EFFECTIVE BRIEF WRITING DESPITE HIGH VOLUME PRACTICE: TEN MISCONCEPTIONS THAT RESULT IN BAD BRIEFS

Sarah E. Ricks and Jane L. Istvan***

I. INTRODUCTION

THERE is an art to writing effective briefs, and each brief is different. But many ineffective briefs contain the same mistakes, regardless of the brief's subject matter or the brief's intended judicial audience. One recent survey revealed that more than 93% of the responding practicing attorneys and judges (both state and federal) believed that the briefs and memoranda they saw were "marred by basic writing problems,"[1] including a lack of focus (76.1%), failure to develop an overall theme or theory of the case (71.4%), and failure to be persuasive (66.4%).[2] Another recent survey of 355 federal judges found that "judges are critical of lawyers' inability to use relevant, controlling authority to their advantage."[3]

The demands of a high volume law practice contribute to these drafting errors. A heavy caseload allows little time for the brief writer to achieve the critical distance from the document necessary to edit and revise effectively.

In addition, many attorneys have misconceptions about the role of a judge that lead to basic drafting errors. Because judges want the result of a case to turn on the merits, rather than on which party hired the better lawyer, they sometimes reach out in cases where the briefs are poorly organized and opaque to independently divine the applicable law and record facts. However, it is not the judge's job to sift through the advocate's possible arguments to determine which argument is strongest or to figure out how the law applies to the facts of the case.

* Clinical Associate Professor & Co-Director, Pro Bono Research Project, Rutgers School of Law-Camden. J.D. Yale Law School 1990, B.A. Barnard College, Columbia Univ., 1985. Thank you to the Rutgers-Camden Clinical Faculty Scholarship Workshop for helpful comments on an earlier draft.

** Senior Attorney, Appeals, City of Philadelphia Law Department, J.D. Yale Law School 1992, B.A. Univ. of Virginia 1988.

1. Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates*: *A Comparative Study*, 53 J. LEGAL EDUC. 80, 85 (2003).

2. *Id.* at 85-86.

3. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 264 (2002) ("The judges seem to think that lawyers can find the law, but they are not doing enough with it; the legal analysis in their briefs is mediocre.").

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Judges will not always have the time, the inclination, or the patience to figure out what a disorganized brief's arguments are or should have been.

In spite of the demands of a high volume law practice, lawyers can avoid committing many common brief-writing errors by making a significant attitudinal shift during the writing process. Lawyers should try to put themselves in the place of their intended readers—the busy judge and the often inexperienced law clerk. The ten most common ways to write a bad brief that the authors have identified are all rooted in a failure to recognize that, like lawyers, judges also have a high volume practice. And, unlike many lawyers who specialize in one area, often judges are generalists who regularly confront widely differing legal subjects. Judges need lawyers to explain to them clearly and concisely what the applicable law is and how it applies specifically to the facts of a particular case. When a judge who has spent all day trying a contract case sits down to consider the merits of a free speech case at 4:30 p.m. that afternoon, he needs help in recalling the relevant legal doctrines in free speech cases and applying them to the facts of the pending case. The following explanation of recurring brief writing misconceptions and errors can assist lawyers in assessing the effectiveness of a brief from the perspective of the intended reader. This article can help lawyers avoid ten of the most common ways to write a bad brief.

II. MISCONCEPTION NO. 1: DON'T WASTE TIME ORGANIZING OR OUTLINING YOUR ARGUMENTS. THE JUDGE CAN FIGURE OUT YOUR BEST ARGUMENTS.

This is a key part of doing a busy judge's work for her. To be effective, the brief must meet the needs of the reader—the court. "[J]udges value well organized, tightly constructed briefs second only to good legal analysis. For efficiency reasons, they seem to prefer traditional methods of organization, such as the use of a summary or roadmap of the arguments to follow and the placement of an advocate's strongest arguments first."[4] A busy judge is more likely to be persuaded by a brief that organizes and prioritizes the arguments.[5] Below are some tips for organizing briefs and making them easier to read.

A. Tip: If You Can, Give Your Brief an Organizing Theme

An organizing theme should be a message that shines through detailed facts and case law for a busy judge. This theme should be logical and easy to grasp. It should make emotional sense and should permeate every part of the brief. Some call this a *theory of the case*.[6] In a recent survey of legal professionals including

4. *Id.* (summarizing survey of 355 federal judges). *See also infra* notes 18-19. *Cf.* Kosse & ButleRitchie, *supra* note 1, at 89-90 (in a different survey of legal professionals, including judges and attorneys, a thesis paragraph was ranked as the most important organizational element by fewer than 10% of judges and 26.1% of attorneys).

5. *See infra* notes 55-63 and accompanying text.

6. This key advocacy concept is explained in most legal writing textbooks. *See, e.g.*, LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 186-87 (2003); ELIZABETH FAJANS ET AL., WRITING FOR LAW PRACTICE 174-76 (2004) (explaining the concept as the "case's core emotional or

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judges, the majority of respondents ranked the most important element of legal style as "an integrated statement of the theory (or theories) that favors the client's position."[7]

Example: Let's say you're briefing a hostile work environment case where an employee complained of sexual harassment and the employer disciplined the perpetrator. Your theme could be:

> Title VII holds employers responsible for their own discriminatory conduct. It does not hold employers responsible for every incident of harassment committed on their premises.

Every part of the brief should support that theme: the facts section, the headings, the introductory paragraph summarizing the argument, the explanation of the governing law, the key facts selected to support the legal argument, and, in an appellate brief, the question presented.

