements that fall apart upon examination. So, no matter how tempting it may be to use “poetic license” when you are drafting your brief, do not do it. Do not obfuscate or gloss over the difficult questions, but instead squarely address the matters that are most likely to trouble the court. Every single

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<sup>20</sup>Interview by Bryan A. Garner with Antonin Scalia, Associate Justice, United States Supreme Court, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

statement in your brief should be accurate and supportable. Never overstate, exaggerate, or fudge, but strive instead to be punctiliously clear and precise.

To this end, *quoting* from a case, exhibit, or testimony is usually far more effective than paraphrasing it. Let the court's or witnesses' words speak for themselves. Providing an actual quotation from the authority on which you rely provides built-in comfort that the judges are getting an accurate presentation. But, as one of our colleagues warns when he teaches effective legal writing:

Beware the risk of seizing on snippets that (like some excerpted movie reviews published in ads) may not fairly reflect the thrust of the decision, e.g., an assertion that “the statute of limitations runs when a reasonable person may have discovered the pertinent facts,” when the full quote is “defendant argues that the statute of limitations runs when a reasonable person may have discovered the pertinent facts, but we think the better rule is that only actual discovery triggers the statute.”

Another rhetorical device that you should avoid is overusing—or even using—the commonplace adverb “clearly” or one of its synonyms. As you draft your papers, look at how often you assert that the record “clearly” establishes some fact or that some legal principle is “clearly” settled. Appellate judges who see this characterization routinely have learned to discount it and, indeed, even to interpret it as a signal that the asserted truth may not be true at all, or at least not “clearly” so. Here again, if something is true, simply assert it and provide the authority for your proposition, preferably quoting the relevant support for your statement. As we have suggested, let the authorities speak for themselves rather than try to provoke the appellate court into weighing just how “clear” the asserted proposition is.

In our experience, inaccuracy and imprecision are usually the result of inadvertence rather than design. Read and re-read your own sentences to ensure that you are saying exactly what you mean to say. If time permits, when your draft is almost complete, look at the cases and the relevant portions of the record one more time. Like the parlor game of “telephone,” subtle shifts in meaning may creep in each time you go through the process of revising your draft brief, eventually leaving a statement of law or fact somewhat afield from the authority being cited to support it. If you revisit these sources after completing what you think is the final draft, you will catch any mistakes. You also may find that you can describe the law or evidence more accurately and make your points more sharply. Finally, you may notice helpful material that you may have overlooked when your arguments were less fully developed.

Remember, too, that the editing process can introduce inaccuracy or imprecision. Never assume that edits proposed by another lawyer are precisely right—even if you think that the proponent of the new language knows the record and the applicable law. In fact, it usually is a good idea for a single person to keep control over the document throughout the editing process so that all proposed edits are scrutinized for accuracy and internal consistency.

Tone is also important in maintaining credibility. We try our best to avoid any appearance of disrespect to the lower court, even if—in our view—the court has made whopping errors. As Judge Kozinski has famously remarked:

Chances are I'll be seeing that district judge soon at one of those secret conferences where judges go to gossip about the lawyers. I find that you can always get a real chuckle out of the district judges by copying the page where he is described as "a disgrace to the robe he wears" or as "mean-spirited, vindictive, biased and lacking in judicial temperament" and sticking it under his nose right as he is sipping his hot soup.<sup>21</sup>

You can easily highlight errors in the court's reasoning without denigrating the judge. The following excerpt is from one of our briefs in which we successfully sought reversal of a district court's ruling that an exclusive franchise arrangement violated the dormant Commerce Clause. The passage is highly critical of the district court's reasoning but nonetheless is respectful in tone.

The district court held that the Agreement and Ordinance discriminate against interstate commerce—and hence are virtually *per se* invalid—on the ground that the City "is favoring one local hauler over all others" without having "eliminat[ed] the market entirely." Doc 123–Pg 13. Under this ruling, a municipal government cannot, consistent with the Commerce Clause, grant a private contractor an exclusive waste collection franchise unless the municipality performs the administrative task of billing consumers of waste collection services (or funds the collection of waste through tax dollars) and then pays the franchisee out of public funds. That decision is unprecedented. Indeed, in a recent decision, another Florida district court stated that it had not found, "upon exhaustive independent research, a single case that supports the notion that a city's attempt to regulate the *collection* of waste is violative of the commerce clause." *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259, 1264 (S. D. Fla. 2002) (emphasis added). The district court's reasoning does not support its ground-breaking conclusion.

As an initial matter, the district court's factual premise—that the City was "favoring one *local* hauler over all others" (Doc 123–Pg 13 (emphasis added))—is inherently flawed. As the court itself elsewhere recognized, there was no *local* favoritism involved in Delray Beach's selection of BFI, and then WM, as the exclusive franchisee. *See id.* at 10 ("Plaintiff has neither alleged nor shown that Defendants prohibited any non-local entities from bidding."). Moreover, neither BFI nor WM was required to make *local* investments, hire *local* workers, or bring the C&D waste to *local* facilities. In short, by deciding to grant exclusive rights to *one* hauler, the City was neither favoring local interests nor burdening out-of-state interests. It was simply requiring (for a limited period) that the inherently local service of waste collection be performed by only one company. Even if doing so had some *incidental* effect on interstate commerce (and it is hard to see how it could), it did not constitute *discrimination* against interstate commerce.

