

North Carolina Appellate Advocacy Training
Co-Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

PERSUASIVE LEGAL WRITING

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LAW AS LITERATURE: SOME SUGGESTIONS FOR EFFECTIVE APPELLATE WRITING

I. Remember that good legal writing has two goals:

- A. Persuasion
- B. Clarity

II. Persuasive Writing

A: Know what your theory of defense is for the appeal. Having an appellate theory of defense will allow you to consciously decide what is important to your case. This is crucial to writing your brief, because you can choose your words intelligently only if you know what you are trying to accomplish with them. For example:

1. What facts are you trying to emphasize?
2. What facts are you trying to downplay?
3. What emotions are you trying to elicit in the reader?
 - a. Disbelief.
 - b. Frustration over an injustice.
 - c. Anger.
 - d. Sympathy.

B: **Write about facts.** In most cases, there is little debate over the law. The real issue is whether the facts of your case fit within the relevant legal boundaries.

1. The statement of facts should be used to persuade, not just provide background information. Emphasize those facts that advance your argument.

2. Use facts to create the mood in which your brief will be read.

a. If you want the reader to feel sympathy for your client, select facts and use language that will make him or her appear sympathetic.

b. If you want the reader to be outraged over the unfairness of the trial judge, lead off with a factual description of the worst things the judge did.

3. When you discuss legal principles, be sure that you quickly follow up by explaining what about the facts of your case makes those principles relevant.

4. Do not just cite case law for general legal principles. Find, cite, and discuss precedents that are factually analogous to your case.

C: Use active, not passive language.

Ex. Active: She went to the office at 9:00 A.M.
 Passive: She had gone to the office at 9:00 A.M.

Active: He took the money from the drawer.
 Passive: He had taken the money from the drawer.

D: Use graphic language to support your case.

Ex. Dull: The officers forcibly entered the room.
 Graphic: The police smashed through the door.

Dull: She threatened appellant with a gun.
 Graphic: She held a gun to appellant's head.
 or: She stuck a gun in appellant's face.

BUT: Be sure that you only use graphic language where it will help you. Don't use it to enhance the prosecution's case.

E: Use dull, conclusory language when describing facts you want to minimize.

Ex. Dull (but good): Appellant held a gun.
 Graphic: Appellant brandished a 9mm automatic.

Dull (but good): Appellant was found with the complainant's personal property.
 Graphic: Appellant was grasping the victim's wedding ring and life savings.

F: Avoid cop-talk.

1. Using institutional police language legitimizes the behavior of the police.
2. Using institutional police language suggests that everything that happened in your case was normal and routine.

3. Remember that institutional police language is designed to give the impression that your client is guilty.

Ex. Cop-talk: They apprehended an alleged perpetrator.
 Normal speech: They arrested somebody.

Cop-talk: They proceeded to the vehicle.
 Normal speech: They went to the car.

G: Use language that humanizes your client.

1. Refer to your client by his or her name.
2. Don't always refer to your client as "appellant" or "defendant."
3. Try to include factual details which make your client seem to be a decent person.

Ex: Instead of: Ms. Smith was on her way to work.
 Humanize: Ms. Smith was walking to her job at Ace Motors, where she had been a salesperson for three years.

Instead of: Mr. Jones went home.
 Humanize: Mr. Jones went to his apartment on Laurel Road, where he lived with his wife and three children.

H. Don't obviously sugar-coat things.

1. If your theory of defense allows you to admit that the crime occurred, you don't have to minimize the seriousness of the crime.
2. Avoid unrealistic and unbelievable claims that your client is a wonderful person.
3. Avoid assertions that are so trivial that the court will automatically dismiss them.

III. Clear Writing

A. In general, shorter is better.

1. Short sentences enable you to communicate in a way that is easier for most people to understand.
2. If a sentence is too convoluted or difficult to understand, try to divide it into two or three separate sentences.

B: Decide how you are going to organize your story. Remember: You don't have to tell the story in the same way the police told it in their reports or the prosecutor told it at trial.

1. Every story can be told in various sequences and perspectives. For example:
 - a. Chronologically, according to the events of the incident.
 - b. Chronologically, according to the events of the trial.
 - c. From the perspective of individual characters.
2. Select an organizational form that best compliments your argument on appeal.
3. Once you have chosen a perspective from which to tell your story, try not to flip back and forth between other organizational forms.

C. Avoid meaningless language. Many words have specific meanings, but are instinctively used by lawyers as filler, when they have nothing of substance to say. Some of these words are:

- a. Clearly
- b. Merely
- c. Obviously
- d. Generally
- e. Certainly

D: "Would a non-lawyer understand this?"

1. Whenever possible, have a non-lawyer read your brief. Ask him or her questions about the clarity and organization of your facts and arguments -- then listen to the answers and make changes accordingly.
2. This is an excellent test for deciding whether your writing is clear enough.
3. This test also forces you to make your argument sufficiently factual.

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**THE GENRES OF APPELLATE STORIES:
ISSUE STORIES,
CRIME STORIES**

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Genres of Crime Stories

1. It didn't happen.
2. It happened, but I didn't do it.
3. It happened, I did it, but it wasn't a crime.
4. It happened, I did it, it was a crime, but it wasn't the crime charged.
5. It happened, I did it, it was the crime charged, but I'm not responsible.
6. It happened, I did it, it was the crime charged, I'm responsible, but there is an overwhelming reason to reverse my conviction anyway.

Genres of A/N/D Stories

1. It never happened (mistake, false report)
2. It happened, but I didn't do it (accidental injury, perpetrator not a caretaker, non-offending parent)
3. It happened, I did it, but it wasn't abuse, neglect, or dependency (isolated incident, DSS overreaching)
4. It happened, I did it, it was abuse, neglect, or dependency, I'm responsible, but DSS is overreacting (inappropriate discipline, out of control teenager)
5. It happened, I did it, I'm responsible, please help me (front-loading disposition)

Genres of Appellate Issue Stories

1. The court made a bad ruling, and I was prejudiced
2. The prosecutor (or DSS or GAL attorney) did something bad, the judge did not/could not stop him or helped him, and I was prejudiced
3. The police (or DSS) or some other witness did something improper, and I was prejudiced
4. A juror or jurors did something improper, and I was prejudiced
5. Some external event prejudiced the trial
6. The defense lawyer at trial did something improper, and I was prejudiced
7. The evidence was insufficient to support the verdict (or court's determination)

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**STORYTELLING:
PERSUADING THE COURT TO
REVERSE A CONVICTION**

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Persuading the Court to Accept Your Legal Issue

Every appellate defense lawyer has had the experience of finding a solid, winning legal issue, writing a brief that explains that issue, and then losing the case anyway. Sometimes the court affirms by repeating the phrase “harmless error.” Sometimes the court doesn’t even mention our legal issue, but pretends that the case is about a weaker, secondary issue. Sometimes the court just focuses on the facts of the crime and hardly addresses any legal issue.

The way to convince a court that a legal issue is worth reversing on requires that we have more than a legal basis to appeal – it requires us to put the legal issue in the context of a persuasive storyline. Sometimes the storyline will be about the legal issue. Sometimes it will be about other facts in the case. But it will always be the thing that persuades the court that reversing is the right thing to do.

I. What Does Telling A Story Have To Do With Winning An Appeal?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories, and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic analysis, but through stories, parables, and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all revealed that storytelling and the love of stories are among the most fundamental traits of human beings.

Unfortunately, law school is one of the few places where storytelling is neither practiced nor honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the only key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles.

For appellate public defenders, this approach is disastrous because it assumes that judges are unbiased and are persuaded by the same academic principles as law students. Unfortunately, this is not true. Lawyers and law students spend a lot of time thinking about “reasonable doubt,” “burden of proof,” “elements of crimes,” and “presumption of innocence,” but appellate judges tend to view these principles as legal technicalities that get in the way of the real issues. And for the appellate court, the real issues are:

1. Did he do it?
2. Was the trial basically fair?

A good story that addresses these questions will go much further towards persuading a court than will the best-intentioned treatise about a legal issue.

II. What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus. The unfairness of the trial, or of some pre- or post-trial hearings or events, is often far more significant on appeal than the facts of the crime. **Remember: You don't have to tell the story in the same way the police told it in their reports or the prosecutor told it at trial. The police and prosecutor always focus on the facts of the crime because that is their strongest, most emotional point. Our job is to tell a story that refocuses the court on the unfairness of the trial level legal process.**

In order to persuade the court to accept your theory of defense, your story must focus on one or more of the following:

The injustice of the trial, focusing on:

The unfair rulings of the trial judge

The improper, unfair conduct of the prosecutor

Anything else that happened that made the trial or conviction unfair

Your client's innocence or reduced culpability

III. A Guide For Telling Your Story of Injustice at Trial

Most stories of reversible error at trial fall into one of seven categories. These are:

1. The judge made a bad ruling and I was prejudiced
2. The prosecutor (or DSS or GAL attorney) did something bad, the judge did not/could not stop him or helped him, and I was prejudiced
3. The police (or DSS) or some other witness did something improper, and I was prejudiced
4. A juror or jurors did something improper, and I was prejudiced
5. Some external event prejudiced the trial
6. The defense lawyer at trial did something improper, and I was prejudiced. (But remember: IAC should almost always be raised in post-conviction, not on direct appeal)

7. The evidence was insufficient to support the verdict (or court's determination)

Please keep in mind that these categories are not meant to be a substitute for in-depth legal research or for articulate and persuasive writing about the facts and law. They are merely a guide to help appellate lawyers decide what kind of a story they must tell to convince a court that there was reversible error at trial.

It should also be mentioned that the seven categories are arranged in order of descending frequency and effectiveness. The final two categories – IAC and insufficiency are rarely successful and therefore rarely raised.

IV. A Word About Innocence

Unless you are raising a claim that the conviction was based on insufficient evidence, or was against the weight of the evidence, you cannot explicitly say on appeal that your client was innocent. It is important, though, to write about the crime facts in a way that emphasizes the weaknesses in the State's case, and to imply that had the trial been fairer, the jury might well have acquitted. This will not only help persuade the court that the conviction was not fundamentally fair, but will also help you overcome the inevitable issue of harmless error.

V. How to Tell a Persuasive Story

A. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a judge in court, but it is always a story. Our task is to figure out how to make persuasive the story of the trial's unfairness. The best way to do this is to be aware that you are telling a story, and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the brief as if you were an author writing a book or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story, and what roles do they play?
2. Setting the scene -- Where does the most important part of the story take place?
3. What scenes must be included in the brief to make the overall story persuasive?
4. In what sequence will I tell the events of this story?
5. From whose perspective will I tell the story?
6. What emotions do I want the judges to feel when they are hearing my story? What

character portrayals, scene settings, sequence, and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to tell the events of the crime.

Finally, never forget that you do not have to tell the same story as the police or the prosecutor told at trial. That is the story that got our client convicted in the first place. It is therefore essential that you tell a different story – a story of the injustice at trial that requires reversal.

B. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the court through your point headings, introduction, statement of facts, and legal argument. When you design these parts of the brief make sure that your tactics are tailored to the needs of your story.

1. The language you use to communicate your story is crucial to convincing the court to accept the theory of defense.
 - a. Do not use pretentious “legalese.” You don’t want to sound like a television lawyer or cop.
 - b. Use graphic, colorful language.
 - c. In general, shorter is better – short words, short sentences, short paragraphs.
2. Use charts, pictures, maps, and other graphic evidence to help make things understandable.
3. Practice, Practice, Practice

When you review your brief, honestly appraise whether it tells your story in a persuasive manner. Have someone, preferably a non-lawyer, read it. Pay attention to his or her feedback, and adjust your presentation until your story is communicated effectively.

North Carolina Institute of Government
Virtual Program
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**WRITING TO PERSUADE:
Rhetoric, Coherence, and Confidence**

Professor Timothy P. Terrell
Emory University School of Law

1

**PERSUASION:
THE STRATEGY**

•Option A: Beat the judge and
your opponent into submission

•Option B: Apply Judge Posner's
formula:

- Persuasive effort needed =
- distance x resistance

2

**PERSUASION:
THE STRATEGY (cont'd)**

•Reduce the distance by moving

•your goal closer to the judge

•the judge's starting place closer
to you

3

**PERSUASION:
THE STRATEGY (cont'd)**

- Reduce the resistance by making
 - the goal more attractive
 - the obstacles less difficult
 - your company along the way more agreeable
 - the road smoother, straighter and faster

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**THE ELEMENTS OF
PERSUASION**

Qualities of the:

- ✓ *Speaker*
- ✓ *Argument*
- ✓ *Audience*

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**STAGES OF INTELLECTUAL GROWTH
Becoming a Good Legal Writer**

- | | | |
|---------------------------------|---------------|---|
| • <i>Thinking Like a Lawyer</i> | | <i>Thinking Like a Writer</i> |
| "The Law is complex" | | "The Law must appear simple" (comprehensible) |
| LOGIC | > command > | COHERENCE |
| PRECISION | >> control >> | FORCEFULNESS(persuasiveness) |

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THREE PRINCIPLES OF “SUPER-CLARITY”

- Principle 1: Provide Context
Readers absorb information best if they understand its significance as soon as they see it.
- Principle 2: Match Form and Substance
Readers absorb sequences of information best if the the sequence’s order (its “form”) is consistent with the information’s purpose (its “substance”).
- Principle 3: Segment Your Information
Readers absorb information best if they can absorb it in relatively short pieces.

7

THE GOALS OF GOOD MACRO-ORGANIZATION

- SMART**
 - Label
 - Map – Structure
 - Point
 - Legal
- ATTENTIVE**
 - Practical
 - Positive
- COMFORTABLE**
 - Non-Negative
 - Language



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JUDGES

- **WHAT THEY WANT**
 - To do justice ... safely ... *quickly*
- **WHAT THEY WANT FROM YOU**
 - The context: the big picture
 - The crux: the specific issues
 - The summary: your argument

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ORGANIZING THE LAW: THE DEFAULTS

- The most common traps:
 - **Chronology**
 - **History of your research or thinking**
 - **Someone else's analysis**

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THE ELEMENTS OF A STORY



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**NORTH CAROLINA INSTITUTE OF
GOVERNMENT**

Virtual Program

Oct. 30, 2020

Presentation on

“Advanced Persuasive Writing”

**WRITING TO PERSUADE:
RHETORIC, COHERENCE, AND CONFIDENCE**

Presented By

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I. INTRODUCTION: THINKING STRATEGICALLY ABOUT PERSUASION

THE SITUATION: What are your current circumstances?

- Procedural: What is the posture of the case?
- Substantive: What are the issues? The facts? The burden of proof or standard of review?
- Practical: How much persuasive work are you going to have to do? What do you want? What will the judge require of you to get what you want?

THE STRATEGY: What perspective should you bring to your “persuasive” situation?

- Option A: Beat the audience into submission.
- Option B: Judge Posner’s formula:

Persuasive effort needed = distance x resistance

Hence: *Reduce* the amount of persuasive effort you will need to achieve agreement by:

- Reducing the distance from the judge’s starting place to your goal
- Reducing the judge’s resistance by:
 - making obstacles less difficult
 - making the goal more attractive
 - making your company along the way more agreeable

Correspondingly, increase the distance and resistance the judge perceives in your opponent’s argument.

THE TOOLS:

What skills will you need to get what you want?

- **Thinking like a lawyer:** What are the strongest substantive aspects of your case?
 - Leads to Part I of “Bringing It All Together: An Advocate’s Checklist,” page 171, *infra*.
- **Thinking like a rhetorician:** How can you make that substance more compelling?
 - Leads to Part II of “An Advocate’s Checklist.”
- **Thinking like a writer:** How can you (a) capture the judge’s attention and (b) make it easier for the judge to follow and remember your arguments?
 - Leads to Parts III and IV of the “Strategic Checklist.”

In the materials that follow, we will generally assume that you have mastered the first skill, and therefore focus on the other two—not because you necessarily lack them, but because they are not sufficiently taught in law school or understood in law practice.

II. RHETORIC AND CLARITY: SUMMARIES

THE ELEMENTS OF PERSUASION

The difference between logic and persuasion:

Logic leaves your reader no choice but to agree with you.