B. Tip: Use CRAC as a Default Analytical Structure for Each Legal Conclusion

Generally, to prove each legal conclusion your brief advocates, the brief should follow the following format, which some call CRAC (Conclusion—Rule—Application—Conclusion).[8]

1. *First, Summarize How the Law Applies to Your Facts—A Legal Conclusion You Want the Court to Reach*

Example: There was no hostile work environment in this case because the undisputed facts demonstrate that the City took adequate remedial measures when the Plaintiff complained about sexual harassment.

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doctrinal theme"); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 275-80 (4th ed. 2001); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING 182 (1999) (analogizing the theory of the brief to a newspaper headline); LAUREN CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 380, 387, 455-56 (4th ed. 2006). This advocacy concept is also explained in legal writing books targeted at practicing attorneys. *See, e.g.*, STEVEN D. STARK, WRITING TO WIN 69-70 (1999) (recommending a writer "[d]evise a one- or two-sentence slogan that embodies your position").

7. Kosse & ButleRitchie, *supra* note 1, at 90.

8. This key legal writing concept is explained in some form in most legal writing textbooks. *See, e.g.*, EDWARDS, *supra* note 6, at 89-108; MICHAEL R. FONTHAM ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 71 (2002) (recommending CRAC as "a simple organizational structure in which to lay out your legal analysis" while keeping in mind that the goal "is not to follow CRAC rotely, but to make a persuasive legal argument"); NEUMANN, *supra* note 6, at 95-100. *See also* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 340 (2d ed. 2006) (cautioning that "[t]he IRAC (issue-rule-application-conclusion) model familiar from law-school exams is inappropriate for structuring memos and briefs because it relegates the answer to the end of the document").

2. *Next, Explain the Legal Propositions Upon Which You Rely*

Prove that the law is what you say it is. Explain the binding case law that sets forth the test for establishing a hostile work environment and explain how the courts define adequate remedial measures.

3. *Then, Explain How Those Legal Propositions Apply to Your Facts*[9]

Describe the record facts that establish that the City took adequate remedial measures. Repeat the language of the legal test when applying it to your facts. Explain how legal principles from applicable statutes, case law, or both, and factual similarities to applicable case law compel the conclusion that the City took adequate remedial measures as a matter of law. Distinguish your client's facts from the key facts of cases that did find a hostile work environment.

4. *Finally, Reiterate the Legal Conclusion You Advocate*

For each legal conclusion your brief seeks, do this before moving to the next argument.

Example: Since the City took adequate remedial steps in response to the Plaintiff's complaints, there was no hostile work environment.

C. Tip: Make the Logical Relationships Between Ideas Easy for the Reader to Grasp

1. *Use Headings*[10]

Using headings helps the court (and you) figure out where your argument is going. "[B]riefs with frequent headings often are more logical because of the discipline needed to organize the arguments into sections that are distinctively labeled."[11] Effective headings are not general statements; rather they articulate your client's specific legal argument.

Example: "Smith's Due Process Rights Were Violated When She Was Fired as a Teacher Without Notice or a Hearing,"

9. *See infra* notes 36-39 and accompanying text.

10. *See, e.g.*, WAYNE SCHIESS, WRITING FOR THE LEGAL AUDIENCE 87-90 (2003) (advising that the "best way to ensure that a trial judge will understand your case is to … [m]ake your organizational plan overt" by using section headings, tabulation, and enumeration); David R. Cohen, *Writing Winning Briefs*, 26 LITIG. 46, 48 (2000) ("Tell the reader where your argument is going. Briefs with few headings can seem disorganized; frequent headings make the brief seem more logical."); Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 SCRIBES J. LEGAL WRITING 1, 16 (2001-02) (quoting the advice of the Hon. Daniel M. Kolkey, California Court of Appeal, that "[s]ections and subsections should be liberally used to focus a busy court on the key components of the argument, and only one point per subsection should be made").

11. Cohen, *supra* note 10, at 48.

Not: "Smith's Due Process Rights Were Violated."[12]

2. *Use a Table of Contents*

To help the court easily grasp the brief's logical structure, put the headings into a table of contents. One Texas judge explained how a table of contents helps the court by increasing judicial efficiency: "a detailed table of contents … [including] [s]ubheadings [is] critical to the speed with which a judge … can write an opinion because they enable the opinion writer to quickly reference the argument being addressed."[13] Most appellate court rules require a table of contents. Even if not required by court rules, a table of contents is a good idea for briefs that exceed ten pages.

3. *Use (But Do Not Overuse) Bullets and Numbered Lists*

In the body of the brief, use numbered lists, if applicable. If the legal test or legal argument can be logically presented in an enumerated list, help the court by listing it. Wayne Schiess succinctly illustrates how to use these aids to assist the reader:

> Enumeration, like this: The important factors are (1) the audience, (2) the document length, and (3) the document's purpose;
>
> - Tabulation, like the bulleted items you are reading now;
> - Enumeration and tabulation together, like this: The important factors are:
> 1. the audience,
> 2. the document length, and
> 3. the document's purpose.[14]

12. STARK, *supra* note 6, at 146. *See also* Coleen M. Barger, *How to Write a Losing Brief*, ARK. LAW., SPRING 1996, at 10, 11 (to write a bad brief, "[d]on't include any point headings … or if you must draft some, make them as nonspecific … as possible … [to prevent judges from] get[ting] a sense of your argument's scheme and structure").

13. Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 ST. MARY'S L.J. 1093, 1102 (1999). *See also* Judge William Eich, *Writing the Persuasive Brief*, WIS. LAW., FEB. 2003, at 20, 22, 24 (noting the importance of a table of contents to an effective brief).