The legal premises of the district court's ruling were equally unsound. In ruling that such an exclusive waste collection franchise violates the Commerce Clause, the district court relied principally on *Carbone* and *USA Recycling*. But neither case supports the district court's belief that an exclusive waste collection franchise discriminates against interstate commerce if the City allows its chosen contractor to bill consumers directly for waste collection.

It is equally important to avoid any appearance of disrespect to your opponents or their counsel. Ad hominem attacks should be entirely off-limits. You really do not want to divert the appellate court's focus so that the issue becomes a choice between honest lawyers and deceitful lawyers rather than a

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<sup>21</sup>Honorable Alex Kozinski, *supra* note 15, at 22.

decision between competing views of the law. Indeed, why risk putting your own credibility on the line, if the court may decide that it is you rather than opposing counsel who is overreaching? Keep the focus on the merits of the opposing party's case, not on opposing counsel.

Moreover, you should discuss your opponent's arguments respectfully, no matter how much you disagree with them. Say that they are "wrong," "misguided," "flawed," or "illogical," but avoid pejorative words like "ridiculous," "preposterous," "absurd," or "dishonest." Keep in mind that the court may find your opponent's position persuasive in some respects. If you are too dismissive or insulting in talking about the other side's case, you may lose credibility. Or you may inadvertently divert the court's attention from your argument. As Judge Kozinski more colorfully put it in a speech on ways to *lose* an appeal:

One really good way of [diverting attention from the main issue] is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients. What is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent.<sup>22</sup>

You may genuinely believe that opposing counsel has distorted the record or misused case authority. You may even be right. The challenge is to restrain your righteous indignation and lay out the relevant points of dispute so that the appellate court can see for itself that your opposing counsel has taken undue liberties with the law or facts. In that process, avoid referring to opposing counsel by name or title and keep the focus on the adverse party—thus, "appellant asserts \* \* \*" rather than "appellant's counsel asserts \* \* \*."

The following passage from a Mayer Brown brief shows what we mean about being forceful but respectful. In this case, the plaintiffs-appellants argued that, although they had sued seeking to enforce a contract that contained an express waiver of the right to a jury trial, they were nonetheless entitled to have a jury adjudicate the defendant's claim that the contract itself was a fraud. We believed this to be an entirely baseless argument that might nevertheless confuse the court. Here is how we addressed it:

[Plaintiff] offers no support for its position that the plaintiff in an action seeking to **enforce** a contract may avoid a jury waiver within the contract simply because the defendant disputes the contract's validity. The two cases that [plaintiff] cites do not support that position. *Gevers v. Wrights Ex'rs*, 18 N.J. Eq. 330, 334 (Ch. 1867)—an ancient decision concerning the enforceability of a voluntary promise to give after-acquired property to children—is entirely irrelevant. In the other case, *Battle v. General Cellulose Co.*, 23 N.J. 538 (1957), the court ruled that "[t]he one who **denies** the existence of a contract" containing an arbitration clause may be entitled to a judicial determination of the contract's validity before the clause is enforced. *Id.* at 543–544 (emphasis added). That, of course, makes perfect sense, as there is no inconsistency in denying both the contract and the jury trial waiver. That is fundamentally different from [plaintiff's] situation, which relies on the existence of the [contract], jury waiver and all, in seeking millions of dollars in damages.

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<sup>22</sup>*Id.*

Nothing in *Battle* suggests that one who *seeks to enforce* a contract may avoid an express jury waiver because its opponent challenges the validity of the contract, nor are we aware of any other court applying such an irrational rule. To the contrary, courts in other jurisdictions have sensibly taken the view that “[a] party who has signed an agreement may not simultaneously rely upon it as the foundation of a claim for damages and repudiate a provision contained therein to the effect that the right to a trial by jury is waived.” *O’Brien v. Moszynski*, 101 A.D.2d 811, 812, 474 N.Y.S.2d 133, 134 (App. Div. 1984). See also [other citations.]

Finally on the issue of tone, we recommend against using language that is too chatty or casual. There is no need to be ponderous or stuffy, but you should err on the side of formality. And—although a few of our colleagues manage to interject a subtle dry wit into their brief writing—most people should not attempt humor. What may seem humorous or clever when you are imagining the thought rarely seems so amusing on the cold page of an appellate brief. Very few Mark Twains are making their living as appellate brief writers. Even if you are convinced that you are the modern exception, avoid the temptation to be witty or snide in your brief. If you are taking up the court’s time with an appeal, it is safe to assume that the case is no laughing matter.