But, since few readers believe themselves so trapped:

Persuasion makes your reader *want* to agree with you.

How do you make logic more persuasive?

Qualities of the:	Classical rhetoric for the polloi	Modern legal advocacy for the judge
Speaker	<p><i>Ethos</i>: deference to an attractive persona (looking “up”)</p> <ul style="list-style-type: none"> • popularity • prestige • righteousness 	<p><i>Ethos</i>: respect for a credible persona (looking “at”)</p> <ul style="list-style-type: none"> • veracity, integrity • professionalism
Argument	<p>Authority</p> <p><i>Logos</i>: plausible reasoning (thinking “for”)</p> <p><i>Axios</i>: worthiness of results</p>	<p>Authority</p> <p><i>Logos</i>: systemic reasoning (thinking “with”)</p> <ul style="list-style-type: none"> • the legal “story” • consistency and coherence constraints <p><i>Axios</i>: principled results</p> <ul style="list-style-type: none"> • legal risk-avoidance • doing justice
Audience	<p><i>Pathos</i>: invoking emotion</p>	<p><i>Pathos</i>: evoking emotion</p>

III. THINKING LIKE A WRITER: THE PRINCIPLES OF “SUPER-CLARITY”

To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers — “the law” — is in fact quite complex. Then — perhaps in law school, but usually much later — we learn that, to communicate about the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of all that complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.

In the first stage, as we learn to “think like a lawyer,” we worry mostly about logic and precision — about having exactly the right information or ideas and putting them in exactly the right order. In the second stage, we realize that logic and precision are not enough. To “think like a writer,” we also have to make our logic easy for our readers to see and understand. And, even if we are not writing as an advocate, we have to be persuasive: we must convince readers to accept our judgment about what matters, to believe us when we say that we have a fact or idea worth their attention.

To write clearly and persuasively, therefore, lawyers must master two kinds of clarity. They must impose a rigorous logic on often-recalcitrant material. Then they must make that logic obvious to their readers from the document’s start through every page to the end. By training and inclination, most lawyers are expert at the first task. But they are seldom as good at the second. In fact, many never realize that the two are different, that an impeccably logical and precise analysis may still leave readers exhausted, confused, and unpersuaded.

To avoid inflicting this kind of pain, you must do more than create logic and precision in your material – more, that is, than think clearly and choose your words carefully. You also have to create coherence – the perception of focus and organization – in your readers’ minds. A coherent document has to be logical, but it also has to be much more.

From logic to coherence:

To create coherence, begin by seeing your document from your readers’ perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

When you write a document, therefore, you are organizing a complex process: the flow of information through your readers’ minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arching syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. They read actively, although much of the action happens in split seconds and never reaches full consciousness. At each moment, they are deciding how much of what they just read

they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

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

- Because readers have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern – the story, the logic, the theme – enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been – and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.
- As the information flows past, they want its structure and sequence to match the logical order of the propositions or events it is describing. In other words, they want the document to unfold in step-by-step synchrony with the legal analysis or factual story it conveys, so that its form matches its underlying substance. They don't like it, for example, when your writing follows the wandering path you took in researching an issue, rather than the logic of the analysis you finally uncovered. Nor do they like it if you recite facts chronologically when the key factual issues have nothing to do with the interminable tale of who-did-what-when. They are irritated if a section is divided into five sub-sections that look of equal importance, when the fourth is logically subordinate to the third. And they are annoyed, if only subliminally, when a sentence's structure implies that three details are equally important, although two are just appendages to the other.
- With words as with food, they cannot easily ingest an unbroken flow. At both the large scale (the document as a whole) and the small (paragraphs and sentences), they want writing cut into manageable pieces, so they can pause and begin to digest each before they go on to the next.

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

This emphasis on principles is closely analogous to a lawyer's approach to the law itself. "Thinking like a lawyer" does not mean relying on simple rules or clear-cut precedents, for the law is seldom so convenient. It means instead grasping the more abstract legal principles that underlie the rules and provide the context in which they must be understood and applied. Correspondingly, "thinking like a writer" does not mean relying on the familiar lists of writing "tips." It means starting from the principles that lie at the foundation of effective communication.

The Principles

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

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

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

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

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

- a. **Break information into segments.**
- b. **Put the most important information into the most emphatic segments.**
- c. **Make the segments concise.**

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

USING STRUCTURE TO PERSUADE: EXAMPLE #1

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USING STRUCTURE TO PERSUADE: EXAMPLE #2

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V. WRITING EFFECTIVE INTRODUCTIONS AND PRELIMINARY STATEMENTS

Unfortunately, the judge does not possess the luxury of time for leisurely, detached meditation. You'd better sell the sizzle as soon as possible; the steak can wait.

Ruggero J. Aldisert (retired Chief Judge of the U.S. Court of Appeals for the Third Circuit), *Winning on Appeal: Better Briefs and Oral Arguments* (1992)

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

What Judges Want: Clarity

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

- If the brief is their first taste of a case, a succinct, simple “big-picture” summary of what the case is all about. How did the dispute arise, and why are the parties fighting? The most common complaint: the brief plunges into the details of its argument before explaining the basics of the underlying dispute.
- If it's not clear from the face of the brief, the specific relief you want.
- A clean, clear statement of the questions they have to resolve to get rid of the case. The most common complaints: issues phrased too vaguely to define the ultimate question, and a scattershot list of more issues than they can remember.
- A clean, clear statement of why you think you should win.
- A clean, clear map of the brief's analytical structure. The most common complaint: a one-thing-leads-into-another approach (“moreover,” “furthermore,” etc.) that doesn't let the judge focus on specific, distinct arguments.

What they do not want to see at the start of a brief:

- Attacks against the opponent that show how strongly you feel, but give the judge no useful information.
- Piling on: a laundry list of issues and arguments.
- Too much boilerplate or inessential procedural detail.
- Clotted prose.

What You Want: Persuasion

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

- Although the “big-picture” context should be factual and non-argumentative, it should never be neutral. Seizing control of the context is just as important as seizing control of the issues.
- Themes persuade; arguments alone seldom do. An argument should create a chain of syllogisms so inexorable that readers are compelled to accept your conclusion. A theme should make them want to accept it. As you draft your clean, clear statement of why you should win, your goal should usually be to create a memorable, one- or two-sentence theme as well as an argument. But cases vary: some lend themselves to equitable themes, some to syllogistic inevitability.
- Details persuade; generalizations and conclusory statements do not. Although introductions must be concise, they are often much more persuasive if they deploy a few carefully selected details.

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

- If an argument is a sure winner on its face, simplicity is best. Few things beat a simple, impeccable syllogism. If it’s not such a sure thing, however, you may persuade best if you summon more than one reason to support your conclusion. This strategy does not justify arguments in the alternative. It just makes the common-sense point that two or three reasons may be more persuasive than one. The most useful discussion of this principle is Stephen Toulmin’s Uses of Argument, which provides an alternative to classic syllogistic logic. Toulmin’s approach is most helpful in the details of your argument, but it sometimes helps with introductions as well—though you should be very careful not to over-complicate them.

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

The Elements of a Strong Introduction

Making the Reader “Smart”

Label
Map – Structure
Point
Legal

Getting the Reader’s “Attention”

Practical
Positive

Making the Reader “Comfortable”

Non-negative
Language

* * * * *

The Elements of Judicial “Attitude”

“I want to do justice.”

I want to do justice *safely*.”

“I need to do justice *quickly*.”

Strategy

The “big picture” – what the case is about; why the judge should care

The “laser focus” – precisely what should the judge be thinking about amidst the case’s complexity

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1

Motion to dismiss

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

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

The revision, though not perfect, tries to:

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PANACEA

_____)	
MIDWEST SEED, INC.,)	
)	
Plaintiff,)	No. C89-1572
)	
v.)	
)	
FIRST CITIZENS BANK, a banking)	MEMORANDUM IN SUPPORT
corporation; RELIABLE EXPRESS,)	OF DEFENDANT FIRST
INC., a Washington corporation;)	CITIZENS BANK'S MOTION
RESOURCE DEVELOPMENT COMPANY,)	<u>TO DISMISS THE COMPLAINT</u>
a Lebanese corporation,)	
)	
Defendants.)	

PRELIMINARY STATEMENT

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

FACTS

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1 REVISED

PRELIMINARY STATEMENT

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

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

FACTS

.....

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2

Appeal

The “before” version commits at least two sins:

- It rushes into its argument before explaining the context: what happened, and why did a quarrel result?
- It fails to create a clear, visible structure for its argument. The first words in the third and fourth paragraphs—”moreover” and “at any rate”—are symptoms of this failing.

documents and as to testimony concerning communications between Big and its attorneys.

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

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

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

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2 REVISED

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

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

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

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

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

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

Third, Big has agreed that Minicorp is free to inquire about communications

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

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3

Preliminary injunction

The problems:

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3

Nature and Stage of the Proceedings

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

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

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

Introduction

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

consideration for the purpose of entrenching Minicorp's Chief Executive Officer, Roger Rogers.

Plaintiffs' brief (Pl. Br. 3-4, 22-26)* contends that Minicorp sold its Green Thumb division to Megacorp for \$57 million less than its worth by extracting a figure of \$400 million used by Megacorp's investment banker, Maxibucks, in preliminary and hypothetical analyses of ranges of premium values that might be attributed to Green Thumb in a possible transaction involving a tender for all of Minicorp's stock at a premium over market price. This hypothetical value was never adopted by either party or their investment bankers or any witness as the actual premium value of the assets sold. In fact, plaintiffs themselves in their interrogatory answer explaining the basis for the complaint's allegation of a \$28 million shortfall used a \$371 million cash premium inflated value for Green Thumb. To exaggerate the alleged discrepancy, plaintiffs value the Minicorp stock given back by Megacorp at an "unaffected" market value of \$91, ignoring the premium value placed on all Minicorp stock in the hypothetical.

Alternatively, plaintiffs suggest a discrepancy of \$42.8 million using a total value of \$390 million which Megacorp's acquisitions director John Smith one time indicated as the most that he "might" be willing to attribute to Green Thumb in a valuation of all of Minicorp at a takeover price of \$130 per share (Roberts 76-78). To exaggerate the discrepancy, at a time when the stock was trading in excess of

[THIS "INTRODUCTION" CONTINUES FOR ANOTHER PAGE]

* Cites to ("Pl. Br. ___") are to plaintiffs' brief on this motion. Deposition exhibits are cited as "PX ___" and "PX (Megacorp) ___." "Pl. Br. Ex. ___" refers to additional exhibits filed with plaintiffs' brief. "Jones Aff. Ex. ___" refers to exhibits to the accompanying affidavit of C. B. Jones. Deposition transcripts are cited by the name of the deponent followed by the page number.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3 REVISED

Introduction

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

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

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

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

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4

Motion to dismiss

The draft makes a couple of common tactical mistakes:

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

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

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4

I.

PRELIMINARY STATEMENT

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

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

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

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

II.

STATEMENT OF FACTS

Super, incorporated in 1985, is the leading

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4 REVISED

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

PRELIMINARY STATEMENT

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

Super is and has been an immensely successful manufacturer of local area computer networks. Since its inception as a public company in 1986, Super’s revenues have grown at an average annual rate of 253%.¹ In each of those years, Super’s yearly earnings per share have also grown at an impressive rate, with the average annual increase equaling 468%. During the

¹ These figures are derived from Super’s Form 10-Q for the third quarter ending on September 28, 1990, its Form 10-K for the fiscal year ending December 28, 1990, its 1990 Annual Report, its Form 10-Q for the first quarter ending March 29, 1991, and its Form 10-Q for the second quarter ending on June 28, 1991. These documents are attached to the accompanying Declaration of [] as Exhibits A-E, and are referred to as “Ex. _.” Because allegations concerning the content of these documents form the basis for the Complaint, the Court may consider their contents on this motion to dismiss. [cites]

putative class period of October 18, 1990 (the date on which Super announced its results for the third quarter of 1990) to July 18, 1991 (the date on which it announced results for the second quarter of 1991), this impressive pattern was equally present.

In the third quarter of 1990, revenues were \$48,355,000 and earnings per share were \$.41 (compared to \$20,912,000 and \$.15 for the prior year's comparable quarter). Complaint ¶ 34; Ex. A at _____. In the fourth quarter of 1990, revenues were \$56,256,000 and earnings per share were \$.45 (compared to \$25,546,000 and \$.19 for the comparable quarter). Complaint ¶ 38; Ex. B at _____. For fiscal 1990, overall revenues were \$175,957,000 and earnings per share were \$1.42 (compared to 1989 levels of \$77,289,000 and \$.61). Complaint ¶ 38; Ex. C at _____. In the first quarter of 1991, revenues were \$61,111,000 and earnings per share were \$.46 (compared to \$30,092,000 and \$.22 for the comparable quarter). Complaint ¶ 45; Ex. D at _____. In the second quarter of 1991, revenues were \$64,067,000 and earnings per share were \$.41 (compared to \$41,254,000 and \$.34 for the comparable quarter). Complaint ¶ 49; Ex. E at 3. Although this pattern is undeniably impressive, it was the 11% decrease in earnings per share from \$.46 in the first quarter of 1991 to \$.41 per share in the second quarter—and nothing more—that drew this lawsuit.

As impressive as Super's business has been, its public disclosures are even more impressive. Although plaintiff quotes passages from Super Form 10-Qs, Form 10-K and Annual Report, plaintiff does not allege that these documents contain a single misrepresentation of fact. Nor could he. These documents set forth concededly truthful historical facts, and make no predictions—let alone promises—of future performance. *See* Exs. A-E. To the contrary, Super's public filings expressly caution that its past results, including the results for any particular quarter or year, may not be indicative of future results. (*See infra* at 5-7).

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

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

Facts

A. The Company

CRAFTING AN INTRODUCTION: EXAMPLE #2

This introduction has several virtues:

1. Because this is a responding brief, it does not set out to explain the case—but it does tactfully remind the reader of some basic facts that are crucial to its argument.
2. It gives the reader several interwoven reasons to support its position:
 - It would be unfair to give the appellant what it wants.
 - The appellant cannot meet the legal test applied by the court below.
 - The appellant is trying to move the boundaries of the playing field, by asking for substantive consolidation in circumstances in which it has never before been granted.

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

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

CRAFTING AN INTRODUCTION: EXAMPLE #2

Introduction

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

CRAFTING AN INTRODUCTION: EXAMPLE #3

Because this is a reply brief, the introduction starts directly with the heart of the appellate dispute, not with the basics of the case.

PRELIMINARY STATEMENT

Two well established legal principles are dispositive here. First, common law and statutory remedies are cumulative, unless statutory language expressly preempts the common law remedies. Second, arbitrators may not issue an award upon a matter that is not expressly and unambiguously submitted for their consideration. Respondents attempt to sidestep these principles by offering a version of events without any basis in fact, logic or the Record on Appeal.

ARGUMENT

I

BELCO'S COMMON LAW RIGHT TO RECOVER PUNITIVE DAMAGES IS NOT PREEMPTED BY INSURANCE LAW § 2601

In an unbroken line of decisions, the New York Court of Appeals and this Court have recognized a common law right to recover punitive damages from an insurer. In enacting the administrative remedies of N.Y. Insurance Law § 2601 in 1970,

CRAFTING AN INTRODUCTION: EXAMPLE #4

This introduction has several virtues:

- In the Preliminary Statement's first paragraph, it provides a lucid, brief "big-picture" summary of the case's background. This summary isn't neutral, of course: without being argumentative, it creates a context that favors the client's position.
- It states a simple theme—"This case is an attempt to turn the bond market collapse into a litigation windfall."—but also provides enough supporting detail to make its argument factual and specific.
- It avoids becoming embroiled in the details of the other side's argument. Instead, in the Preliminary Statement's second paragraph, it adopts a much more effective technique: it re-defines the essence of the opponent's allegations. In effect, it takes control of the opponent's own terrain.
- It creates a clear structure, with separate paragraphs (the fourth and the fifth) devoted to separate, clearly defined arguments.