14. Wayne Schiess, *The Five Principles of Legal Writing*, 49 PRAC. LAW. 11, 16 (2003). *See also* David Lewis, *New England Appellate Judicial Survey*, 29 VT. B.J. 41, 41 (2003) (survey of federal and state appellate judges in New England showed approval of bullet points or other creative typography to highlight a list). Because briefs are formal documents, overuse of bullets and tabulation may undercut the persuasiveness of your brief by making the document appear too informal. Use these techniques occasionally, when they significantly clarify legal or factual information. *See* Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 154 (2002) (survey of thirty-four California judges and staff attorneys found "weak support for bullet points … and visual aids such as charts and diagrams" and recommended they be used "sparingly and with excellence"). For a thoughtful guide to structuring lists, including

4. *Use Transitions*

Try to make the logical relationships between ideas even easier to grasp by using transitions, such as "in addition," "by contrast," or "in the alternative."[15] If you are arguing in the alternative, use transitions in the headings to make it easy for the court to grasp that you recognize that two arguments are not consistent with each other.[16] For example, if the brief argues the court lacks jurisdiction and then argues the merits, use a transition to signify that the arguments are in the alternative, such as "Even if this Court Has Jurisdiction …" or "Regardless…."[17]

D. Tip: Summarize Before Launching into Detail

Summarize the crux of the argument in an introductory, roadmap, or executive summary paragraph. In a recent national survey of federal judges, "[s]eventy-six percent of the judges said it is essential or very important to include an introductory paragraph that explicitly outlines the arguments to follow."[18] While required for appellate briefs, this is also helpful in trial court briefs as a courtesy to the reader—the court.[19]

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recommendations for word choice, placement, format, and punctuation, see MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 192-96 (2000).

15. *See, e.g.*, RAY & RAMSFIELD, *supra* note 14, at 383-84 (recommending repetition of key words to communicate connections between sections, paragraphs, or sentences, and recommending a list of words that signal logical connections); EDWARDS, *supra* note 6, at 271; NEUMANN, *supra* note 6, at 211-14.

16. EDWARDS, *supra* note 6, at 180-81. *See also* SCHIESS, *supra* note 10, at 105-08 (explaining the use of transitions).

17. By contrast, adverbial intensifiers such as "clearly" or "obviously," do not strengthen legal writing and, in fact, often are considered red flags for logical leaps in the argument. *See, e.g.*, EDWARDS, *supra* note 6, at 277; Bird & Kinnaird, *supra* note 14, at 153; Gerald Lebovits, *Legal-Writing Myths—Part I*, N.Y. ST. B.J., Feb. 2006, at 64, 67 n.15. *Cf.* Lewis, *supra* note 14, at 41 (survey of federal and state appellate judges in New England showed "mild agreement" that words like "clearly" and "obviously" bothered them).

18. Robbins, *supra* note 3, at 273. *See, e.g.*, EDWARDS, *supra* note 6, at 71; STARK, *supra* note 6, at 144-46 (recommending all briefs begin with a first-page, introductory summary of favorable arguments); Garner, *supra* note 10, at 13 (quoting the Hon. Mike Keasler, Texas Court of Criminal Appeals, that "[i]t is refreshing to read an opening paragraph that succinctly frames the case's principal issue and urges its just and correct resolution. My attitude immediately becomes receptive"); Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 8 SCRIBES J. LEGAL WRITING 103, 111 (2001-2002) (explaining that "[g]ood summaries in briefs and memos will contain the same three elements that opinions do: the crucial facts, the deep issue, and the answer"). Some legal writing professionals "recommend that every piece of analytical writing have a summary up front … [including] [s]ummarizing the point of a letter in the first paragraph; [s]tating the conclusion of a legal analysis first … [f]raming the issue up front in a trial brief." Schiess, *supra* note 14, at 14-15.

19. Wayne Schiess recommends that all briefs to trial courts begin with "a bold synopsis," a "one- or two-sentence summary of your point, highlight[ed] with boldface text, and set … off with indentations." SCHIESS, *supra* note 10, at 84-87.

E. Tip: Address Threshold Issues First

Unless you have a strategic reason to do otherwise, address threshold issues (like jurisdictional or statute of limitations arguments) before the merits. After all, if the threshold argument persuades the court, it may not need to reach the merits.[20]

F. Tip: Open With Your Strongest Argument[21]

"Always lead from a position of maximum strength. This strategy requires you to produce an intelligent answer to the following question: What argument, objectively considered, based on precedent and the court's previously-stated policy concerns, is most calculated to persuade the court to your benefit?"[22] In a recent survey of legal professionals, about 30% of judges and attorneys "wanted the first issue presented to be the one most likely to get needed relief, and also to be the most significant issue presented by the case."[23]

III. MISCONCEPTION NO. 2: DON'T BOTHER TO FIND CITES FOR THE FACTUAL AND LEGAL ASSERTIONS YOU MAKE IN YOUR BRIEF.

Assume you are the moving party. The easiest thing for a judge to do is to deny your dispositive motion and move on to trial. If she is going to deny a party its right to a jury trial, she wants to be confident that she is doing the right thing, and she is going to want to be able to explain and justify that decision. Therefore, you need to do the judge's work for her and make it easy for her to find the points in case law and in the factual record that prove your argument.

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20. Gerald Lebovits, *You Think* You *Have Issues? The Art of Framing Issues in Legal Writing—Part II*, N.Y. ST. B.J., June 2006, at 64, 73.