## 7.8 Making the Brief Readable

Effective briefs are a pleasure to read. Perhaps overstating the point a bit, Chief Justice Roberts says that “[t]here’s nothing better than a well-written brief.”<sup>23</sup> The judge should not have to wade through unnecessary words and complicated sentences in order to discern your argument. Your prose should be so clear and understandable that your arguments practically jump off the page. Remember that a simple and elegant presentation can make your points seem obvious, while a dense and complicated one can create the appearance that you are struggling to justify your position.

To professional readers of briefs, like Chief Justice Roberts, “pacing” is critical. “Pacing is bringing the reader along at the particular speed you want, for the effect you want. \* \* \* [w]hether it’s the shorter sentences that give you a quicker pace as you’re reading through it to get to a particular point as the drama’s building up, or a sentence that’s going to cause you to pause a little bit more, to slow down, I am conscious of that.”<sup>24</sup>

Use the active voice unless there is a specific reason to use the passive voice. After you have drafted your argument, go through and recast passive-voice sentences in the active voice unless you can identify the reason that justifies using the passive. Short, direct, declarative sentences tend to be more persuasive, and they make life easier for the reader, who will be more inclined to pay closer attention when you need to use a passive or complex sentence to make an important point.

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<sup>23</sup>Interview by Bryan A. Garner with John G. Roberts, Chief Justice of the United States, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

<sup>24</sup>*Id.*

Judges appreciate it—and pay more attention—when your brief is “interesting.” As Chief Justice Roberts explains: “Think of the poor judge who is reading again hundreds and hundreds of these briefs. You know, liven their life up just a little bit in some case with something interesting. I’m not saying make something up or go out of your way to, you know, but if it’s in the course of the narrative and it’s not going to be distracting, I think they’ll appreciate it.”<sup>25</sup>

To keep the reader interested and awake, vary your sentence length and structure: A short sentence can break up the monotony of several long ones. Interspersing the occasional participial phrase can make the writing more interesting than using the standard “noun-verb” form in sentence after sentence. For example, consider saying: “Ignoring the welter of contrary authority cited in our opening brief, Smith asserts that the district court’s instruction correctly stated the elements of a claim for tortious interference with contract” instead of “Smith asserts that the district court’s instruction correctly stated the elements of a claim for tortious interference with contract. This argument ignores the welter of authority cited in our opening brief.”

For similar reasons, we recommend varying the length of your paragraphs. Paragraphs of more than half a page are seldom justified. They seem visually daunting to the reader. They also suggest that too many thoughts have merged into that single paragraph. By contrast, the occasional very short paragraph can pack a punch.

Vary your word choice within paragraphs. For example, rather than saying repeatedly that the plaintiffs “argue” certain points, you can say that they “contend,” “assert,” “suggest,” or “insist.” Do not use long phrases when short ones will do. When editing your own work, experiment with trying to reduce the number of words you use to convey your points. The need to satisfy word or page limits often will force you to strive for economy in your language. But even if you have plenty of space, shorter is almost always better, if you can be concise without sacrificing meaning or nuance.

Also, avoid using long, abstract words or legalisms like “hereinafter” and “aforementioned.” No one uses those words in real life, and you should not weigh down your brief with them. Keep in mind what we said at the beginning of this chapter: Good brief writing is good writing. While a federal appellate brief must deal with legal doctrines and principles, try to avoid making the brief read like something an eighteenth-century English conveyancer would have written and instead, recognizing the limitations on this goal, try to aim to have the judges enjoy reading your submission.

Other simple techniques also can make your presentation more digestible and elegant. Unless there is a good reason to use the parties’ respective procedural designations, refer to the parties by name rather than as “appellant” or “appellee.” All that those terms convey is the procedural posture of the case as it currently stands. Similarly, “plaintiff” and “defendant” merely remind the court that someone was suing someone else in the lower court. To make the brief as intelligible as possible for a judge who is trying to keep in

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<sup>25</sup>*Id.*

mind who is saying what about what, use the parties' proper names. When it is necessary to use a short form for repeated reference, try to come up with appropriate and easily understandable abbreviations that will stay with the judge without the need to refer to a glossary. For example, unless a company is well known by its acronym (like "GM"), try using an abbreviation that is a short form of the name (for example, "Ford" rather than "FMC" when referring to Ford Motor Co.).

As an equally acceptable alternative, adopt and use some generic designation that will help the reader follow the flow of events and arguments. This will help the judges appreciate what certain parties allegedly did or why certain parties are advancing certain arguments. Thus, for example, speak about the "employer" and the "union," or the "manufacturer" and the "supplier," or the "dealer" and the "purchaser." Indeed, in many situations, these generic terms may make it easier to follow what is going on than using proper names, such as when several companies or several individuals are involved and even using proper but unfamiliar names may not help the judges keep everyone straight.