For the sake of contrast, look at the first paragraph of the Introduction to the Opposing Memorandum (starting on page 64). It's largely boilerplate. As a result, it's irritating to read, and it misses an opportunity to persuade.

CRAFTING AN INTRODUCTION: EXAMPLE #4

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

PRELIMINARY STATEMENT

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

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

In fact, the prospectuses (i) disclosed that the Term Trusts planned to invest as much as 85% of their assets in mortgage-backed securities, (ii) discussed in detail the volatility and other risks of investing in such securities, (iii) explained that 25-30% of Trust 2003’s assets and 25-40% of Trust 2000’s would be invested in “inverse floaters,” and (iv) described at length the characteristics of inverse floaters and their potential volatility in the face of interest rate shifts.

The prospectuses also specifically drew attention to the risk of a decline in the Term Trusts' net asset value because of interest rate moves and other market forces. Read as a whole, and not in the selective and misleading fashion quoted by plaintiffs in the Complaint, the prospectuses "bespoke caution" about the specific risks plaintiffs say have now caused their shares to decline in value. Because nothing material was either misstated or omitted, the complaint must be dismissed. See pp. 9-22, *infra*.

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

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

BACKGROUND

The Term Trusts

The Term Trusts are “closed-end” investment companies registered pursuant to the Investment Company Act of 1940.¹ Unlike

¹ For purposes of this motion only, we take the allegations of the Complaint as true. In addition, because the Complaint relies on and quotes the prospectuses, the Court may also consider the prospectuses as a whole on a motion directed to the pleadings. I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991) (“Pincus”); Cortec Indus. v. Sun Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991), cert. denied, 112 S. Ct. 1561 (1992). The prospectuses for the two Term Trusts are substantially similar. Page references herein are to the final prospectus for Trust 2003. Copies of the final prospectuses for Trust 2003 and Trust 2000 are attached as Exhibits A and B, respectively, to the accompanying affidavit of _____ sworn to January 13, 1995 (‘ - Aff.’).

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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

INTRODUCTION

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

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

- 1) Misrepresentation of the maturities of the portfolio;
- 2) Misrepresentations concerning the amount of borrowing by the Trusts;
- 3) Failure to disclose the Trusts' interest rate risk;
- 4) Failure to disclose the Trusts' vulnerability to rising interest rates;
- 5) Failure to disclose the risk of the lack of liquidity of the Trusts' investments;
- 6) Failure to disclose that the initial structures of the Trusts' portfolio were biased towards a declining interest rate scenario and that such bias ensured that the Trusts would suffer severe losses when interest rates rose;
- 7) Failure to disclose the risk that due to the lack of liquidity of the Trusts' investments and the bias of the portfolios' structure towards a declining interest scenario, a rapid rise in interest rates would trap the Trusts in

investments which would suffer massive losses when interest rates rose;
and

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

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

A couple of years ago, inverse floaters were among the cheapest thing in the history of American financial markets.

....

Now, they're probably one of the best sales in history. The best case is that you get 12% or 13%. But they can only go down." [Emphasis supplied.] See, Exhibit 1, Affidavit of Lee Squitieri dated March 8, 1995 (the "Squitieri Affidavit"). Barrons, November 29, 1993, "Inverse Floaters."

FACTUAL BASIS OF PLAINTIFFS' CLAIMS

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

CRAFTING AN INTRODUCTION: EXAMPLES #5-8

The next four introductions do an expert job of controlling situations that, in less skillful hands, could have produced chaos—either because they involve many facts and issues or because the issues lead quickly and inevitably into dense thickets of detail. These examples demonstrate the importance of stepping far enough back from the details to provide a bird’s-eye view of the terrain. They also show how helpful it is to create an organization that is not just coherent, but also “visible,” so that it provides an easy-to-read map of the brief’s structure. For this point, see also the careful use of subheadings in the Statement of Facts in the *Tunick v. Kornfeld* (pages 54-56, *supra*).

CRAFTING AN INTRODUCTION: EXAMPLE #5

Appeal to the U.S. Fifth Circuit;
appellee's brief

I.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear appeals from affirmances by the United States District Court for the Northern District of Texas, Dallas Division, of orders of the United States Bankruptcy Court, pursuant to 28 U.S.C. § 158(d). 28 U.S.C. § 158(a) grants jurisdiction to the district courts to hear appeals from final orders of bankruptcy courts on “core” bankruptcy matters. Orders relating to plan confirmation are “core” matters. 28 U.S.C. § 157(b)(2)(L).

II.

STATEMENT OF THE CASE

These cases began over two years ago with the filing of involuntary bankruptcy petitions on February 21, 1985 by a number of banks, including The Bank of Nova Scotia (“Scotia”), against Kendavis Holding Company (“KHC”) and Kendavis Industries International, Inc. (“Kiii”) (referred to collectively as the “Debtors”). The issues on appeal arise out of the affirmation by the District Court for the Northern District of Texas of orders issued by the Bankruptcy Court for the Northern District of Texas. Of particular significance is the order entered in the Bankruptcy Court on November 24, 1986 confirming the plan of reorganization proposed by the Official Unsecured Creditors Committees of KHC and Kiii (the “Committees’ Plan”). As the largest creditor of the Debtors—Scotia is owed more than \$67,000,000—and as a member of those Committees, Scotia was and is an active proponent of the Committees’ Plan. It is also a shareholder of the new KHC created pursuant to that Plan.

The facts and procedural history of these cases are fully and accurately stated in the brief of the Official Unsecured Creditors Committees of KHC and Kiii (the “Committees”), and the relevant portions of that brief are incorporated herein.

III.

SUMMARY OF ARGUMENT

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

Appellants’ position on each of these issues is flawed. First, Appellants’ arguments regarding standing ignore certain essential facts. Perhaps the most important is that the Committees’ Plan provides that all claimants, except the banks, will be paid in full within two years. In fact, all of the Class 5 claims and \$293,651.69 of the Class 6 claims have already been paid and KHC, as reorganized by the Committees’ Plan, has moved to pay the remaining Class 6 claims, \$493,964.96, as soon as possible. The Debtors, who purport to be the protectors of those creditors, proposed a plan in which those creditors would have had to wait twenty years for a full payout. Thus, the Debtors’ protestations that they must have standing in order to protect the creditors of the estates ring hollow.

The Davises also lack standing because (a) to the extent their interest is that of equity holders, they have no interest because, the Debtors being hopelessly insolvent, equity has been cancelled; and (b) to the extent their interest is that of creditors, the Davises cannot appeal because they failed to raise objections to the Plan in the Bankruptcy Court.

*”Appellants” shall refer to all parties purporting to appeal here. “Debtors” shall refer to KHC and Kiii. The “Davises” or the “Davis family” shall refer to K.W. Davis, Jr., T.C. Davis, Alana Lawler, Alana Lawler Trust “A”, A.T. Davis, A.T. Davis Trust “A”, Kay Davis, Kay Davis Trust “A”, Tricia, Kae Lawler, Alana Lawler Children’s Trust, Allen Kenneth Davis, Janiece Breanne Davis, A.T. Davis Children’s Trust, Kay Davis Children’s Trust, T.C. Davis, II, T.C. Davis, II Trust, T.C. Davis, II Trust “A”, T.C. Davis, II Trust “A” Dated January 15, 1982, Brian Keith Davis, Brian Keith Davis Trust, Brian Keith Davis Trust “A”, Brian Keith Davis Trust Dated January 15, 1982, Chesley Davis, Chesley Davis Trust, Trey Davis, Trey Davis Trust, and Ken W. Davis Foundation.

Appellants' argument regarding Judge McGuire's disqualification also conveniently overlooks one critical fact: Judge McGuire disqualified himself as soon as he became aware of his financial interest in J.P. Morgan. Such prospective disqualification is all that is required. It is absurd to retry these cases or to permit discovery when all the relevant facts are already known. Even assuming the most damaging facts that could be adduced in discovery, there is simply no way that this situation could rise to the level of those cases where judges were disqualified retrospectively, since in each such case there was an allegation of actual knowledge and no such allegation is present here.

With respect to substantive consolidation, Appellants miss the relevant point that some need must be shown before substantive consolidation is allowed. The Bankruptcy Court clearly and specifically concluded that the Debtors had failed to prove such need.

With respect to the charge of "gerrymandering," the classification system of the Committees' Plan reaches results clearly and appropriately contemplated by the Bankruptcy Code. This classification system provides for an immediate payment, in full, to small claimants, and a full payment within two years to trade and employee claimants. The payment to the small claimants has already been made, and a motion is pending for an early payment to the trade and employee claimants. In light of this payment schedule, it seems clear that the Appellants are dissatisfied with the classification scheme only because it acts to extinguish the interests of the Davis family. Such a result is, however, contemplated by the Bankruptcy Code and is more than appropriate here.

Finally, Appellants ignore the fact that their appeals are now moot because the effective date of the Committees' Plan, April 16, has come and gone, and irreversible steps have been taken to implement that plan.

IV.

ARGUMENT

A. THE DISTRICT COURT USED THE CORRECT STANDARD OF REVIEW

The District Court correctly used the clearly erroneous standard of review set forth in Bankruptcy Rule 8013 with respect to all factual issues in these cases.

CRAFTING AN INTRODUCTION: EXAMPLE #6

PRELIMINARY STATEMENT

Defendants Charles Green, Richard Brown, Paul Hill, Bruce Smith, John Jones, Douglas Green, Paul Thomas, Charles Knight, Allan Gibson, Blair Hill and Mega Bionics Corporation (collectively, the “Defendants”) respectfully submit this memorandum of law in support of their motion for summary judgment on the two remaining claims set forth in the Second Amended Complaint.

Mega Bionics Corporation (“Mega Bionics” or the “Company”) is a Delaware corporation with its principal executive offices located in []. Complaint ¶3. Mega Bionics’s business consists of the development, production and marketing of []. Id. Plaintiff John James, a Mega Bionics shareholder, brought this action in 1991 challenging the repurchase by Mega Bionics of 448,474 shares of its Class A Common Stock from two members of the Mega Bionics Board of Directors (the “Board”), Thomas Green, Jr. and Thomas Green, III (collectively, the “Thomas Green Defendants”) and their families (the “Repurchase”).

On February 28, 1994, this Court, in its decision on Defendants’ Motion for Judgment on the Pleadings (the “Opinion”), dismissed all but two of the claims in Plaintiff’s Second Amended Complaint (the “Complaint”). All the claims of Count I were dismissed as to all Defendants, except the claim that the Mega Bionics Board failed to exercise due care when it approved the Repurchase.¹ Opinion at 11, 18. In declining to dismiss this claim, this Court was

¹ The Court dismissed claims for breach of the duty of loyalty, entrenchment and corporate waste but found that the allegations in the Complaint, if true, sufficiently state a claim of breach of the duty of care and, therefore, create a reasonable doubt that the transaction is protected by the business judgment rule. Opinion at 11-17. The Thomas Green Defendants also made a Motion for judgment on the Pleadings. The Court granted their motion as to Count I. Opinion at 10-11.

required to accept Plaintiff's characterization of the facts as true. As will be demonstrated below, each of Plaintiff's allegations is decisively refuted by the uncontested factual record in this case. In addition, although this Court also let stand Count II, a class action claim based upon Defendants's alleged breach of the duty of candor arising out of voluntary disclosures by the directors to the Mega Bionics stockholders after the completion of the Repurchase in July, 1991, it noted that "[t]he well-pleaded allegations of Count II... are sufficient, (if only barely so), to state a claim upon which relief can be granted."² Opinion at 8.

Now that substantial fact discovery has been completed, with only two claims remaining, this action is ripe for summary judgment. Defendants produced thousands of pages of documents and Plaintiff took the depositions of many of the Mega Bionics directors involved in approving the Repurchase as well as the deposition of a representative of Deal Doers, the investment banking firm that advised Mega Bionics prior and during the course of the transaction. The factual record developed during this extensive discovery demonstrates that there is no genuine issue of material fact with respect to either of the remaining claims and that Defendants are entitled to summary judgment as a matter of law on both claims.

² The Motion for Judgment on the Pleadings of the Thomas Green Defendants on Count II was also denied. Opinion at 9.

CRAFTING AN INTRODUCTION: EXAMPLE #7

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELLON L. WILLIAMS, *et al.*,)
)
 Plaintiffs,)
) Case No. _____
 v.)
)
 NATIONAL MEDICAL ENTERPRISES,)
 INC., *et al.*,)
)
 Defendants.)

REPLY TO OPPOSITION TO MOTION
TO DISQUALIFY PLAINTIFFS' COUNSEL

I.

INTRODUCTION

Something is amiss when a company discloses all of its attorney-client privileged claims files to a reinsurance company's lawyers pursuant to its duty of cooperation and then is sued by the very lawyer who reviewed the files on a matter which relates to the contents of such files. Although plaintiffs try to cover up this problematic situation with their 60-page oversized brief, arguing, primarily that Mr. Allen had no attorney-client or fiduciary relationship with NME or HUG, plaintiffs failed to address the following issues:

1. How does Mr. Allen and his firm have the right to divulge attorney-client privileged and work product privileged information that he gained as a result of NME's duty of cooperation to its current client when NME or HUG has not waived the privilege?
2. How can a situation such as this comport with the institutionalized duty of

- cooperation in the insurance industry, public notions of fair play and substantial justice, and the duty to avoid the clear conflict of interest between an attorney's ethical obligation to defend his client vigorously and the obligation to maintain the confidence of privileged information?
3. How can plaintiff's counsel maintain that there needs to be a former attorney-client relationship in order to be bound by the conflict of interest rules when this very court has held otherwise?
 4. How can plaintiffs defend the logical extension of their position, which is that Mr. Allen has no obligation to protect the confidentiality of the files he audited? Following this logic, can Mr. Allen share that information with any other party? Can he sell the information? Can he publish the information anywhere and everywhere for all the world to see?

Instead of answering the above questions, plaintiffs' counsel has filed a brief which exceeds this court's page limit by 25 pages, submitted a declaration of a hired "expert" of the law which similarly does not address the true issues, and requested and received a three-week extension to do so. Methinks plaintiffs' counsel doth protest too much—and apparently so does the Honorable Cruz Reynoso (retired), also a legal ethics expert who disagrees with Plaintiffs' "expert" opinion.

Certainly plaintiffs' counsel has a lot to lose monetarily by being disqualified. Although this is unfortunate, this is not a factor that the court must weigh when deciding whether or not to disqualify counsel. Plaintiffs' counsel makes much of the fact that to disqualify his firm would effectively prevent him from representing medical malpractice plaintiffs. However, this was a risk he took. One would not expect a lawyer who specializes in representing insurance

companies and/or healthcare providers also to represent the very plaintiffs that are suing such companies. This is because to do so would often create a conflict of interest. Accordingly, it is not surprising that when plaintiffs' counsel chose to represent medical malpractice plaintiffs, a conflict of interest arose. This hardly sends "shock waves" throughout the legal system.

CRAFTING AN INTRODUCTION: EXAMPLE #8

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. _____

Chemco, Inc.,

Appellant

v.

Ace Plant Nursery, *et al.*,

Appellees

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

The Supreme Court has long warned that the inherent contempt powers of the courts are “uniquely . . . ‘liable to abuse.’” International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2559 (1994) (quoting Ex parte Terry, 128 U.S. 289, 313 (1888)). That potential for abuse was fully realized in this case.

In August 1993, a consolidated product-liability action against Chemco (known as Smith Ranch) settled during jury deliberations and was dismissed with prejudice. Well over a year later, in the spring of 1995, appellees (several of the former Smith Ranch plaintiffs) filed a “Petition” asking the District Court to sanction Chemco for alleged discovery misconduct in Smith Ranch. Appellees disclaimed any interest in challenging the settlement or otherwise seeking damages; rather, they asked the District Court to assert jurisdiction in the exercise of its “inherent power” to vindicate its own dignity and authority. The District Court agreed and, after conducting a “show-cause” hearing, imposed fines of more than \$114 million on Chemco.