21. Robbins, *supra* note 3, at 273 (noting that 74% of federal judges surveyed "said it is essential or very important for advocates to put their strongest arguments first"). *See also* STARK, *supra* note 6, at 126 (recommending leading with your client's best argument, unless addressing a procedural issue, and not following the adversary's outline of issues).

22. Ruggiero Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 655 (2006). *See also* Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 421 ("The persuasive writer wants to create an argument chain that leads the judge to start nodding 'yes' to her arguments.").

23. Kosse & ButleRitchie, *supra* note 1, at 89.

A. Pincite to the Exact Pages of a Case or the Precise Sections of a Statute or Regulation[24]

Before filing, check to ensure the pincites are accurate. As a Georgia federal judge warned, "'Misleading or incorrect citations, however unintentional, detract from the persuasiveness of the brief.'"[25] Checking the accuracy of your pincites is also good self-discipline. It helps ensure that your recollection of the governing law is accurate, not wishful thinking.

B. Do Not Make Unsupported Factual Assertions

Make sure the record you are creating for the trial court includes the facts you want to assert in the brief. Whether in a trial brief or on appeal, cite to your record and provide helpful quotes to let the judge know that you are not distorting the record. Precise record citations make it easy for the judge or law clerk to locate the specific fact that supports your argument. This is also good self-discipline. Like accurate pincites to the relevant law, precise record citations help ensure that your recollection of the factual record is accurate, not wishful thinking.[26]

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24. *See, e.g.*, MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 86-87 (2002) (cautioning that if you do not give pinpoint citations, "you may force the law clerk to wade through 30- or 40- page opinions" to locate the legal principle upon which the brief relies); GARNER, *supra* note 8, at 127 ("Failing to pinpoint a reference can hurt a writer's credibility by making it hard … to evaluate the validity of an argument."); Lewis, *supra* note 14, at 41 (survey of federal and state appellate judges in New England showed failure to pincite "cause[d] judges to become suspicious of whether the authority stands for the proposition asserted"); Jonathan Byington, *How to Make Your Appellate Brief More "Readable,"* 48 ADVOC. 17, 17-18 (2005) ("Citing a source without referring to specific material within the source suggests it does not directly stand for the position the writer is asserting.").

25. Garner, *supra* note 10, at 9 (quoting the Hon. Duross Fitzpatrick, U.S. District Court, Middle District of Georgia).

26. Duncan, *supra* note 13, at 1101 (based on her experience as a Texas appellate judge, explaining that "[a]ccuracy makes you a friend of the court and keeps you one throughout your career"). *See also* EDWARDS, *supra* note 6, at 185 (explaining that precise citations to the factual record are necessary because "[t]he citation allows the judge to verify that the fact actually appears in the record and to check that the writer's descriptions of the fact and its context are not misleading. Judges *do* check the facts."); Raymond T. Elligett, Jr. & John M. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 STETSON L. REV. 415, 418 (2003) (noting that appellate courts have criticized counsel for misrepresenting the factual record or the decision on appeal, omitting material facts, "and using quotation marks … where no witness … actually used" those words); Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 19 (1997) (citing cases where attorneys have been disciplined for willful misrepresentation of facts to the court).

IV. MISCONCEPTION NO. 3: IF YOU DO PROVIDE CASE CITATIONS, DON'T BOTHER TO EXPLAIN TO THE COURT WHY THEY ARE RELEVANT. QUOTE FROM CASES A LOT. AND THROW IN SOME BIG BLOCK QUOTES FOR GOOD MEASURE.

Doing the court's work for it includes citing case law effectively and demonstrating to the court how that case law supports the position that you want the court to adopt. "The secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical."[27]

A. Tip: As a General Rule, Avoid String Cites

Skeptical readers, like courts, do not trust attorneys enough to rely upon string cites. Nor are string cites an effective way to teach the court the governing law. Instead, prove to the court that each case you cite is on point. As one state supreme court justice cautioned, it is "essential" to tell the court why a case is cited: "[T]he purpose of a citation should be explained. A case may be important for its facts, its holding, its reasoning, its approval of other authority, or an observation that is dictum."[28] Explain the purpose of the citation either in the text or, for a less important case, in a parenthetical.[29] Parentheticals are also useful when citing several cases to illustrate the same principle.

B. Tip: Discuss Your Best Cases in Detail

Use parentheticals for the rest of the cases. In explaining your best cases, be sure to include the key facts and reasoning that the brief later will argue make the pending case analogous to, distinguishable from, or controlled by the precedent case. For the brief's application of the law to persuade the court, the explanation of the law needs to lay the groundwork for the brief's later analogies and distinctions.[30]

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27. Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 310 (2002).

28. Garner, *supra* note 10, at 25 (quoting the Hon. E. Norman Veasey, Chief Justice, Supreme Court of Delaware). *See also* Randall H. Warner, *Cites for Sore Eyes: Case Law Analysis That Works*, ARIZ. ATT'Y, Dec. 2004, at 18, 20 ("[I]f the rule you are citing is really important and somewhat debatable, you should probably go into some detail about the case law that supports it.").

29. For a thoughtful guide to effective drafting and use of parentheticals, see MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 263-84 (2002). *See also* Bird & Kinnaird, *supra* note 14, at 152 (survey of thirty-four California judges and staff attorneys found that most did not find string cites helpful but approved of parentheticals when "dealing with a large body of similar authorities"); Terry Jean Seligmann & Thomas H. Seymour, *Choosing and Using Legal Authority: The Top 10 Tips*, 6 PERSP.: TEACHING LEGAL RES. & WRITING 1, 4 (1997) (recommending summary of less important authority in a parenthetical, which is "a quick and efficient way to provide your reader with instructive but not crucial information about that authority, such as a factual variant or a slant on reasoning").