The key point to keep in mind is that the appellate judges have not lived with the case for months or years, as you probably have. They will have more trouble keeping in mind the *dramatis personae*. Your job is to make the story unfold clearly so that there is no doubt which character in the drama is center stage at any point in time.

Mayer Brown brief writers typically use first-person pronouns when referring to the client's arguments (e.g., "As we argued in our opening brief," rather than "As General Motors argued in its opening brief"). In our view, using first-person pronouns is less stilted and also conveys the impression that we as lawyers stand behind the client's position. This is a matter of preference, though, and some counsel prefer to emphasize the formal separation between the client—the party to the appeal—and the advocate for the client's position.

The use of an occasional analogy or literary reference can also be effective in reinforcing an otherwise dry legal argument. One of our colleagues added the following paragraph to a reply brief during the editing stage. We were contending that an Arkansas truck tax unconstitutionally discriminated against interstate commerce by exempting trucks carrying certain specified agricultural products (which were predominantly grown or used in Arkansas), while fully taxing trucks carrying other items. The state sought to defend the exemption on the ground that trucks carrying agricultural products do not do the same damage to the highways as other trucks. Our draft reply made the straightforward response that the state's argument was counterintuitive and unsupported by the record. But our colleague had an idea how to make this point come alive for the court. This is what he added to the introduction:

There is an old riddle: Which weighs more, a ton of feathers or a ton of bricks? While many find the question deceptive at first, the correct answer, that a ton is a ton regardless of what is being weighed, becomes irrefutably clear once explained. But in enacting and now defending the NR Exemption, the State has managed to get the answer wrong—a ton of soybeans or chicken feed is treated as though it weighs less than a ton of baked beans or dog food.

Here is another illustration from one of our appellate briefs. In this case, we were challenging a district court's ruling that the city of Delray Beach had violated the Commerce Clause by giving a single out-of-state company an exclusive franchise to collect and dispose of construction and demolition waste. The district court had held that the franchise was unconstitutional because the hauler collected a disposal fee from the generators and then remitted 5 percent to the city. We wanted to make the point that the manner in which the franchise fee was paid to the city was no concern of the Commerce Clause. This is how we did it.

The district court plainly finds the exclusive franchise arrangement and its attendant 5% franchise fee to be distasteful. Indeed, in its order denying defendants' motion to dismiss, it characterized the arrangement as a "kickback." ("It remains to be shown what exactly the City does to earn its five percent cut of the fees collected. In fact, the Defendants do not attempt to explain or even mention this apparent kickback in either the Response or the Reply.") But the sole concern of the Commerce Clause is *interstate* commerce, not whether it is appropriate for a municipality to award an exclusive franchise and then charge a percentage-based franchise fee. The district court's effort to use the Commerce Clause to vindicate that perceived impropriety (with which, in fact, there is not a thing wrong), calls to mind the old saying that "when all you've got is a hammer, everything starts looking like a nail." The Commerce Clause is not the all-purpose hammer that the district court believed it to be, however, and reversal of the court's summary judgment is therefore required.

Our punitive damages cases supply another example of what we consider the effective use of a literary reference. In virtually every punitive damages case in which we have been involved, the plaintiff's lawyer has characterized the defendant's conduct as being exceptionally despicable. This is one of the factors that the Supreme Court has ruled must be taken into account in determining whether an award of punitive damages exceeds the amount permissible under the Due Process Clause. The premise is that higher awards may be constitutionally permissible when the conduct being punished is *really* reprehensible. But not all punishable conduct is highly or even equally reprehensible. As counsel for the defendant in these cases, therefore, our job is to convey to the court that there is a spectrum of reprehensibility and that the plaintiff's claims of high reprehensibility should not be credited in applying constitutional scrutiny. We thought that a reference to a famous line from Garrison Keillor might help make our point that not all conduct can be at the high end of the spectrum. Here is how we put Mr. Keillor to work in a case involving an isolated violation of the Fair Credit Reporting Act.

The Supreme Court admonished in *BMW* that the fact "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." 517 U.S. at 580. Rather, "to justify a punitive sanction that is tantamount to a severe criminal penalty," the conduct must be "egregiously improper." *Id.* at 580, 585. Notwithstanding Bach's rhetoric to the contrary, FUNB's willful failure to correct her credit information more quickly can be treated as "egregiously improper" only in a land in which "all the children are above average" and all punishable conduct is highly reprehensible. *Cf.* Garrison Keillor, Monologue Excerpt (Feb. 15, 2003) available at <http://prairiehome.publicradio.org/programs/20030215/forward>.

Of course, any literary reference or analogy may advance the cause only if the intended audience—the judges on a particular appellate court—is likely to “get it.” If the reference is arcane, obscure, or parochial, it may have exactly the opposite effect, prompting the judges to wonder what you are talking about. But we felt that a panel of judges in the Midwest would probably be familiar with Keillor’s brand of humor and his charming refrain that in his mythical town “all the children are above average.” Only the members of the Sixth Circuit panel that considered the appeal will know whether this reference helped make our point, but the outcome of the case is at least indirect evidence. The court held that the conduct was not highly reprehensible and that the \$2.6 million punitive award was grossly excessive.