The entire proceeding was unlawful and unconstitutional. A court’s “inherent powers” do not place it above the law. A court cannot impose avowedly punitive (hence criminal) contempt sanctions without affording a litigant the fundamental procedural protections guaranteed by the Fifth and Sixth Amendments. By conducting the proceeding below as if it involved civil, not criminal, contempt, the District Court denied Chemco those protections.

Merely vacating the District Court’s Opinion and the Order because of its procedural defects, however, would leave unredressed much of the injury it has wrought. The Court followed the unconstitutional “show cause” hearing with a 79-page diatribe excoriating Chemco, its trial counsel, and its experts for (supposedly) engaging in a “fraud on the court” by concealing scientific data from the Smith Ranch plaintiffs in discovery and misrepresenting the substance of

the data at trial. Those charges have no basis in law or fact. Chemco was under no obligation to produce the testing documents in question, and accurately described the test results at trial.

Although this case involves a number of complex legal and factual issues, at bottom it is very simple. This case is about whether a district court is bound by the rule of law. Even when faced with grave allegations of misconduct, a court must always abide by the rules. “Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.” Bagwell, 114 S. Ct. at 2563 (internal quotation omitted). “Inherent power” is not a license to disregard those procedures. The rule of law does not tolerate the assumption that the ends justify the means. Because both the ends and the means pursued below were invalid, this Court should reverse the District Court’s Opinion and Order in its entirety.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. _____

Chemco, Inc.,

Appellant

v.

Ace Plant Nursery, *et al.*,

Appellees

APPELLANT'S REPLY BRIEF

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Appellees' brief is not so much a response as a retreat. Rather than engaging Chemco on any of the genuine issues on appeal, appellees simply insist that the District Court had "jurisdiction" to impose "civil sanctions," that such sanctions are justified here in light of the Court's "findings of fact," and that the sanctions chosen are "within the power and discretion of the Court." App. Br. at 14. None of those arguments addresses Chemco's core complaint—that, on both procedural grounds and the merits, the proceeding below was an unlawful exercise of the District Court's contempt powers. Those powers have long been limited to protect against judicial tyranny. The unjust proceeding below underscores the vital importance of those limitations.

**VII. RHETORIC AND ORGANIZATION:
AVOIDING DEFAULT ORGANIZATIONS**

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

**ORGANIZING A DISCUSSION OF THE LAW:
THE PROBLEM OF “DEFAULT” (OR “READY-MADE”) ORGANIZATIONS**

The most common traps:

- Chronology (Example #1)
- History of your research or thinking (Example #2)
- Someone else’s analysis (Examples #3-#4)

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

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

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #1

Before:

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

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

In NLRB v. Acme Manufacturing, Acme had succeeded Superior

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

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

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

After:

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

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

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

In NLRB v. Acme Manufacturing

In Comfort Hotels v. Hotel Employees

In John Smith v. Jones

In Clover Valley Packaging Co. v. NLRB

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #2

Before:

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

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

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

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

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

After:

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

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

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #3

Before:

ASSESSMENT OF COSTS

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

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

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

After:

ASSESSMENT OF COSTS

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

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

....

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

....

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #4

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

Before:

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

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

After:

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

1. The Content of the Non-Disturbance Agreement

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

“Toulmin Logic”

(from S. Toulmin, *The Uses of Argument* (1969))

Responding to the fussy skeptic: “Do I really have to do this?” “Is this really a good idea?”

The obstacles:

(a) Skepticism – The questions:

(*context*): Is there a problem here about which I should care? Why?

(*claim*): OK, so what are you arguing?

(*grounds or data* [“is”]): So you say, but why should I believe you? What facts support your claim?

(*warrant* [“ought”]; connecting the data to the claim): Why does that prove your argument?

How is that data relevant?

(*backing* [deeper principles or consequences]): On what authority does that proposition rest? Do I really have the authority to do as you ask? If I do this, is it justified? Will I do justice? Even if your request is not a bad idea, couldn't we really get by without doing what you ask?

(b) Risk-aversion – The questions:

(*qualifier*): Is your claim “certain” or really a “usually” or “probably”?

(*exception*): How can I be sure there isn't some reason that in this particular case your argument doesn't apply?

(the other side or *limitation* [preemptive counter-argument]): What about your opponent's argument? Don't they have a point?

Article for “Perspectives”

Teaching Law Students Practical Advocacy

Stephen V. Armstrong and Timothy P. Terrell

Tim Terrell is Professor of Law at Emory University School of Law. Steve Armstrong is the principal of Armstrong Talent Development, which provides consulting services and training programs to law firms. Both have conducted many programs on legal writing for law firms, bar associations, and federal and state judges. Together, they are the authors of Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing (3rd edition, 2008), and regular contributors to the Writing Tips column.

Practitioners regularly criticize law schools for failing to prepare their graduates to practice law. We will step into that crossfire hesitantly, and only to a limited extent. Among the ways in which new lawyers could be better prepared to practice, one in particular continues to bother us: They do not know how to construct arguments that persuade in the real world. In this non-academic place, a simple syllogism seldom carries the day. Facts, law, principles, and values interact in complex ways; the other side is likely to have an argument that is almost as strong as yours; and a judge or arbiter may be just as concerned with the consequences of a decision as with its technical correctness. As a result, IRAC and the other classic methods of legal analysis are, by themselves, seldom enough to persuade a knowledgeable legal reader.

Novice lawyers usually sense a chasm between a technically correct analysis and a persuasive argument, but lack tools to build a bridge across it. Once they have exhausted the standard law school methods of analysis, all that seems left is hyperbole, repetition, and attacks against their opponents’ motives, all of which do nothing except damage their credibility.

Many law school writing instructors tackle this problem by teaching rhetoric as well as legal analysis, introducing their students to a repertoire of persuasive strategies (the “*ethos-logos-pathos*” framework, for example, which we employ as well¹). Among these strategies, one is especially useful for showing students how to argue rationally even when no argument is a clear winner, and when their readers worry not only about what the law says, but also about fuzzier and more pragmatic questions: is this the “right” thing to do, or is a definitive decision

¹ *Thinking Like a Writer*, Chapter 12

really necessary, or can a compromise be reached, or could there be consequences you're not telling them about?

This strategy begins by recognizing that the readers you are trying to persuade have two essential characteristics: They are skeptical and risk-averse. Rather than obligingly falling into line with your reasoning, nodding along with you, they are more likely probing energetically: "What's the problem here? Why should I accept that? Prove it. But what if . . .?" This means that your argument should be more jujitsu than brute force. You will persuade not by wielding your logic like a club, but by anticipating readers' doubts and turning them to your advantage. Hence, good advocates are adept at organizing arguments so that they dispose of the reader's reasonably suspicious questions even before they are fully articulated in the reader's mind.

To implement this strategy, a useful guide is the model of persuasion proposed by the logician and rhetorician Stephen Toulmin,² which we will adapt here for our purposes rather than copy faithfully. It arises from an exploration of the kinds of support for a proposition that a reader will accept as rational, not from traditional logic's obsession with the proposition's certainty.

Toulmin's approach, corresponding to the reader's background worries, involves two steps. The first addresses readers' skepticism, the second their aversion to risk. But these two categories should not be taken as rigidly separate from each other. Instead, they overlap and interact: Readers are skeptical, in part, because they are risk-averse; and they are risk-averse, in part, because they are skeptical. Hence, what follows is simply a practical structure for organizing the elements of a thorough argument.

² *The Uses of Argument* (Cambridge University Press, 1958). We have also drawn on *An Introduction to Reasoning* (Macmillan, 1979), in which Toulmin substitutes "grounds" for "data." Several relatively recent articles have discussed the use of Toulmin's model in legal writing programs. See, for example Kritsen K. Robbins-Tiscione, "A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom," 50 *Washburn L.J.* 319 (2011), and Kurt M. Saunders, "Law as Rhetoric, Rhetoric as Argument," 44 *J. Leg. Educ.* 566 (1994).

First, to confront skepticism, you must establish your basic credibility. You have to demonstrate that there is an unresolved problem or issue worth addressing. Your argument then requires, in Toulmin's terminology:

- a "claim" (within the context of the problem or issue, of course), which is the conclusion for which you are arguing;
- "grounds" or "data," which are the facts that support your claim;
- a "warrant," which is the principle or rule on the basis of which you are asserting that the data support the claim; and
- "backing" which anchors the warrant in some form of authority that the reader will accept as valid.

Second, to address readers' risk-aversion, you should enhance your credibility by adding reasonableness and pragmatism as necessary. Again in Toulmin's terminology, sometimes you will have to provide

- a "qualifier," which modifies the strength of your claim from "certainly" to "usually" or "probably;"
- an "exception," a circumstance you have to acknowledge in which the "warrant" you are relying on does not hold; or
- the pragmatic consequences of acting or failing to act as you request. (Consequences do not fit neatly into Toulmin's model, but they are too important an element to ignore.)
- an acknowledgement, but rejection, of the other side's position. (This element is often implicit in the other Toulmin categories, but sometimes needs to be confronted separately and directly.)

The best way to appreciate Toulmin's model is to attach his elements to the sequence of questions with which the naturally dubious and anxious reader will confront your argument. Below is a very simple example, adapted from one of Toulmin's.

Skepticism: Establish that you have a credible argument.

(1) (context): Is there a problem here about which I should care? Why?

Although Jane has been incarcerated by immigration officials as if she were an alien,

...

(2) (claim) OK, so what are you arguing?

...she is a U.S. citizen and should therefore be immediately released.

(3) (grounds or data): So you say, but why should I believe you?

Jane was born in the U.S., as proven by her birth certificate, ...

(4) (warrant): Why does that prove your argument? How is that data relevant?

...and birth in the U.S. automatically confers U.S. citizenship ...

(5) (backing) On what authority does that proposition rest?

... under Section 301 of the Immigration and Nationality Act. ([8 U.S.C. § 1401](#)).

Sometimes, the warrant and backing will leave a reader still skeptical: “Yeah, but does that law really make sense? Will I be doing the right thing in a principled way?” In those cases, the backing can go on to include the principle that is the reason for the law’s existence.

The United States has a proud history of revitalizing itself through controlled immigration, and the grant of citizenship to those born here is a pillar of that tradition. ³

Risk-aversion: Demonstrate that the action you request is reasonable and safe.

Often, the “warrant” on which you base your argument – that is, the proposition that explains why your data support your claim or conclusion – may not be a slam-dunk certainty. Hence, your persuasiveness may ultimately rest on how you deal with the proposition’s potential weaknesses and with the attacks that might be launched against it.

Let’s return to Jane. You no doubt noticed a flaw in the argument as it now stands. The core proposition – that is, the warrant that connects the fact she was born in the U.S. to the

³ Some readers will note that the difference between the two forms of backing in this example roughly corresponds to David Hume’s familiar distinction between “is” and “ought.” See David Hume, *A Treatise of Human Nature*, Book III, Part 1, Section 1 (1739).

claim that she is a U.S. citizen – is that birth in the U.S. automatically confers citizenship. But the question isn't whether Jane was a citizen at birth; it's whether she is a citizen now. If the warrant had been shaped to deal with Jane's current citizenship, we would have had to qualify it: "Those born in the U.S. automatically become U.S. citizens and, almost always, remain citizens for their lifetime." Or "If a person was born in the U.S., she is almost certainly a U.S. citizen."

Instead, the argument will deal with the potential problem in another way. Here, Toulmin's concepts of "qualifiers" and "exceptions" come into play.

(6) (qualifier) Are people born here *always* U.S. citizens?

The qualifier is already lurking in the reader's head: Instead of making it explicit, the argument both alludes to and disposes of it in the next step.

(7) (exception) How can I be sure there isn't some reason for which Jane is no longer a citizen?

Although Jane has lived much of her life in the Republic of Desertania, became a Desertanian citizen, and served in its armed forces, she nevertheless remains a U.S. citizen unless she announced her intention to renounce citizenship or Desertania was engaged in hostilities with the U.S. when she served in its military. Neither is the case.

Those sentences would be supported, of course, by a citation to the Immigration and Naturalization Act – that is, by another "warrant."

You may have noticed, however, another weakness in the argument as it now stands. The initial claim had two parts: Jane is a U.S. citizen, and Jane should be released immediately. So far, we have dealt with only the first. Is it safe to assume the second follows inevitably? Circumstances are seldom so simple. Let's assume that the government is arguing, or might argue, that it needs more time to check the facts about Jane's citizenship and that, in the meantime, she should stay in custody to remove the risk that she will flee.

To confront that counter-argument and reassure the reader that releasing Jane immediately isn't too risky, we need data of a different kind, data that go to the consequences of

acting or not acting. From here on, Toulmin's terminology becomes less useful. But the basic strategy – predict and answer your reader's questions – remains just as important. :

- (8) (consequences) Even if your argument holds water, should I really do what you ask? Is there a safer or less radical solution?

Jane is employed and may lose her job if not released immediately.

And finally:

- (9) (the other side) What about your opponent's argument? Don't they have a point?

Although immigration officials have not yet received a certified copy of Jane's birth certificate, to incarcerate her while that document is in transit is unreasonable given the risk to her employment. (And here comes an "exception" to be disposed of:)

Incarceration would be justified in this case only if Jane were a flight risk. Immigration officials cannot demonstrate that she is. In fact, she is tied to this city by her family and her job.

Toulmin's model works not only for small-scale passages, such as the one we have used here because of space limitations, but also for large-scale arguments such as an entire brief. Whatever the scale, the model has the virtue of flexibility. Depending on the circumstances, some of its elements can be emphasized, de-emphasized, combined, or dropped altogether.

Here is another example:

Because of the number of parties before the court and the number of potentially dispositive motions now pending [*data*], the court should stay discovery pending the entry of a discovery plan [*claim*], as it is empowered to do by Rules 16 and 26(f) of the Federal Rules of Civil Procedure [*backing for the warrant, which will be stated later as a principle of case management*]. The 12 parties to this case have made duplicative discovery demands upon each other, often requesting that different search terms be used to search huge electronic databases when the same terms would be equally effective for all parties. To compound matters, they have already filed 17 discovery motions, although the case is only three months old

[this is more data to back up the conclusory data in the paragraph's opening clause; it leads directly to the warrant below].

As many courts have recognized, “the key to avoiding excessive costs and delay is early and stringent judicial management of the case” *[warrant]*. In a case of this magnitude involving so many lawyers, and in a district where judicial resources are already strained to the limit, the role of case management is especially important. Without such management, this case is likely to degenerate into chaos, with the parties taking discovery in inconsistent and duplicative ways *[further backing for the warrant's application to this situation, and a look at the consequences of not acting]*.

At the moment, only discovery on the jurisdictional issues should be allowed to proceed, because these issues involve a limited number of parties and cannot be rendered moot by the court's decisions on the motions before it *[a limitation of the claim, to make it more reasonable]*.

The next example mixes the elements in yet a different way:

As to petitioner's claim that her counsel was incompetent and that she was denied effective representation at the trial, no evidence supports the charge. *[that's the claim]* This conclusory allegation is amply contradicted by the record. *[a promise of data to come]* A reading of the trial minutes demonstrates that petitioner's counsel, despite the paucity of defense material, conducted a resourceful defense, effectively cross-examined prosecution witnesses, particularly the complainant, and made a reasoned plea to the jury in urging acquittal on a reasonable doubt basis. *[this becomes not just data, but a warrant based implicitly in appropriate legal procedures]* That the jury was not persuaded by the argument, particularly in a case where powerful evidence supports the jury's verdict, by no means furnishes a basis for attacking the competence of counsel.

The final sentence rebuts a potential counter-argument. However, the counter-argument is so

weak that rebutting it does not add much persuasive punch. The sentence's real impact comes instead from the phrase tucked into its middle. That phrase provides more data to support the claim, but it also implicitly acknowledges and disposes of a potential exception to the warrant: Even if lawyers handle themselves well at trial, couldn't they still be considered ineffective if the other side's evidence is weak? The possibility is neatly acknowledged and disposed of in just a few words.

Experienced advocates are so accustomed to dealing with the questions we have described, and to providing the kinds of support for their arguments that Toulmin defines, that they need no prompting. Most students, however, are not that far removed from the high-school debate approach to argument (or, for that matter, the school-yard approach). For them, Toulmin's structure can be a useful guide for their first steps towards more effective, practical advocacy.