30. *See infra* notes 36-39 and accompanying text.

C. Tip: If the Court Will Need to Parse the Language of the Legal Test, Then Quote It[31]

Quoting the legal test is both helpful to the court and good self-discipline to ensure that your memory of the legal test is not more favorable to your client than its reality. Summarizing the language of a legal test may gloss over nuance.

D. Tip: Except for Quoting the Legal Test, Rarely Quote from Cases

Your summaries of the legal authority are more succinct. Save quotes for the rare occasions "when the opinion's language is just so juicy and on point that you could not say it better or more concisely yourself."[32] In particular, use block quotes sparingly. Many readers confess to skipping them.[33] Save block quotes for when: (1) the quote is completely on point; (2) the quote sets forth a legal test; or (3) you can plug in the names of your litigants to demonstrate the quote's application to your case.

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31. *See* EDWARDS, *supra* note 6, at 264 (recommending quotation marks to alert the reader that the quoted language is the precise legal test "when the analysis must apply a particular legal test or when the analysis must construe particular words of a statute …[, e]ven though quotation marks would not be required for these words, the writer should use them anyway to let the reader know that these are the words at issue in the analysis"); NEUMANN, *supra* note 6, at 248 (recommending quotation of words "that must be *interpreted* in order to resolve the issue").

32. NEUMANN, *supra* note 6, at 248 (recommending limiting quotes to: (1) words that "must be *interpreted*" to resolve the issue; (2) words that "are so closely identified with the topic under discussion that they are inseparable from it"; (3) words that, "*with remarkable economy*, put the reader in touch with the thinking of a court [or] legislature"; or (4) words that eloquently express an important idea); STARK, *supra* note 6, at 131-32; GARNER, *supra* note 8, at 407 (stringing quotes together in a brief undermines the reader's confidence in the brief by making the "writer sound hesitant and unconfident"); Warner, *supra* note 28, at 23.

33. NEUMANN, *supra* note 6, at 249 (recommending block quotes be avoided because judges and supervising attorneys view them as evidence of laziness; busy readers "will skim over or refuse to read large quotations" because their experience tells them that it is not worth the effort to ferret out the important words); MARGARET Z. JOHNS, PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES 210 (1998); Bird & Kinnaird, *supra* note 14, at 152 (survey of thirty-four California judges and staff attorneys found that half tended to skip block quotes longer than six or seven lines); David Lewis, *Common Knowledge About Appellate Briefs: True or False*, 6 J. APP. PRAC. & PROCESS 331, 337 (2004) (survey of federal and state appellate judges in New England showed they had a "slight inclination to skim a long, block quote"); Barger, *supra* note 12, at 11 ("The writer whose brief is resplendent with quotations, stitched together by citations, not only persuades the appellate court that he or she has done no original thinking, but also, if the quotations are long enough to merit block format, gives the judges a handy way to skip reading large sections of the brief."); Warner, *supra* note 28, at 23 ("[S]ince our eyes gloss over quotations, especially block quotes … by leaving a critical point inside the quote you take a chance that the judge might not read it."). Professor Ruth Anne Robbins posits that readers dislike the visual impact of block quotes because block quotes interrupt the reader's rhythm by requiring them to switch to a shorter line length. Ruth Anne Robbins, *Painting With Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS'N LEGAL WRITING DIRS. 108, 123 (2004).

E. Tip: When Quoting More than Just a Few Words, Introduce Your Quote and Draw Your Reader's Attention to Key Passages in the Quotation

Introduce your quote by explaining why it is in your brief. The introduction both "induces the reader to read the quotation—which might otherwise be skipped—by providing a key to its meaning." If the brief writer has accurately represented the legal significance of the quoted language, it helps earn the court's trust.[34]

If the quote is long, <u>underline</u>, *italicize*, or **bold** key short passages to pique interest. Use these techniques sparingly, as special type is no substitute for forceful logic and overuse can annoy the reader.[35]

V. MISCONCEPTION NO. 4: DON'T BOTHER SPELLING OUT EXACTLY HOW THE LAW APPLIES TO YOUR CLIENT'S FACTS. THAT'S THE JUDGE'S JOB.

An effective brief meets the needs of the reader—the court. In a recent survey of members of the legal profession, over 60% of federal judges and about 40% of both state judges and practicing attorneys identified the most important element of legal analysis as "effectively weaving the entire body of authority into an argument to give the reader a clear understanding of the applicable body of law."[36] The court does not share your familiarity with your client's facts and needs your help to understand which facts are legally significant and why. Explicitly apply the law to your client's facts.[37] Explain how the facts of a particular case make it distinguishable, analogous, or controlling. Below are some tips to help you apply the law to the pending case more explicitly.

A. Tip: Repeat the Language of the Legal Test When Applying the Law to Your Client's Facts

Example: The employer provided employee Smith with a meaningful opportunity to respond to the allegations against him because the employer met with Smith to permit him to refute the charges before the employer decided to suspend him.

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34. Kenneth F. Oettle, *Give a Quotation a Good Introduction*, 170 N.J.L.J. 1140 (2002). *See, e.g.*, LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK 842-43 (3d ed. 2002).

35. *See* RAY & RAMSFIELD, *supra* note 14, at 385. Bryan Garner suggests conservative use of special type, such as italics, to preserve its impact and avoid the risk of irritating the reader. GARNER, *supra* note 8, at 69. Bold is preferable to underlining or all capitals, since both of the latter slow the reader down. *See* Robbins, *supra* note 33, at 118.