In recommending the *occasional* use of analogies and literary references, we do not mean to say that they are right for every case or every writer. If it does not come naturally, you should not force it. An awkward analogy or strained literary reference is surely worse than no analogy or allusion at all.

A common error made by less skilled brief writers involves the use of authorities (typically, cases). Nothing is more boring for a court than a brief that simply summarizes case after case that the brief writer thinks supports her client’s position. Just as not all misconduct is equally reprehensible, not all cases are equally important. One major mistake in framing a brief is to march through a whole series of cases, including cases from different jurisdictions and from different levels of the judicial system, as if each is as weighty as the next. This flawed technique involves providing elaborate and sometimes congruent narratives of each case. The format for discussing cases, however, must show the court that you understand that there is a hierarchy of cases and that you are spending more time focusing on the precedents that are most authoritative.

Of course, a single on-point case from a court whose decision is binding should be milked for all it is worth, but such a situation is rare. And even then, it is important to limit the discussion of the case to those facts—not all facts about the case—that make it on all fours with your case, along with the holding that you are arguing is controlling.

Here is an example from one of our briefs that illustrates several of these points:

*General Guaranty* is controlling here. Like Cingular, the defendant in *General Guaranty* filed a motion for summary judgment on the ground “that the contract sued on had been abandoned by mutual consent and superseded by another contract.” The defendant suggested that, in the alternative, the court should stay the proceedings pending arbitration if it determined that the original contract had not been superseded because that contract contained an arbitration provision. In its initial ruling on the defendant’s motion, the district court reasoned:

The question is then presented—should the parties be directed to arbitrate? We think not. There is a possibility that the contract has been abandoned. If this were the case, it would be because of some subsequent agreement over which it is agreed the arbitrator has no jurisdiction. That issue must be determined by the Court, and to avoid a useless arbitration, should be, we believe, determined now. \* \* \* Accordingly, \* \* \* a separate trial of the issue of whether the contract was abandoned \* \* \* [will] be held.

After a two-day trial on the issue of abandonment, the district court concluded that the contract had not been abandoned. It also ruled, however, that the defendant had waived its right to arbitration because it failed to request arbitration prior to the filing of the lawsuit, allowed the plaintiff to take depositions without indicating that it would seek arbitration, asked for a stay pending arbitration only as an alternative to a ruling on the merits, filed a counterclaim, and attempted to implead third parties who were not subject to the agreement to arbitrate.

This Court reversed, holding that the defendant had not waived its right to arbitrate because “[t]he propriety and desirability of an initial judicial determination of whether an arbitration contract exists is well recognized.” \* \* \* (emphasizing “the usefulness of determining in court if there is an arbitration contract before sending the parties to arbitration”). In so holding, the Court rejected the plaintiff’s suggestion that the defendant had waived its right to arbitration by arguing that the agreement containing the arbitration provision had been abandoned. It explained:

While never put so boldly, [the plaintiff’s] implicit position is this: because the issue of abandonment would determine not only the existence of an arbitration agreement but also effectually determine a defense of [the defendant] on the merits, [the defendant] had to make an election—it could admit the contract was in effect and call for arbitration, or deny the viability of the contract and defend in court. No such election was required.

The Court went on to explain that the defendant’s “actions [were not] sufficiently inconsistent with the right to arbitrate” to constitute a waiver. Rather, in the context of litigating the threshold issue of “abandonment,” the Court deemed filing an answer, asserting a counterclaim, seeking to implead a third party, and submitting to depositions to be fully “consistent with orderly participation in the lawsuit.”

As in *General Guaranty*, litigation in this case has been confined to the threshold question whether the Letter Agreement supplanted the Reseller Agreement, including its arbitration provision, in its entirety. In other words, Cingular has “limit[ed] its pretrial activity to the threshold question of whether there [is] a valid agreement to arbitrate.” *Republic Ins. Co.*, 383 F.3d at 345 (discussing *General Guaranty*). Indeed, all other aspects of the case were stayed by court order pending resolution of the issues of accord and satisfaction and release.

Note that, although somewhat lengthy, this discussion wastes no time on the underlying facts of *General Guaranty*, the case claimed to be controlling. Instead, it immediately zeroes in on the procedural facts, which are all that is relevant to the issue being briefed. Note also the structure of this presentation. It starts with a short, hard-hitting statement that *General Guaranty*, an earlier decision from the same court that was hearing the appeal, “is controlling.” It then goes on to set forth the pertinent facts that we later will assert are identical to ours (secure in the knowledge that we already have familiarized the court with the relevant facts of our case in the Statement of the Case). The brief quotes the holding that we contend is dispositive. And then it finishes by establishing that our facts are identical to those in the controlling decision.