WRITING PERSUASIVE STORIES

The Elements of Story:

- Opening Situation: What circumstances drove the action?
- Outcome: What are the consequences?
- Protagonist/Antagonist: Character and motive
- Other characters: Do they make the chief character look better or worse?

THE ELEMENTS OF A STORY

opening situation



protagonist → **STORY** ← **other characters**



outcome

How Stories Persuade:

- Define the nature of the act.
- Describe the cause that produced it.
- Describe its consequences.

- Create inferences about motive.
- Create empathy.

Key Decisions:

- Where does the story begin?
- Through whose eyes do I tell it?
- Where do I add detail and where do I omit it?
- * Where does the story end?

MS Word: Tips to Save Yourself Time

Jonathan Nolen
Office Manager
Office of the Appellate Defender

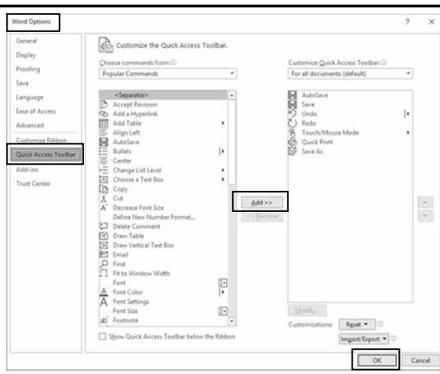
1

Find yourself doing the same thing over and over?

Customize the **Quick Access Toolbar** (in the upper left corner) so you can do it in fewer clicks.

Options include:

- Save
- Save As
- Undo
- Quick Print (goes to your default printer)
- Email (opens an Outlook draft with the file already attached)
- Pretty much any other button Word has

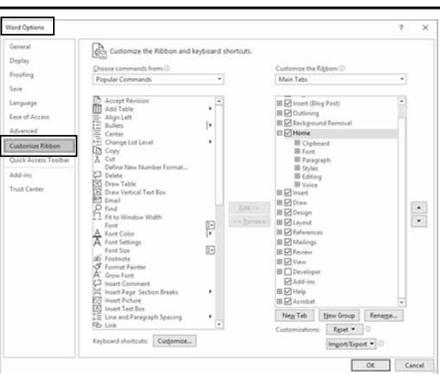


2

Same idea as before, but on a bigger scale.

Customize Ribbon adjusts what groups display and can change where things are nested.

It populates "Popular Commands" to predict what might be useful, but you can manually change that to any menu you want to adjust.



3

These things can drive people nuts, so you can toggle them off and on.

Go to Word Options > Proofing > AutoCorrect > AutoFormat As You Type

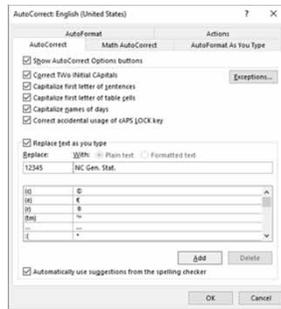


4

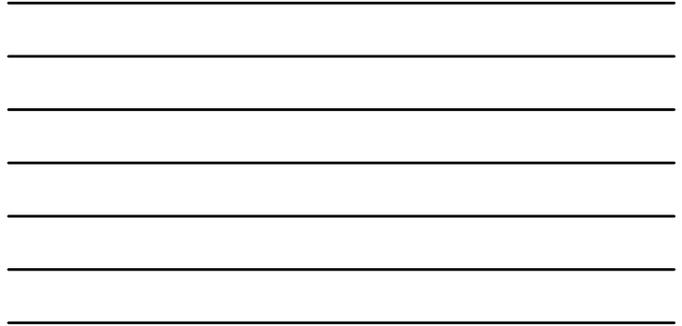


This is an easy place to adjust AutoCorrect for things you type all the time.

Go to Word Options > Proofing > AutoCorrect

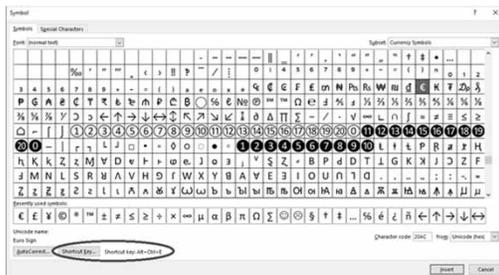


5



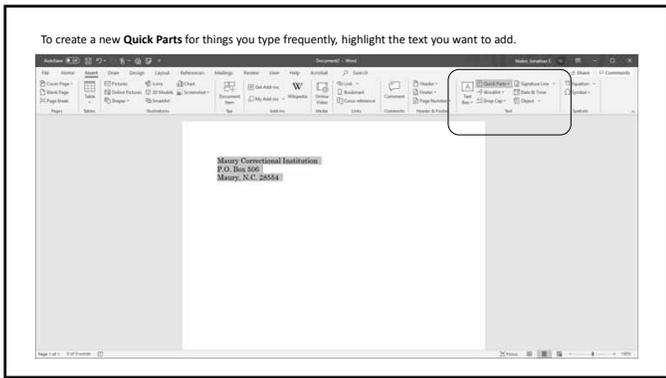
Inserting Symbols.

You can assign keyboard shortcuts to save yourself time by clicking the symbol and click "Shortcut Key..." to assign the keyboard combination to automatically insert your selected symbol.

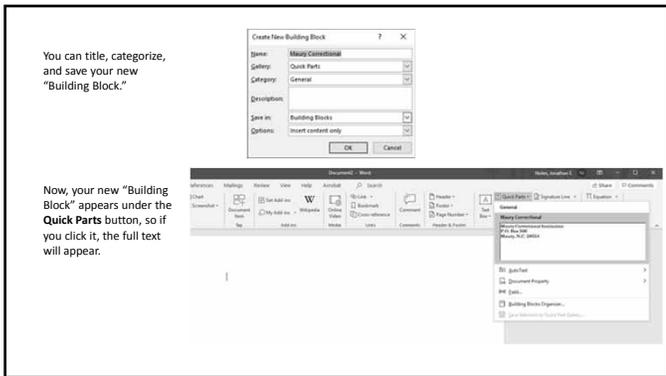


6

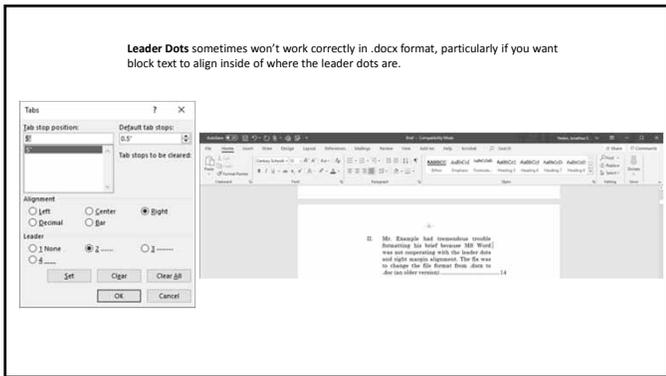




7

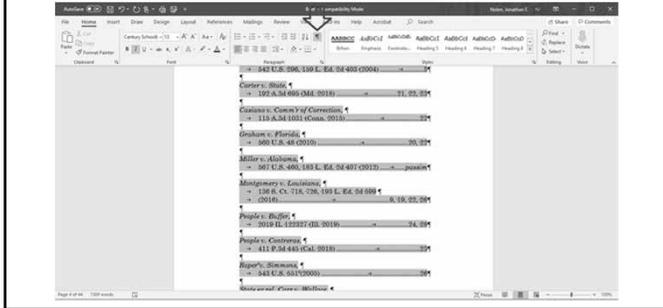


8



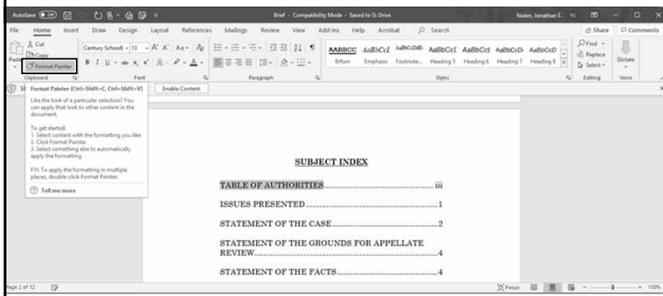
9

If (when) something goes wrong, click this button to reveal the formatting markup. It's a good place to look for odd page breaks or other things that shouldn't be there.



10

Once you get something formatted correctly, use the **Format Painter**. It works across MS Word documents (just open both files), and it copies the formatting from selected text to the next text you select.



11

When in doubt, turn to Google.

Start your search string with "MS Word" and add words. Google will predict based on what others have searched for, and you can usually quickly find a helpful thread or article to fix what you need.



12

Things to watch out for in the final PDF:

- Font color
- Any page number shifts
- Check the entire PDF not for typos, but to make sure the margins, text, and fonts haven't changed
- **If something is wrong, go back to Word.** Fix it, then generate the PDF and check it again

13

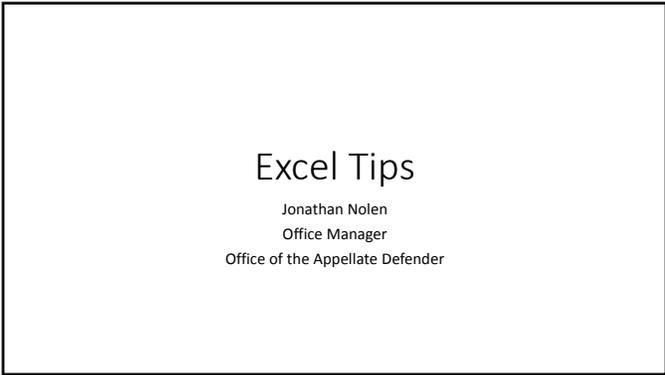
Font colors

Use Ctrl + A or right click and "Select All."

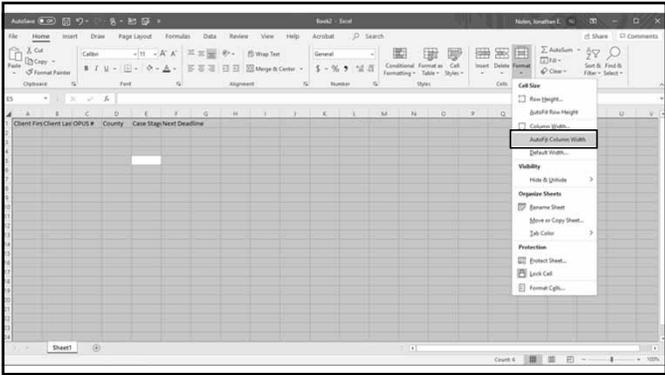
Fonts can display as grey if the selection is "Automatic," especially if text has been pasted into the document.



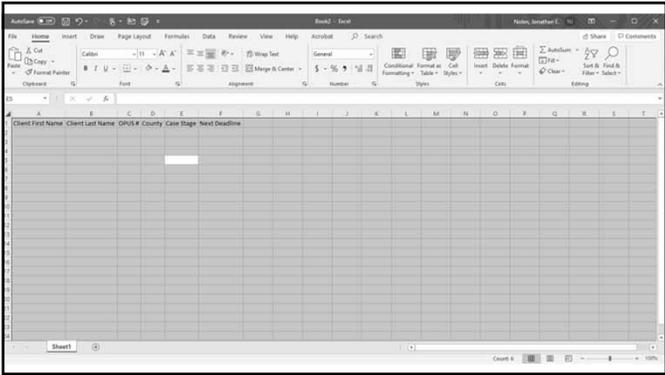
14



1

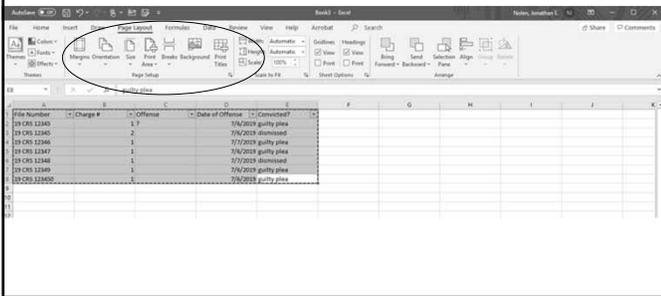


2



3

Important (but easy!) settings to make Excel more useful:
Page Layout/ Page Setup – Click the arrow in the corner to expand options.



7

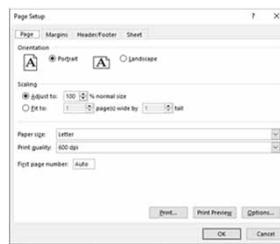


Under the **Page** tab, you can change the Portrait or Landscape orientation.

- Landscape works best for most spreadsheets.

You can also tell Excel to fit the spreadsheet onto one page.

- Warning: this can make the text so small that it's unreadable!
- It's a quick option if you're printing a hard copy.



8

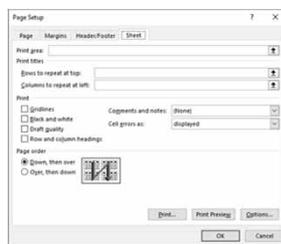


Under the **Sheet** tab, you can adjust how and what you want to print.

- Repeating the heading rows is very helpful when you have lots of data.

The checkbox for **Gridlines** under Print is one of the most useful settings.

- It will make the lines print for hard copies.
- It will make the gridlines move over to Word if you copy and paste your spreadsheet as a table. (You might have to select **Paste Options** to make sure the gridlines display).



9



Word, Excel, and Acrobat: Tips for Appellate Practice

by Leslie Rawls
Board-Certified Specialist in
Federal and State Appellate Practice Law

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I. Tips from the Clerks' Offices

The North Carolina Supreme Court and Court of Appeals offer the following tips.

A. Photos and Exhibits

Every time a photo is copied by different individuals along the way and then finally scanned and printed by the Court, the resolution quality degrades significantly. If records are efiled, that does eliminate one duplication and does preserve more of the photo's resolution quality, but it is still "iffy" as to how clear the printed version will be.

Now that exhibits/photos can be uploaded (and exhibits are not printed), an attorney should be able to see what our judges will see when they pull up that digital copy online. When in doubt, attorneys can still send in a hard copy of photos as an exhibit for our judges' use.

When uploading supplements or exhibits, counsel should wait until the record on appeal (either filed hard-copy or efiled) has been processed and they have received the "COA" number that has been assigned to their appeal. Counsel can then use that COA number to upload PDFs of supplements and/or exhibits.

If exhibits and photos are filed electronically, the Court will have access to a color/good quality version.

B. Some of the most common mistakes

- Not using the right court and file number
- When filing electronically, the documents need to be signed electronically. Please see rule 33(b) and check out the NC Appellate Style Manual for great guidance on this and lots of other stuff!

- At the Supreme Court, you do not need to include a word count certification unless it's a Termination of Parental Rights case (Appellate rule 3.1(f))
- Incorrect information in the Certificate of Service
- Filing at 11:59pm the day something is due. It is allowed but, even if the clerk's office cannot docket right away, they try to open documents asap just to scan for common mistakes. If there's time, you may be able to file a corrected version before the clerk docket the errant version. That way, you avoid having to file a motion to amend, motion to deem timely, etc.
- Being afraid to call with a question. We are happy to help!

II. **Word Styles, Sections, and Templates: Keys to Consistency and Generating Tables**

Styles allow attorneys to create consistency across the document in text including headings and subheadings.

Sections allow attorneys to manage differing margins and pagination as required by the Rules of Appellate Procedure.

Templates allow attorneys to create styles and sections *once* and ensure each document complies with the Rules of Appellate Procedure.