36. Kosse & ButleRitchie, *supra* note 1, at 89. In a different recent survey of federal judges, "[o]nly nineteen percent of judges consider advocates' use of precedent in analogizing or distinguishing cases to be 'excellent' or 'very good.'" Robbins, *supra* note 3, at 269. One federal judge criticized the briefs he reviewed for "neglect[ing] to focus more on the application of controlling case law to the particular facts of a case." *Id.*

37. *See supra* note 9 and accompanying text.

B. Make Analogies Between Your Client's Facts and the Facts of Decided Cases Explicit and Easy for the Court to Grasp[38]

Example: Like the unattached garage in *Picaroni*, which was separated from the house by a walkway, in this case the trailer was separate from Ms. Peluso's main house.

C. Make Distinctions Between Your Client's Facts and the Facts of Decided Cases Explicit and Easy for the Court to Grasp

Example: Unlike the attached garage and enclosed patio in *Cook*, which qualified as integral parts of the main house because they were akin to additional rooms, here Ms. Murray's trailer does not share any door with the main residence.

D. Make It Easy for the Court to See that the Result Your Brief Advocates Is Consistent with the Policies Underlying the Results in Binding Precedent[39]

Example: The public policy served by considering the attached garage and patio in *Cook* to be part of the "inhabited dwelling house"—imposing a more serious sanction for the crime of burglarizing a

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38. *See, e.g.*, BEAZLEY, *supra* note 24, at 77-79; EDWARDS, *supra* note 6, at 165-66 (advising that briefs "[e]xplicitly state the similarities between your client's facts and the facts of the favorable cases. Distinguish unfavorable cases by showing relevant factual differences."); Sherri Adelkoff, *IRAC: Twelve Tips For Better Brief Writing*, LAW. J., June 2000, at 5 ("[Cautioning that] the force of case law is wholly relative to the facts to which it is applied. It is, therefore, crucial to thoroughly analogize or distinguish your legally-significant facts to or from the facts of controlling cases."); Duncan, *supra* note 13, at 1131 ("[D]o not just say the facts are similar and therefore, the case controls. Compare the facts of the cited case to your facts; show why the court's reasoning in the cited case reached a just and workable result then and would again."); Sarah E. Ricks, *You are in the Business of Selling Analogies and Distinctions*, 11 PERSP.: TEACHING LEGAL RES. & WRITING 116 (2003); Seligmann & Seymour, *supra* note 29, at 5 ("There may be dozens of cases on point, but if only two of them involve facts that are nearly identical to yours, use those to make arguments by analogy or distinction. Especially in situations in which the law is indeterminate, courts look for guidance to cases that are factually analogous.").

39. JOHNS, *supra* note 33, at 209 ("Show the court how the policies supporting the cited authority apply to your case."); WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 120 (2002) (noting the similarity between precedent and the pending case "is measured by whether the policies underlying the rule from the cited case would be served by applying that rule to the case at hand"); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 44-45 (4th ed. 1999); Robbins, *supra* note 3, at 284 (suggesting that the results of the survey of federal judges mean that "when advocates analogize to or distinguish case law, they need to look beyond the facts, to the issues, themes and policies involved in those cases"). *See also* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 71-83 (2001) (explaining that categories of policy arguments include judicial administration, normative, institutional competence, and economic, and cautioning that each must be rooted in authority to be used persuasively).

place likely to be populated—would not be similarly served by expanding the definition to include the trailer here.

VI. MISCONCEPTION NO. 5: DON'T WORRY ABOUT WHETHER YOUR RECITATION OF THE FACTS IS COMPELLING. BRIEFS ARE ALL ABOUT LAW, NOT FACTS.

Whether you are writing a trial-level or an appellate brief, do not make the facts a sterile recitation of the record. Rather, use the facts section to advance your argument. Pull facts together into a compelling story that helps sell your case[40] without overt argument[41] and without slanting the facts unfairly.[42] Open with a summary of the facts and the core of the brief's legal theme or theory.[43] Emphasize favorable facts by using concrete, easily visualized words and by supplying more detail.[44] "To read a story from the client's perspective, the reader must be able to … sense somehow what the people in the story must have heard, seen, tasted, smelled, felt and believed."[45] Neutralize an unfavorable fact by juxtaposing it "with other facts that explain, counterbalance, or justify it."[46] Use

40. *See, e.g.*, EDWARDS, *supra* note 6, at 183-200; ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT 462-64 (2006); *id.* at 462 ("A good story is one that focuses on people and portrays the story from the sympathetic perspective of the client.").

41. This basic brief writing concept is widely recommended. *See, e.g.*, NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 278-79 (4th ed. 2004); STARK, *supra* note 6, at 105-08 (advising writers of fact sections to limit adjectives, avoid legal conclusions, and avoid ascribing mental states); Cohen, *supra* note 10, at 47 ("When you state the facts, do not argue. Some appellate courts prohibit argument in the facts section. Even when there is no rule, most judges disfavor overtly argumentative statements of facts. An effective fact section persuades without arguing. It does this primarily by story order, juxtaposition, and focus.").

42. SCHEISS, *supra* note 10, at 90-91 (cautioning writers to include relevant unfavorable facts because "several potential audiences can scrutinize your court paper besides your colleagues and your own client: [such as] the trial judge, [and] the judge's clerk, and … [s]omeone will figure out you've fudged on the truth"); Eich, *supra* note 13, at 54 ("The facts must be stated with absolute, uncompromising accuracy. They should never be overstated—or understated, or 'fudged'—in any manner."). *See also infra* notes 69-73 and accompanying text.