When a case supports a component of your argument or when its reasoning supports your position, you should weave the case into the argument. Sometimes this can be done by quoting its key language, other times by paraphrasing it. In such instances, it rarely will be necessary to provide a recitation of the case’s facts. Here is an example, from the same brief just quoted:

This Court has also held that “a party may participate in the discovery process [without waiving its right to arbitrate] so long as it does not *‘shower the*

*opposing party with interrogatories and discovery requests.’*” *Keytrade USA, Inc. v. AIN TEMOUCHENT M/V*, 404 F.3d 891, 898 (5th Cir. 2005) (quoting *Steel Warehouse*, 141 F.3d at 238) (emphasis added; alternations omitted). There has been no “shower” of discovery requests in this case. Notably, the only discovery that has taken place could not possibly have prejudiced Unity because it was reciprocal and strictly limited (by court order) to the issues of accord and satisfaction and release.

Note that we wrote the first sentence so that the citation would follow it. Often, lawyers include the citation within the sentence such as in this alternative to the approach we use:

This Court held in *Keytrade USA, Inc. v. AIN TEMOUCHENT M/V*, 404 F.3d 891 (5th Cir. 2005) that “a party may participate in the discovery process [without waiving its right to arbitrate] so long as it does not ‘*show the opposing party with interrogatories and discovery requests.*’” *Id.* at 898 (quoting *Steel Warehouse*, 141 F.3d at 238) (emphasis added; alternations omitted).

Unless you want the judges to focus on the name of the particular case, it is smoother and less distracting not to include the case name in the sentence. The name of the case is almost never important. Only if the case is a truly seminal one, known by name to jurists and lawyers alike, should you flag the name of the case by including it within the sentence rather than just placing it as a citation after the substantive point for which you are citing it. In all other circumstances, you are merely cluttering up the sentence by sticking the case name and citation in the middle of it.

Another error that inexperienced brief writers often make is to cite cases that state a legal principle in a helpful way but actually reach a *holding* that is harmful to the client’s position. Sometimes this is a function of failing to read the entire case; sometimes it is a result of making the misjudgment that it is critical to support every proposition with a citation even if the holding of the case is adverse. If a proposition is sufficiently uncontroversial, you are better off citing nothing for it than citing a case that, after acknowledging the general proposition, reaches a harmful holding. By citing a case whose ultimate holding is adverse, you give your opponent the chance to respond by invoking *your* case and arguing that the adverse holding supports the opponent’s ultimate position about how your case ought to come out.

This is not to say that you should never cite a case with a harmful holding. The duty of candor requires you to do so, if the holding would be controlling. Moreover, apart from this rather atypical circumstance, it is usually better to cite and address an adverse case if (1) the court below relied on it; (2) the other side cited it below; or (3) there is good reason to believe that the appellate court will be aware of it or will be likely to come upon it during its research. Raising and addressing an adverse authority in your own brief can take the sting out of it, give you an opportunity to put your spin on it before the other side gets the chance, and enhance your credibility with the court.

A corollary to the rule that you are better off citing nothing for an uncontroversial proposition than citing a case with an adverse holding is that, even if there are plenty of cases with good holdings, you should not clutter up your brief with string cites for basic propositions. An appellate brief is not supposed to resemble a law review article or a treatise. It is not a medium for

documenting the extent of your legal research and diligence. Not only are excessive citations distracting and potentially dangerous, you do not have room to squander in an era of page and word limitations. Either cite one case or none for commonly understood propositions, and then move on to the more controversial propositions. The court has enough to read without having to wade through three or four cites for black-letter legal principles. Of course, if one of those black-letter principles is case dispositive, all bets are off. Cite as many cases as it may take to persuade the court to read no further and to rule for you on the spot.

Sometimes a case is so helpful and the court has made your point so compellingly that it is tempting to quote the decision at length. Resist that temptation. It is empirically provable that readers tend to gloss over lengthy block quotes. (We nevertheless are assuming that readers of this treatise will be motivated to read through the excerpts we are providing from our briefs so that our general points take on concrete form.) That is almost surely the case with busy judges and law clerks, who are called upon to read thousands of pages of briefs in a week. As Judge Kozinski explained in his tongue-in-cheek speech about how to *lose* an appeal:

Block quotes, by the way, are a must; they take up a lot of space but nobody reads them. \* \* \* Let's face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.<sup>26</sup>

We have seen briefs that contain block quotes that go on for more than two pages. Ask yourself whether, if you were the judge, you would have the patience to read that tightly packed quote or instead would be more likely to skim it or skip it entirely. As a rule of thumb, you should assume that a federal appellate judge will skip over a block quote of more than five or six lines. Anything longer than that carries a higher and higher probability of being ignored as the length grows beyond half a dozen lines.