A. **Styles**

Word has several built-in styles that rarely fit the needs of appellate documents. While you can easily choose a default font¹, this choice is just a start. To ensure consistency and compliance with the Rules, it is useful to create our own styles and preserve them in

¹ To create a default font: (1) select some text, (2) either right click the highlighted text and select font *or* in the Home tab, click the down arrow on the right side of the font section, (3) in the pop-up box, choose the font and font size you want, and (4) select "set as default" at the bottom left of the pop-up box.

templates, discussed below. Factors to consider in setting up styles include:

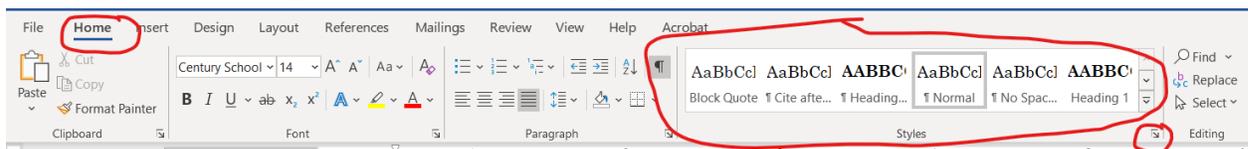
- (1) preferred font and font size;
- (2) paragraph indent (or not), including double-indent;
- (3) paragraph spacing—double or single
- (4) Space before and after heading
- (5) Keeping the heading with the following text
- (6) Widow/orphan control
- (7) Style for following paragraph

1. Creating Styles

You will get a better idea how your style looks if you set it up in an existing document. Once you have your styles, you can also set up a template by stripping out the case data before saving it as a template. I suggest you using the style names from Word, modifying the style itself for your needs. Adding a lot of new styles can make the styles list cumbersome.

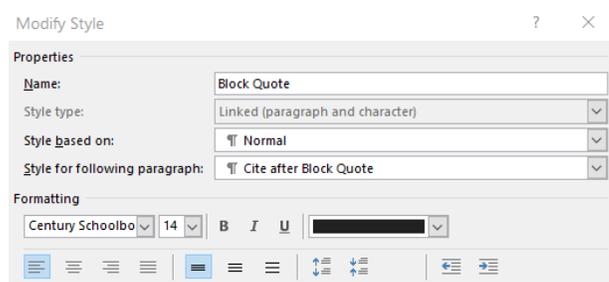
Let us start with the main headings in your brief. Type a heading, say Issues Presented.

- Place your cursor in the text.
- Navigate to the Home tab.
- There, you will see the Styles tool tab.



- If the style you want—say Heading 1—shows, right click the style itself and select modify.
 - In the new pop up window, select the font and font size you want as well as bold or underline.
 - Click on the Format button at the bottom of the window to select the paragraph attributes, tabs, and anything else you want.

- When formatting the paragraph, be sure to click the line and page breaks tab to select Keep with Next and Widow/Orphan protection. Otherwise, your headings may sit alone on a page with the related text starting on the next page.
- Consider what you want the following paragraph to look like and select that style where indicated at the top of the style window. For example, I created a style called Block Quote with the indents required by Appendix B of the Rules. I typically want the next line to be flush left, single space, with 12 points after it. So, I created a Style called Cite after Block Quote with that formatting. My Block Quote style formatting lists Cite after Block Quote for the following paragraph.



- Before you close the style window, check two boxes at the bottom: automatically update and new documents based on this template.
- If the style you want does not show in Word’s style list, click on the arrow in the bottom right corner of the Styles tab and scan the styles list until you find the heading you want. (You can also create a new style in this window by selecting the tab with a plus sign.) Follow the steps above to format the style.
- *Heads up:* The Table of Contents heading will look like all the other headings, but you probably do not want to list it in the Table of Contents. This is where you might want to create a new style, mine is called Heading-not TOC. Its formatting is identical to Heading 1, but I omit it from my auto-generated Table of Contents.

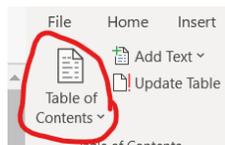
2. Auto-generating Table of Contents, aka Indexes, with hyperlinks

Once your styles are created and headings properly classified, let the computer generate your table of contents.

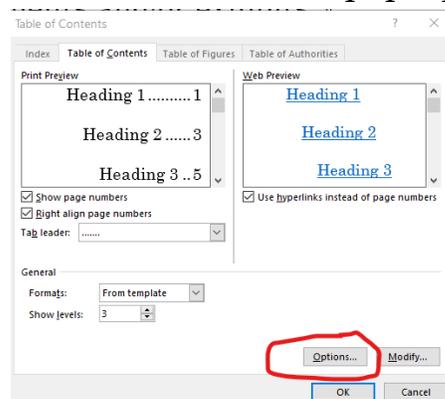
- Put your cursor where you want the Table of Contents to start.
- Navigate to the References Tab, where you should see Table of Contents on the far left.



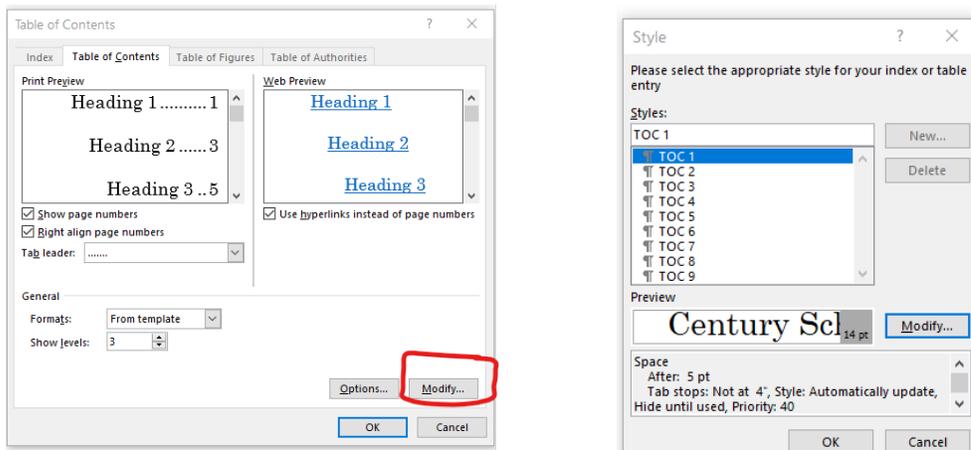
- Select the down arrow by Table of Contents with the document icon:



- If a suggested Table of Contents looks like what you want, select that one. Otherwise, select Custom Table of Contents at the bottom of the pop-up box.
- To be sure you are including the headings you want and no others, select options from the next pop-up box.



- Then, scroll through the list to be sure you are including what you want in the proper order.
- Click okay, and the computer will generate your table of contents from your headings.
- *Heads up: Table of Contents listings also rely on Styles. If the listings do not look the way you want, choose Modify in the Custom Table of Contents pop-up box (on the left, below). Then, change the formatting in the next box (on the right, below)*



- *Heads up: If, like me, you keep proofing and editing documents until they are filed, remember to update your table of contents (and table of authorities) as the very last thing you do.*
 - To update, move your cursor to the left of the Table of Contents. The cursor will tilt toward the text.
 - Right click and select update table.
 - Then, select either update entire table or update page numbers only.

3. Tables of Authorities

The computer will generate your Table of Authorities if you mark the citations properly. All authorities are marked in full the first time, then marked from the citation list all other times.

Heads up: At the 2020 NCBS Annual Review, North Carolina Supreme Court Justice Robin Hudson said the use of *passim* was

frustrating, because it did not tell the Court anything about where authorities were cited in briefs. You can remove passim from your Table of Authorities when you mark the citation.

To mark a citation, select the full citation in your text, then click on the References tab. Select Mark Citation on the far right of your task bar. Be sure the drop-down menu in the middle matches your citation type—cases, statutes, constitutional authorities, etc. Be sure the citation is correct, deselect Use Passim, and click Mark Citation.

Tip: If your original citation included pinpoint cites, those will appear in your table of authorities. To avoid this, either put the pinpoints in after you mark the citation or (1) turn on paragraph marks, (2) look for the bracketed citation after the cite itself, (3) delete the pinpoints from within the bracketed citation. The bracketed citation appears only when paragraph marks are turned on.

B. Creating Sections for Different Margins and Pagination

Briefs and records on appeal have different margins and pagination styles for different sections per Appendix B of the Rules.

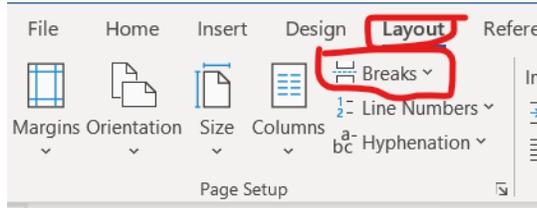
Creating different sections allows us to create different margins per the Rules. Generally, pages have one-inch margins all the way around, but indexes are to be indented ¾” from that one-inch margin. (Note the index margin applies to the main index and the index to the appendix.)

1. Record on Appeal Index Margins

For most documents, the index starts on the page after the cover page. But Appendix B requires record on appeal index to be placed right after the caption, on the cover page. “Numbering Pages,” N.C. R. App. P. Appx. B. This means the cover page has two different margins. To accommodate the different margins, you can divide the pages into sections.

Note the following instructions are for typed Indexes, which are usual for records, but not for briefs and other documents where the computer can generate a full Index.

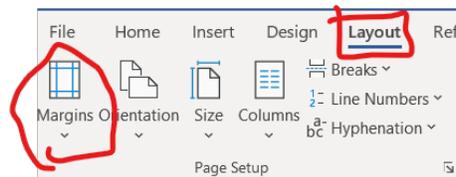
- Start the record cover page with the usual 1” margins all around. Then, after the caption and document title, insert a continuous section break as follows. In your main ribbon, go to Layout, click the down arrow beside Breaks, and under Section Breaks, select Continuous.



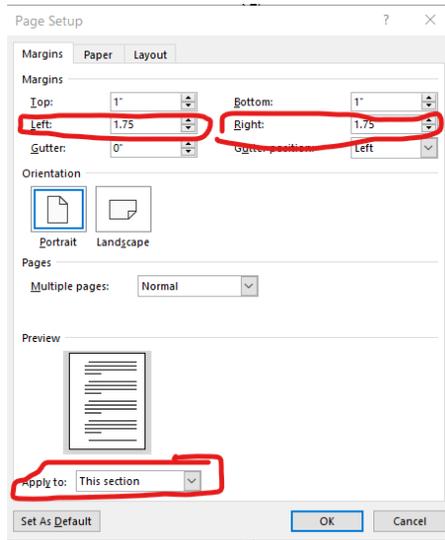
- If you have paragraph marks turned on, you will see your break:



- Now, to set up margins for the Record index, go to Layout, click the down arrow under Margins, and select custom margins.



- Set the margins at 1.75” right and left and be sure to select apply to this section.

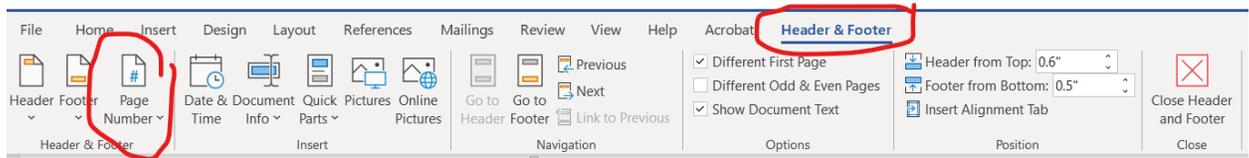


- To set the correct tabs for the index, select Home and press the down arrow on the bottom right corner of the Paragraph frame.
- Select Tabs from the bottom left of the popup box.
- Clear all tabs. Then, set a tab at 6.25, align right, dot leader.
- When you reach the end of the index section, go back to Layout, Breaks, and select Section Break, next page. Be sure to reset your margins for this section as 1” all the way around.

2. All Documents Index Pagination:

Also, though cover pages are unnumbered, the record cover page counts as page i. If your index only takes one page, no numbers. Otherwise:

- on page ii, double-click in the page header until Header and Footer opens in your main toolbar.
- Be sure Different First Page is checked. (Right beneath Header & Footer.)
- Select the down arrow beneath Page Number and choose Format Page Number. Use the dropdown arrow in the next box to choose lower case roman numerals.



- Double-check the distance between the header and the top of the page.
- When you move into the next section, i.e., the main document body, reset the pagination the same way, but set it for Arabic numerals.

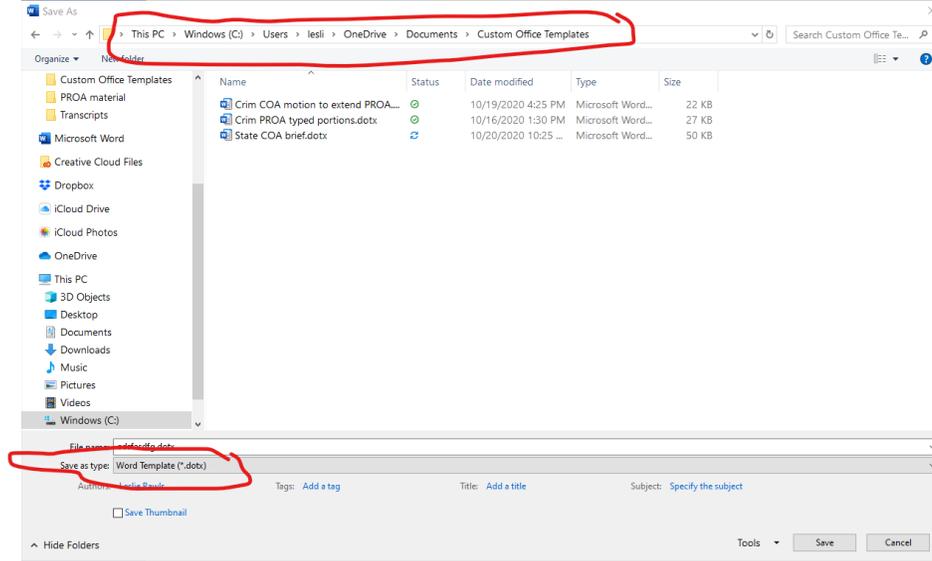
C. Creating a Document Template

Stripping and reusing old briefs creates the risk of including information that applied to the earlier case, not the one you are working on now. The North Carolina Supreme Court reports a common error is for briefs to have the wrong file number—an error that may result from using old briefs instead of working from a template.

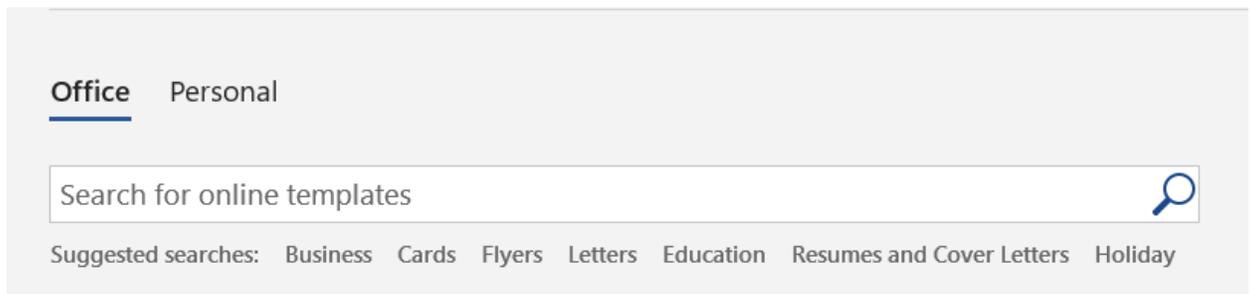
Set up your styles, pagination, and sections as you want your document to appear. Once done, you can strip the text from a “perfect” document and let it become the template.

- Go to File and choose Save As.
- In the next window, choose Browse, which lets you designate the document as a template.

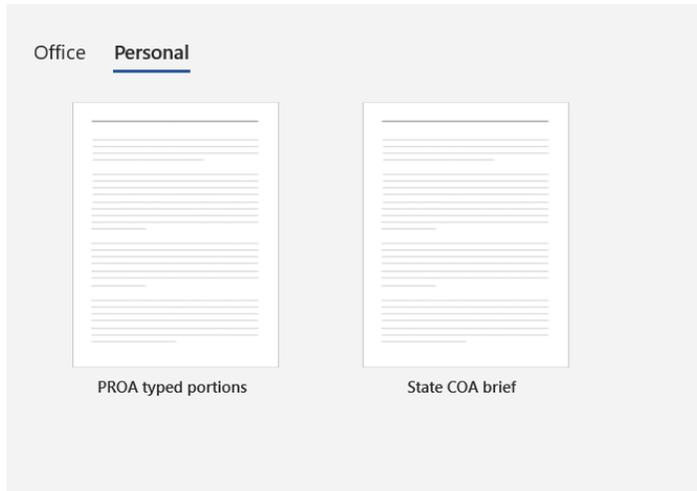
- From the bottom section, select Save as type: Word Template.