43. *See, e.g.*, NEUMANN, *supra* note 6, at 347; SLOCUM, *supra* note 40, at 469-71 (recommending highlighting favorable facts by placing them "within the first few paragraphs" or at least before unfavorable facts and advising writers to provide context at the beginning); STARK, *supra* note 6, at 96-97 ("A summary paragraph provides a context for the facts to come.").

44. *See, e.g.*, BEAZLEY, *supra* note 24, at 119-25 (advising a writer to decide which facts are likely to support the brief's position positively, or are likely to detract from the brief's position, or are neutral, and to emphasize them accordingly); NEUMANN, *supra* note 6, at 348-49; SLOCUM, *supra* note 40, at 465-66. *See also* RAY & RAMSFIELD, *supra* note 14, at 119-21 (recommending that information be emphasized by placing it at the beginning or end of a sentence or paragraph or in a short sentence by using concrete words that create a mental picture, and by using strong subject-verb combinations when stating doctrines or facts central to the brief).

45. SLOCUM, *supra* note 40, at 462.

46. NEUMANN, *supra* note 6, at 348-49; SHAPO ET AL., *supra* note 39, at 314, 315-16; SLOCUM, *supra* note 40, at 468-69 (explaining techniques to de-emphasize negative facts, including: juxtaposition with positive fact, introduced by transitions signaling contrast, such as "although," "despite"; placing the bad fact in the middle of a paragraph, when readers pay less attention; and strategic use of passive voice).

topical (not argumentative) headings to break up a long story into digestible chunks and to focus the narrative.[47] Word choice matters. "[W]hat we call something goes a long way toward what or how a reader will think of that thing. For example, do we call the dog that bit the plaintiff a 'pet,' a 'guard dog,' a 'Doberman,' or, simply by its name, 'Chocolate'?"[48]

Try to create empathy for your client by working in relevant information from the record about the client's honorable traits, such as a criminal defendant's struggle to overcome a violent childhood or a corporation's longtime financial support of adult literacy programs.[49] Professors Brian Foley and Ruth Anne Robbins recommend that lawyers borrow fiction-writing concepts, such as classic conflicts (e.g., *Man Against Institution*, *Man Against Leader*, or *Man Against Powerful Entity*) to frame the facts and infuse the client's legal position with emotional force.[50]

To illustrate some of these techniques, below is an excerpt from the Statement of Facts of a civil rights brief.[51] The brief argued that the court should not hold the government actors liable for a crime because a private person, not the government, raped and murdered the victim.[52] The theme of the brief was that the crime victim had no constitutional right to be rescued from the violence inflicted by the criminal, a private actor, because no state actor had personally put the victim in danger or prevented the victim from being rescued by private parties.[53]

The brief's author organized the Statement of Facts below to further that theme. Notice how the Statement of Facts opens by summarizing the most compelling fact at the heart of the brief's theory—that the rapist/murderer had no connection to the government. Note that a fact favorable to the brief's theory—that even before police had arrived, the neighbor who could have broken into the apartment to rescue the victim had decided not to break in—is emphasized in several ways. It is stated. It is underlined. It is described in detail. Its presence in the record—three times—is itself stated.

Note how the author emphasizes another fact favorable to the brief's theory. When police were deciding whether to forcibly enter the victim's apartment, they asked the witness who had called 911 whether the noise he had heard had in fact come from the apartment—and the witness equivocated. That fact is stated. It is

47. FAJANS ET AL., *supra* note 6, at 182.

48. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 466 (2001).

49. *See id.* at 473-75 (suggesting techniques to humanize potentially unsympathetic clients). *See also* NEUMANN, *supra* note 6, at 349.

50. Foley & Robbins, *supra* note 48, at 469.

51. Brief of Appellants at 4-9, Schieber v. City of Philadelphia, 320 F.3d 409 (3d Cir. 2003) (No. 01-2312), 2001 WL 34117938. The brief was drafted principally by one of the co-authors of this article, Jane Istvan. The Statement of Facts has been slightly edited to remove footnotes and additional citation information.

52. *Id.* at 10.

53. *Id.* at 10-13.

described in detail. It is illustrated with a quote from the record and underlined to draw the court's attention to key language.

Note how the Statement of Facts below attempts to neutralize an unfavorable fact—that another neighbor did not think the witness who called 911 had equivocated on the source of the noise. It is de-emphasized—while at the same time not deceptively omitted or described—by juxtaposing it with the admission of equivocation by the neighbor who called 911. It is de-emphasized by placement at the middle of a paragraph, sandwiched between two favorable facts.

Note how the Statement of Facts attempts to create empathy for its potentially unsympathetic clients—the two police officers who did not rescue the victim. They are not labeled simply "police," but instead are named: Officer Scherff and Officer Woods. Since rescue of the murder victim would have required the police to break into a private home, the Statement of Facts creates empathy for the officers by articulating their acute awareness of the constraints on their government power to enter private homes forcibly. The Statement of Facts suggests Officer Woods was brave and was willing to break into private homes when necessary to save lives by mentioning that he had done so before. The Statement of Facts creates empathy for the police by detailing the solid investigatory steps the officers *did* take in easily visualized language.

Finally, note that the Statement of Facts emphasizes not only the record evidence that favors the brief's theory, but concludes by emphasizing the absence of evidence that would support the opposing side.

STATEMENT OF FACTS

In the early morning hours of May 7, 1998, a private individual with no connection to municipal government raped and murdered Shannon Schieber in her Center City Philadelphia apartment.