If you are convinced that you need to lay that amount of material from a single source before the court—a situation that we have difficulty imagining—think about ways to make the material digestible. Rather than quoting that much of an opinion (or law review article) at one time, try to break the quote into manageable bites. If you can summarize and paraphrase parts of it, you can quote the truly important parts without losing the reader's attention. Here is an example from a brief on which we had the opportunity to comment. First, we set forth the draft as it came to us. Then, we set forth our proposal for breaking it up. (Note also that this draft violates our rule about not gratuitously sticking the citation of a case in the middle of a sentence.)

#### **The wrong way:**

The District Court in *In re California Micro Devices Securities Litigation*, 168 F.R.D. 257, 260–262 (N.D. Cal. 1996), elaborated on the dangers associated with this conflict:

Permitting class counsel who are not effectively monitored to prosecute a class action is the functional equivalent of allowing that counsel to serve as both class representative and class attorney. Such a situation

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<sup>26</sup>Honorable Alex Kozinski, *supra* note 15, at 23.

directly implicates the danger of collusion between plaintiff and defense counsel recognized in FRCP 23, which assigns to the courts both broad responsibility and broad power to monitor the conduct of class actions to ensure their essential fairness. \* \* \* An attorney may not serve both as class representative and as class counsel. \* \* \* The risk recognized by these courts and inherent in having an attorney wear the hats of both class representative and class counsel is obvious: ordinarily, class counsel stands to gain much more in fees from a settlement than any individual class member stands to gain from the settlement itself. If one attorney played both roles, he would be sorely tempted to sacrifice the interests of his fellow class members in favor of maximizing his own fees. \* \* \* This danger of class counsel self-dealing is not, of course, limited to the situation in which an attorney serves as both class representative and class counsel, rather, it is present in every situation where class counsel is allowed to prosecute an action and negotiate settlement terms without meaningful oversight by the class representative.

### A better way:

A federal district court in this State has similarly recognized the dangers of allowing counsel to “prosecut[e] this action with little or no monitoring from the putative class representatives.” *In re California Micro Devices Securities Litigation*, 168 F.R.D. 257, 260 (N.D. Cal. 1996). As the court explained, “[p]ermitting class counsel who are not effectively monitored to prosecute a class action is the functional equivalent of allowing that counsel to serve as both class representative and class attorney.” *Id.* The court reiterated that “[w]hen class counsel are not effectively monitored by the class representative, the result is indistinguishable from the situation in which an attorney serves as both class counsel and class representative.” *Id.* And it is “one of the most fundamental of [the] rules” governing class representatives that “an attorney may not serve both as class representative and as class counsel.” *Id.*; see also *id.* at 262 (citing “the long line of cases which have prevented attorneys from serving as both class representatives and class counsel”). Allowing “an attorney [to] wear the hats of both class counsel and class representative” creates an “obvious” risk:

[O]rdinarily, class counsel stands to gain much more in fees from a settlement than any individual class member stands to gain from the settlement itself. If one attorney played both roles, he would be sorely tempted to sacrifice the interests of his fellow class members in favor of maximizing his own fees.

*Id.* at 262. The court made clear that “[t]his danger of class counsel self-dealing \* \* \* is present in every situation where class counsel is allowed to prosecute an action and negotiate settlement terms without meaningful oversight by the class representative.” *Id.*

For the same reason that we discourage the use of lengthy block quotes, we counsel the judicious use of parentheticals: Readers tend to gloss over material in parentheticals. Justice Thomas, for example, reports: “I’m not real fond of parentheticals \* \* \*. I find them distracting \* \* \*.”<sup>27</sup> It is okay to place a quote from a case in a parenthetical if you are doing so only to satisfy the court that the proposition asserted in text is in fact directly supported by the cited case. Similarly, if your assertion in text is that numerous cases have had the same basic outcome, it is both appropriate and effective to include a short

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<sup>27</sup>Interview by Bryan A. Garner with Clarence Thomas, Associate Justice, United States Supreme Court, Washington, D.C. (2006–2007), available at [http://www.lawprose.org/supreme\\_court.php](http://www.lawprose.org/supreme_court.php).

description of each case in a parenthetical following the cite. But if either the actual language of the case or its underlying facts are critical to the argument, put them in text.

The following excerpt from one of our briefs demonstrates the appropriate use of parentheticals. In the first paragraph, the quotations that explain the background law are included in the text, and no parentheticals are employed. In the second paragraph, parentheticals are used to efficiently describe the holdings of each case cited.

In most cases, the outcome of a Commerce Clause challenge to state regulation will turn on whether or not the regulation discriminates against interstate commerce. Discriminatory regulations are attempts by states or municipalities “to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.” *H.P. Hood & Sons*, 336 U.S. at 535. Thus, “no State can, consistently with the Federal Constitution, impose upon the products of other States \* \* \* more onerous public burdens or taxes than it imposes upon the like products of its own territory.” *Guy v. Baltimore*, 100 U.S. (10 Otto) 434, 439 (1879). The Commerce Clause also prohibits measures that “hoard a local resource \* \* \* for the benefit of local businesses that treat it.” *Carbone*, 511 U.S. at 392. Put generally, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste*, 511 U.S. at 99, 114 S. Ct. at 1350.