- Once you select the save type as template, Word will suggest you put the document in the folder Documents/Custom Office Templates. It is best to agree with Word on this, because that is where the program will look for templates by default.
- Name your document and click Save.
- To use the template, with Word open, click the File button and select New instead of Open. In about the middle of the next window, you will see the Templates selection:



- Click on Personal and it will take you to Documents/Custom Office Templates. There, you will see the template you just saved, as well as any others you have created. It will look like this:



- When you click on the template, it will open as a new document. This means you will not be editing the template itself, which is preserved for the next time.

III. Acrobat: Creating PDFs for filing, pagination, and OCR

A. Creating PDFs

If you have a scanner, follow the equipment’s instructions for scanning to your computer.

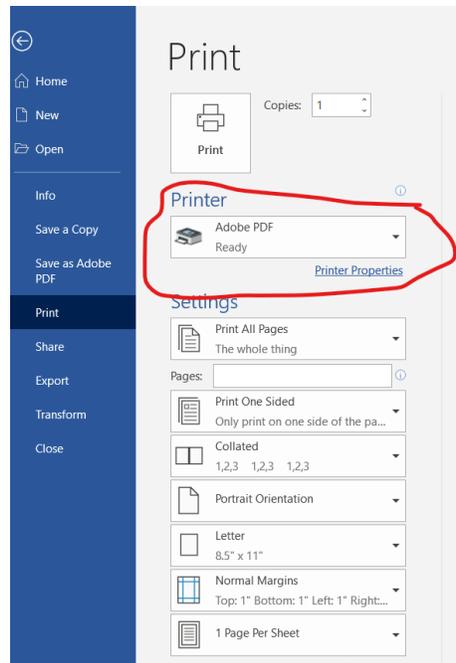
1. Creating a PDF directly from Word

This is easy. **DO NOT** print your document and scan it back into the computer. Every time a document is scanned, it loses integrity. Even with the best scanners and OCR enhancement, letters begin to break down and blur. Also, if you sign a printed document and scan it back to your computer, your signature is easily lifted from the page.

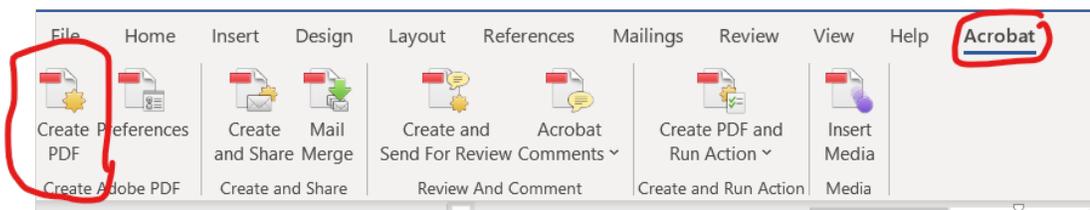
You have three options to convert a Word document to PDF:

1. Go to File, choose Save as pdf. In the popup box, be sure the document is going into the correct client folder, give it a name, and Save.

2. Go to File, Print, select Adobe PDF as the printer, click Print. In the popup box, be sure the document is going into the correct client folder, give it a name, and Save.



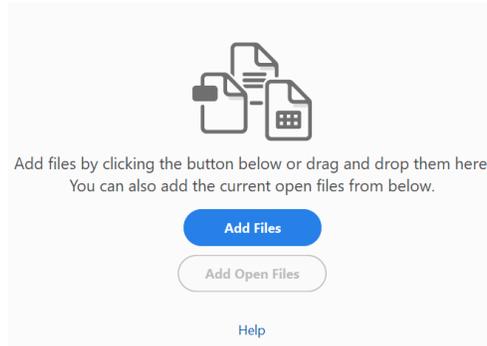
3. If you have Acrobat DC installed on your computer with the add-in enabled in Word, (highly recommended \$21/month), go to Acrobat, select Create PDF. In the popup box, be sure the document is going into the correct client folder, give it a name, and Save.



2. Two ways to coming files to create a PDF

1. Open Acrobat.
 - a. Select File, Create, and Combine Files into Single PDF.

- b. In the next window either select open files to combine or drop unopened files.



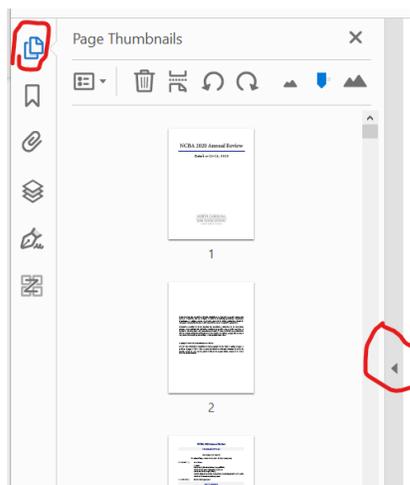
- c. Double-check that the files are in the order you want and click Combine.

- d. Save and name the file.

2. If you are just adding a page or two from one file to another, you can easily drag and drop between the files.

- a. Open both files and click on the arrow to the left of the page to expand selections.

- b. Choose the page thumbnails icon at the top of the section, so you can see thumbnails of pages in both files.



- c. In the file to which you are adding pages, move to the section where you want the new pages.
- d. In the file from which the pages are coming, select the thumbnails of the pages to be copied and drag them to their new home in the other file. They will be copied, not moved from the old file.

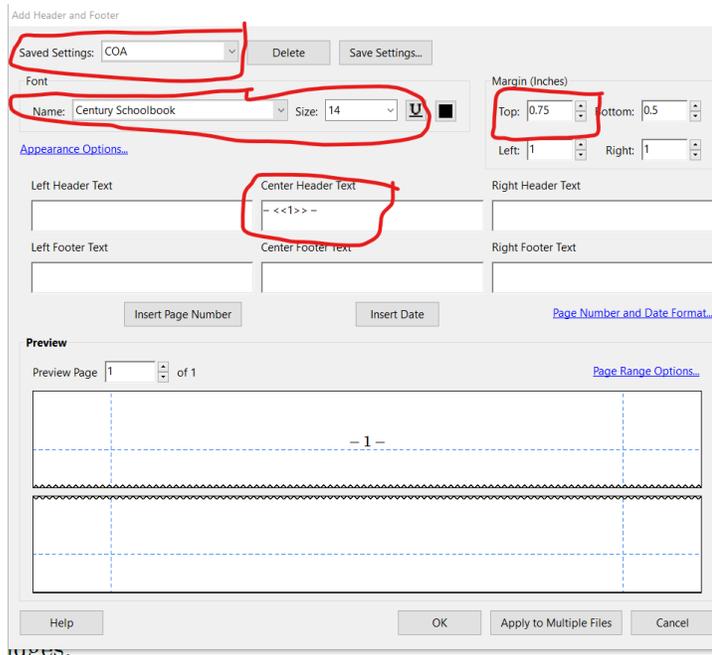
B. Pagination

Pagination is useful for navigating PDF documents. The Rules also require pagination at the top, center of each page, flanked by dashes.

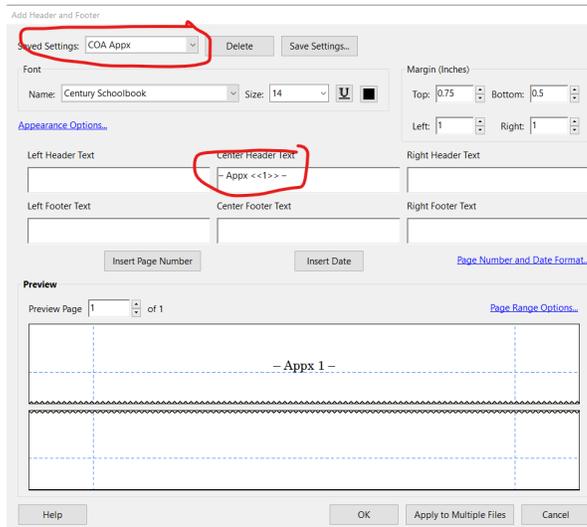
Top of the Page Numbering

For the top of page numbering, Acrobat uses headers. You can save time by creating a setting for appeal documents. Word is likely paginating the main pages of your briefs. Otherwise, saved pagination settings can be useful for numbering records on appeal or appendixes. Note that you have page range options and can choose which pages to number, as well as page numbering format. Once these are set and saved, you can reuse them easily.

I have two saved settings that I use over and over. The first is called COA, has my preferred font, Century Schoolbook 14, and puts the page numbers .75” from the top.



My second saved setting is for appendixes. It is called COA Appx. It has the same settings as my general COA pagination, except I added Appx before the page number:



Pagination within the document

If you open the page thumbnails from the left-side bar, (see above), you can select pages and give them numbers. Working with a brief, it can be easier to navigate to page 24 if Acrobat recognizes correct page

numbering. Usually, this means renumbering the initial pages, those with lower case roman numerals. I also renumber brief cover pages by selecting the page as described below and choosing none for the page numbering.

Open the page thumbnails, select the pages you want to renumber. Right click on any one selected page. Select Page Labels about halfway down the popup list. Follow the prompts in the popup box to get the pagination you want.

C. OCR (Optical Character Recognition)

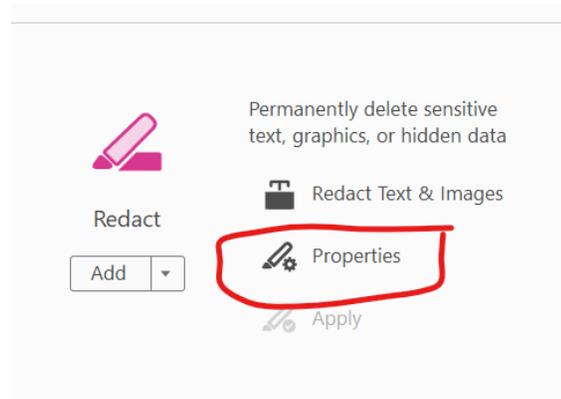
With OCR, Adobe recognizes and reads text, a valuable tool if you are searching for a particular word in a long transcript. Acrobat typically has OCR on by default. You can also choose edit PDF from the Tools menu and OCR should automatically be applied to the document. If not, look for Settings in the Edit bar on the right side. Under settings, be sure recognize text is turned on.

You can also use the enhance button in Acrobat to deskew pages and clean them up.

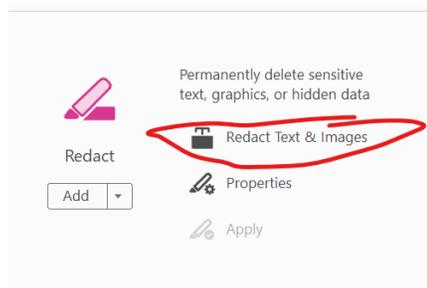
D. Redacting Social Security Numbers and Private Data

With your document set up for OCR, you may find social security numbers and other personal data more easily, but it still pays to proof very carefully to catch all. Then, redact!

- If you do not have a redact button on your tool bar: With your document open, go to the Tools tab in Acrobat and type redact in the search box.
- Use the properties button to set up how redactions appear — big black bars or no color added. (The latter saves black ink and does a fine job.)



- Select Redact Text & Images.



- Go through your document and select the material to redact. You can simply select the material with your cursor if it is clear text. If that does not seem to work, hold down CTRL and select the data.
- When you run your mouse across redacted material, it will disappear. That way, you can double-check what you have redacted.
- When you finish selecting all redactions, select apply to finish redacting.

IV. Excel: A Case Management Tool

A. Managing Office Deadlines and Tasks

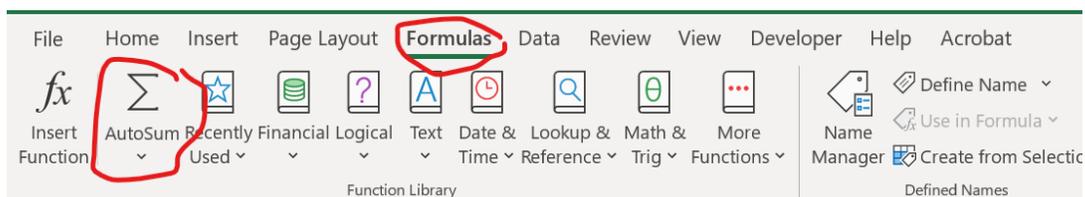
Over the past few years, I have closed the law practices of several lawyers who died or were disbarred. Each time I learn something that changes the way I manage my practice. In addition to keeping me updated and alert to deadlines, using Excel for office management will help anyone who has to clean up my office after me.

As a sole practitioner, if something happens to me, I want the attorney cleaning up my office to be able to quickly and easily (1) see what cases have impending deadlines and need immediate attention, (2) be aware of upcoming deadlines in cases that need quick, though not immediate attention, (3) know the last thing I did in a case and the next thing I need to do, (4) know who to contact about cases and how, and (5) know what fees are currently outstanding and due. (My Clio account helps with this as well.) An Excel workbook with two color-coded spreadsheets is one tool in my toolkit to address these concerns. I update the spreadsheets regularly, at least once a week, sometimes daily.

The first spreadsheet sorts active clients alphabetically with the following pertinent data. I keep this one in a folder on my desk, labelled Current Clients and Case Details. I also told the attorney responsible to take over my practice if something happens to me where the folder is and what it is.

Client	Appointed (A) Retained (R)	Case Name	Trial venue & case number	Appellate case number	Case Status as of Oct 20, 2020	Next Step	Due Date	Following Step	Outstanding Fees
Austin, Jane	R	State v. Austin	Wake 18CRS1122 bank robbery	COA21	Trial court extended transcript due date	Transcript due	11/16/20	PROA due 12/16/20	
Collins, Billy	A	State v. Collins	Union 18CRS1111 arson	COA19-1234	10/6/2020 affirmed, client already released; says no to PDR; 10/14/2020 fee petition submitted	To be paid			\$3,216.80
Dickinson, Emily	A	In re M.D.	Durham 18JT123	COA19-1111	All briefs filed 7/22/2020	COA to set hearing date		7/31/20 interim fees paid \$3,503.79	
Khayyam, Omar	A	State v. Khayyam	New Hanover 19CRS2211 RDW	COA20-	10/20/20 COA extended PROA deadline	PROA due	11/24/20		
Kipling, Rudyard	R	State v Kipling	McDowell 16CRS1111 RDW	COA20-1111	10/13/2020 Appellant brief filed	Appellee brief due	11/16/20	Reply Brief due 11/30/20	
Yeats, Wm. B.	A	In re YY	Nash 13JT1111 (private TPR)	1111A20	10/20/20 reply brief filed	Supreme Court to set hearing date		5/30/19 interim fees paid \$2,166.74	
								TOTAL OUTSTANDING FEES	\$3,216.80

The outstanding fees column is formatted for US currency. The computer calculates Total Outstanding Fees on the bottom right with Excel's formula's function. With my cursor in that cell, I select Formulas, then AutoSum:

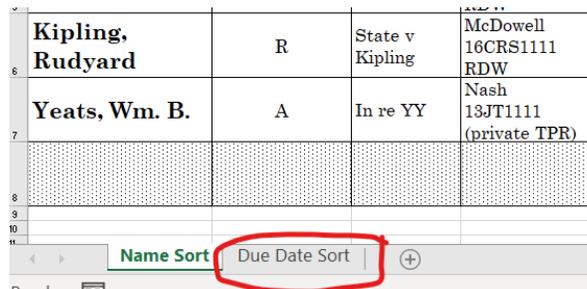


Under the AutoSum down arrow, select Sum. Excel will guess what you want to add together and may only choose part of the Outstanding Fees column. You'll see a formula in the total box, something like this: =SUM(J3:J7). The parenthetical indicates which cells will be added together. The cells also will be selected on your screen. That means Excel will total the figures in J3 through J7 to come up with total outstanding fees. BUT we need J2 included. You can type right in the formula, changing J3 to J2. Or you can drag the top corner of the selection up to include J2. Double-check the sum formula to be sure Excel got it right.