On many occasions, the Supreme Court has invalidated state or municipal regulations requiring goods to be processed by local operators, finding that they discriminate against interstate commerce. See, e.g., *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984) (striking down state regulation requiring in-state processing of timber); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295 (1951) (striking down ordinance requiring all milk sold in the city to be pasteurized within five miles of its center); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948) (striking down South Carolina statute requiring shrimp fishermen to unload, pack, and stamp their catch before shipping it to another state); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S. Ct. 1 (1928) (striking down Louisiana statute requiring the pre-shipment processing of oysters). Such “local processing” requirements violate the Commerce Clause because they “erect[] an economic barrier protecting \* \* \* local industry against competition from without the State.” *Dean Milk*, 340 U.S. at 354, 71 S. Ct. at 298.

## 7.9 Visual Impact of the Brief

Make your brief an attractive document. Your argument will be easier to sell if it is presented in a professional-looking package.

Pay attention to the formatting of your brief. Although the relevant court rules undoubtedly will dictate some elements of the formatting, you will also be left with some discretion. Review some sample briefs, and decide what looks pleasing and readable to you. Make sure that your formatting decisions are implemented consistently throughout the brief.

Use a readable font that is no smaller than 12 points—in the footnotes as well as the text. It really does get harder to read small print when you reach middle age, and most federal appellate judges are in this group (or beyond it). Use margins of at least an inch to give your text a nice frame. Don’t

make the print too large or leave too much white space, however: Having too little text on each page may actually make it harder for the court to follow your argument and will force you to shorten your paragraphs too much.

Be judicious in your use of emphasis. If you emphasize too many phrases, your brief will look too busy and seem overwrought. Also, pick one form of emphasis and stick with it: You can use underlining, *italics*, **boldface type**, or some combination of those. After many years of experimenting, we have come to the view that ***bold italics*** is the most readable form of emphasis. We find it preferable to italics both because in most briefs case names are already in italics and because we like to reserve italics for situations in which the authority we are quoting used italics. We also find bold italics preferable to bold alone both because headings are usually set out that way and because bold italics strikes us as easier on the eye than straight boldface. We don't much like using underlining, which is a relic of the era predating word processors.

## 7.10 The Great Footnote Debate

One of the most hotly debated topics among experienced brief writers involves the use of substantive footnotes. Although some judges and lawyers have become quite hostile to footnotes, we think that footnotes are a useful home for points that otherwise would detract from the flow of the argument. But if you use too many footnotes, or if they are too small or tightly packed together, the judge may skip over them. (Most word-processing programs will automatically set up footnotes with no space between them. If you add six points of spacing following each paragraph, your footnotes will be nicely separated.)

In deciding whether to use footnotes, consult not only the local court rules to see whether there are any restrictions but also some experienced practitioners who appear regularly before the court of appeals handling your case. Some courts or individual judges are downright hostile to the use of footnotes. Many courts explicitly state that they will regard arguments made only in footnotes as not adequately preserving a material issue. In any event, it is generally ineffective to try to make an important argument in a footnote.

If you conclude that a point is not important enough to go in the text of the brief, or it does not fit in the text anywhere within your overall organization of the brief, there is a temptation to drop it into a footnote. One term sometimes used to describe such footnotes is the "cameo footnote"—a discussion that addresses a nice, little point, perhaps even an interesting point in some sense, but one that is not integral to the flow of the argument to which it is appended.

Keep in mind that—if it is going to be read at all—material in a footnote is at least as distracting as having the same discussion incorporated in the text where you insert the footnote call. Any textual footnote is inevitably a break in the flow of the main discussion in text.

In the end, whether to put a particular point in a footnote is a judgment call. If you need to provide a qualification to the main argument, define terms, or address a secondary or tertiary argument by the other side or the court

below, we think that it is appropriate to do so in a footnote. On the other hand, if the point is truly collateral and of purely academic interest, drop it from the brief. For each footnote, ask yourself: “Am I really advancing the most persuasive and artful expression of my position by leaving in this footnote?” Once you overcome the normal pride of authorship and natural reluctance to sacrifice something you have created, you may well conclude that the right place for the footnote is the waste basket.

### 7.11 A Final Cautionary Note

Although few lawyers would think to do it, every once in a while a lawyer copies material from another lawyer’s brief or from a law review article without attribution. One such lawyer confided to one of the authors of this chapter that he did so because he thought that he could not make the points any better than they were already made in the brief from which he was copying and that trying to do so would unnecessarily run up the client’s bill. This was flattering to hear. The problem is that some courts believe that unattributed copying violates standards of legal ethics.<sup>28</sup> Accordingly, the safest practice would be to paraphrase the material or to associate the author of the brief being copied as co-counsel.

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<sup>28</sup>See *In re Burghoff*, 374 B.R. 681 (Bankr. N.D. Iowa 2007) (sanctioning lawyer for unattributed copying of law review article).