To keep aware of upcoming deadlines — in addition to my computer and written calendar reminders—, I set up a Macro in Excel to sort the client data by whose task is due (color-coding) and the pending due dates. Creating a Macro is simply a matter of doing the task once while recording it.

To sort the sample client chart above:

- Add a new page to use for due date sorting. (I title mine to minimize confusion.)

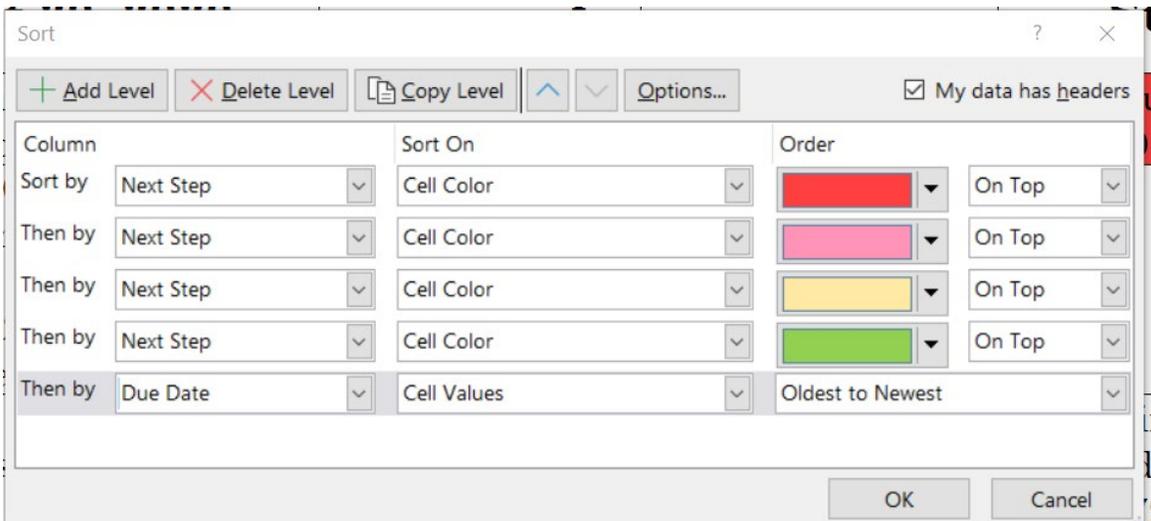


Kipling, Rudyard	R	State v Kipling	McDowell 16CRS1111 RDW
Yeats, Wm. B.	A	In re YY	Nash 13JT1111 (private TPR)

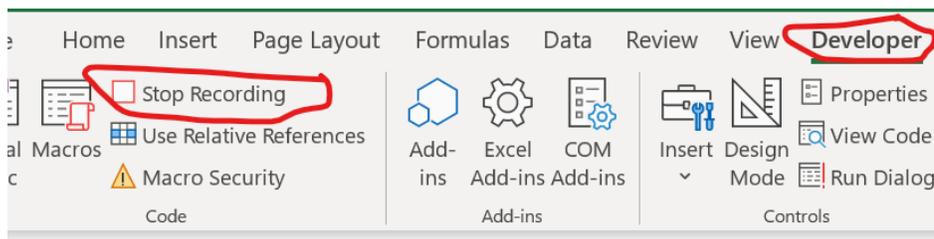
The screenshot shows the Excel interface with a worksheet named 'Name Sort'. A new tab named 'Due Date Sort' is visible at the bottom and is circled in red. The main worksheet contains a table with columns for client names, initials, case names, and case numbers.

- Select Developer and then, Record Macro. *Note: If you do not have a Developer tab, just type developer or record macro in the search box, and Excel will take you there.*
- Name your macro with no spaces. I use DueDateSort.
- Then select the columns you want on the next page, copy them, and move them there. I do not need every column in my upcoming deadlines sheet, so I choose what I need for deadlines.

- Now, you want to sort the Due Date page, so you can see what needs your attention and when. Go to the Data tab and select Sort.
- Just once—I promise, only when you set up the Macro— you must tell Excel how you want the data sorted. I color-coded my Next Step column earlier because Excel can then tell me what is my responsibility and what is opposing counsel or the court reporter’s responsibility. So, I add levels in the Sort window that sort by the next step, by color, and then by due date. I do want the column headings, so I check My data has headers. Like this:



- Click okay in the sort box, then on your tool bar, go back to Developer and click Stop Recording.



- Voila! You have a sorted spreadsheet that will help keep track of upcoming due dates.

Client	Appellate case number	Case Status as of Oct 20, 2020	Next Step	Due Date	Following Step
Khayyam, Omar	COA20-	10/20/20 COA extended PROA deadline	PROA due	11/24/20	
Austin, Jane	COA21	Trial court extended transcript due date	Transcript due	11/16/20	PROA due 12/16/20
Kipling, Rudyard	COA20-1111	10/13/2020 Appellant brief filed	Appellee brief due	11/16/20	Reply Brief due 11/30/20
Dickinson, Emily	COA19-1111	All briefs filed 7/22/2020	COA to set hearing date		7/31/20 interim fees paid \$3,503.79
Yeats, Wm. B.	1111A20	10/20/20 reply brief filed	Supreme Court to set hearing date		5/30/19 interim fees paid \$2,166.74
Collins, Billy	COA19-1234	10/6/2020 affirmed, client already released; says no to PDR; 10/14/2020 fee petition submitted	To be paid		

B. Creating Appellate Timetables for Clients, Using Templates

Our clients want to know what is going on in their appeals and how long it will take. While we cannot predict the timeline with total accuracy, it can be useful to give the client a timetable based on the Rules as a guide. I use Excel’s formula capacity to create timetable templates, which I send to appellate clients. Different cases have slightly different timelines, so it helps to have different tables for retained and appointed cases, 3.1 cases, and capitally tried appeals. Having templates helps.

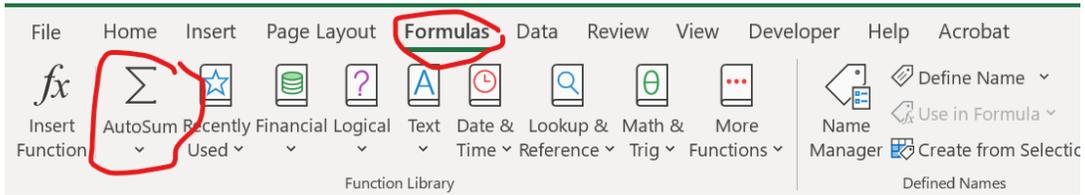
The example below uses deadlines in an appointed, non-capitally tried, criminal appeal to the Court of Appeals. The procedures work with any appeal, retained or appointed, criminal or juvenile, capital or non-capital. Just change the deadlines and descriptions as appropriate for your case. Set up a sample to use as a template in each type of case.

- Here is what my timetable template looks like in Excel. What you cannot see here is that, except for the transcript order date, all the date boxes are using formulas to calculate the due dates for next steps.

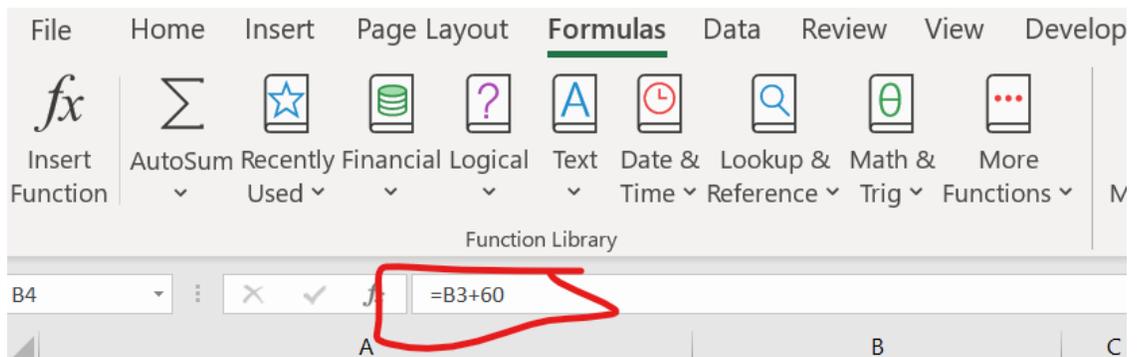
Appeal Timetable for _____ from _____ County	
Events and dates in red have already been completed. Dates may change if the event is completed ahead of schedule or if the Court grants an extension of time. If a due date falls on a holiday or weekend, the due date becomes the next business day. Court of Appeals decisions are announced on the first and third Tuesday of each month. Therefore, an estimated decision date on any other day should be adjusted to the next first or third Tuesday of the month.	
Action	Due Date
Transcript Ordered ---already done	March 19, 2020
Court reporter to deliver transcript to Rawls	May 23, 2020
Rawls to Serve Proposed Record on Appeal on prosecutor	June 27, 2020
State to Serve Proposed Amendments or Objections to Record on Appeal	July 30, 2020
Rawls to file Record on Appeal in Raleigh	August 14, 2020
Defense Brief Due in Court of Appeals	September 13, 2020
State Brief due in Court of Appeals	October 16, 2020
Consideration Date in Court of Appeals (estimated date) <i>Note: Most appeals are considered without any court hearing.</i>	December 30, 2020
Court of Appeals announces decision (estimated date) <i>Note: All decisions are announced on the first and third Tuesday of each month.</i>	March 30, 2021

- First: Be sure to format the due date cells to be dates. Select the cells, right click, choose Format Cells, select the Number tab, then select Date. You can choose whatever date format you like but be sure it includes the year to avoid confusion. Click Ok.
- To let Excel calculate the due date, place your cursor in the cell where you want the date to appear. *Caution: Start with the earliest date you want calculated, because subsequent dates will flow from earlier dates.*
- In my example, the first due date is the transcript delivery, due 65 days after order in this criminal case. So, I want Excel to add 65 days to the transcript order date in cell B3.

- Select Formula, AutoSum, and Sum.

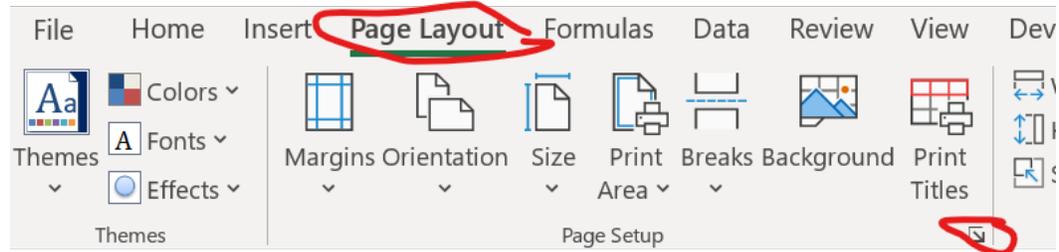


- In your selected cell, you will see =SUM(). No numbers in the parentheses, but that is where you will put the calculations. I know two ways you can do this.
 - Option 1: With your cursor in the cell, hold CTRL and click in the cell above (transcript ordered date). Now, the cell will say =SUM(B3). In a non-capital criminal appeal, you need to add 60 days, so place your cursor beside B3 and type +60.
 - Option 2: With your cursor in the cell, double click in the bar at the top of worksheet and type =B3+60

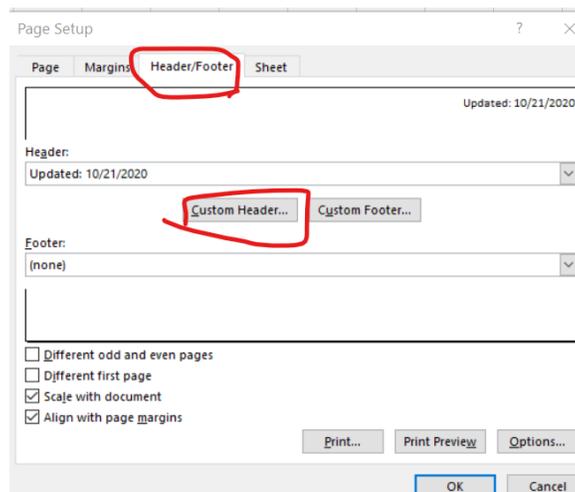


- Whichever option you choose, continue down the column, telling Excel to add the proper number of days to the preceding cell.
- Finally, I set an updated date on the file, so the client can see the date I created the timetable. I update timetables and send them to clients whenever a task is complete or a date changes.

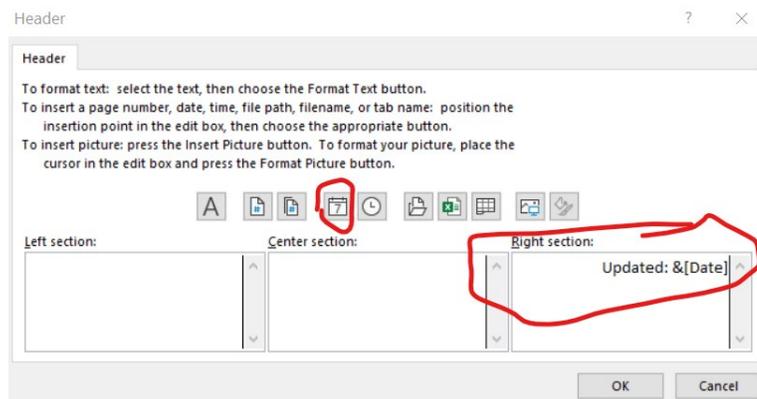
- To create a header with the current date, go to Page Layout and click the down arrow in the Page Setup section.



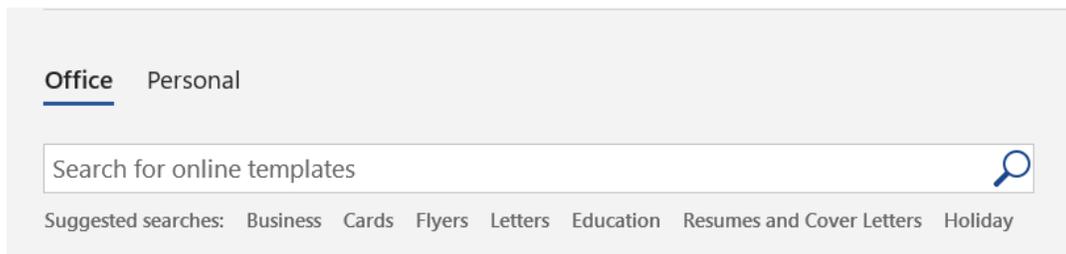
- In the next popup, choose the Header/Footer Tab and select Custom Header (or Custom Footer if you prefer the date at the bottom).



- I put the updated information in the top right header, so I put my cursor in the Right section, type Updated: and then, click on the calendar icon to insert the date. Excel will automatically update it any time I change the timetable for my client.



- Once you set up a table, save it as a template for future use.
 - File, Save As, Browse.
 - In Save as Type, choose Save as Excel Template.
 - Let Excel choose the file location because that is where it will look for your templates in the future. (Most likely, Documents/Custom Office Templates)
 - When you want to use your template, open Excel. Select File, then choose New instead of Open. In about the middle of the next window, you will see the Templates selection:



- Click on Personal and it will take you to Documents/Custom Office Templates. There, you will see the template you just saved, as well as any others you have created. It will look like this:
- When you select the template, it will open as a new document. You can then modify it with details appropriate to your client. Save the new timetable in your client's folder and update it as needed.
- *Note:* I save the Excel file in my client's general correspondence folder. When I update the timetable, I print it to a pdf and name it by the date, e.g., 2020-10-21 timetable enclosure. This way, I have a record of the timetable sent to my client on a particular date.

V. Leslie's contact information

Nearly everything I know comes from making mistakes and finding my way out again. And there is more than one way to skin a cat, so you may know other ways to accomplish these tasks. I am happy to talk with anyone who has questions or even ideas for simplifying processes. My contact info is:

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