On May 7, 1998, between approximately 12:00 a.m. and 1:15 a.m., Ms. Schieber's next door neighbors, Leah Basickes and Parmatma Greeley, heard a noise. 110a; 64a. Greeley thought the sound came from the direction of Shannon Schieber's apartment, but Basickes disagreed and made it "very clear" that the noise came from outside. 111a; 61a-65a.

The couple took no action, and sometime after Basickes went to bed, Greeley heard "a strangle" or "strangulation sound." 69a. Greeley exited his apartment, crossed the hall, and banged on Schieber's apartment door, yelling into the apartment, but he heard no further noises. 65a-66a. He then returned to his own apartment and instructed Basickes to call 911. 66a-67a.

Greeley then returned to Schieber's apartment door, and "banged" on it some more, but he heard nothing further. 67a. Greeley did not attempt to forcibly enter Schieber's apartment because he "was afraid" and "thought if there's someone in there with a knife or something, what am I going to do now." Id.

Greeley returned and learned that Basickes had not called 911. 68a, 74a. Greeley repeated his request, but she refused. 68a. Greeley called 911 himself at 2:04 a.m. and reported the incident. 432a.

After calling 911, Greeley went downstairs to the first-floor apartment of Amy Reed and her boyfriend, Hooman Noorchasm. 69a. Greeley was

"thinking of possibly breaking down a door," but he "wanted some other male there just in case he heard something more." Id. Greeley spoke with Reed and learned that Noorchasm was not home. Id.

Greeley then returned to Schieber's apartment and knocked on her door for a third time, but he got no response. 70a. Greeley confirmed three times during his deposition that at this point, prior to the arrival of police, although he considered breaking down the door, he had decided not to because he was unable to track down Noorchasm to accompany him. 71a, 73a.

Officers Scherff and Woods voluntarily responded to the call, but they were not privy to communications between Greeley and the 911 operator. 173a. Rather, they learned of the incident via a Priority 1 Police Radio dispatch of "a report of a female screaming" at "251 South 23rd." 432a-33a; 147a; 173a.

Upon arriving at the apartment building, the Officers approached the door abutting 23rd Street and interviewed a woman. 148a; 174a. She denied hearing any noises and directed the officers to the Manning Street entrance of the complex. Id. Reed and Greeley met the Officers there. 71a; 148a; 174a.

While still outside the apartment complex, Greeley informed the officers that he had called 911 and led them to Shannon Schieber's apartment. 71a, 75a. Reed remained on the staircase. 134a. Greeley told the Officers that he heard his neighbor scream for help. 75a. With Officer Scherff backing him up a few feet away with his hand on his gun, Officer Woods banged loudly and repeatedly on Ms. Schieber's apartment door, announcing that police were present and asking Schieber to open the door, but there was no noise or response of any kind from her apartment. 76a; 134a-135a. At this point, Greeley expressed uncertainty regarding the location of the noise he heard prior to calling 911:

> **Q.** Now, after there was no response to the knocking by the police with the baton, what happened next?
> **A**. That's when I said I'll be embarrassed if you break down the door and nothing's happened.
> **Q.** Tell me why you said that.
> **A.** Because I thought they were going to break down the door, and I hadn't heard any sounds in so long that I was sort of just at this point he's probably woken up a bunch of people and I was just—let me phrase this properly. It was my ego on the line. I thought he was going to break down my neighbor's door on my call, so it would be embarrassing if you break down your neighbor's door and there's nothing happening, don't you think?

76a-77a; see also 135a.

The Officers asked Greeley whether he was sure that the noise came from inside Ms. Schieber's apartment or whether it might have come from

outside, and Greeley responded that "maybe it came from the outside." 74a, 77a. Although Greeley admitted that he expressed such uncertainty about whether the noise came from inside or outside, Reed did not hear any uncertainty in Greeley's answers and she recalls that he answered "No, I don't think so," when asked whether the noise might have been people talking outside. 77a; 135a. Christian Ritter, a third-floor tenant who came over while the Officers were banging on Schieber's door, observed that Greeley's response to the Officers' questions concerning the location of the noise "was uncertain." 209a, 219a. At this point, the Officers were "still looking for anything that might indicate the necessity of continuing." 219a.

Officers Scherff and Woods also inspected the outside balcony area of Ms. Schieber's second-floor apartment. It is undisputed that, during this inspection, the Officers shined their flashlights onto the balcony area and no one observed any signs of forced entry or unusual activity. 134a; 209a; 153a-154a; 178a, 186a.

The Officers decided not to enter Ms. Schieber's apartment because they determined that they could not justify a warrantless entry under the Fourth Amendment. 152a; 189a. They correctly understood that they were required to articulate a "reasonable belief" that someone inside was in imminent danger. 55a-57a, 159a; 186a-187a, 192a. On other occasions, Officer Woods applied this exception and entered buildings without a warrant in order to protect life, but he did not believe that such conduct was warranted here. 187a-88a.

Officers Scherff and Woods left the scene and instructed the residents to "call 911 if you hear anything more." 77a; see also 154a; 179a. No one testified that they understood this instruction to prohibit them from taking action on their own if they heard more noise.

Likewise, there is no evidence in the record that anyone asked the Officers to reconsider their decision or protested when they left. 77a (Greeley said nothing to Officers as they left); 114a (Basickes made no attempt to tell Officers they should not leave); 217a (Greeley made no comments about further action when Officers said there was nothing more they could do).

The record is also devoid of evidence that Greeley or any other neighbor expressed to the Officers a desire to break down Schieber's door. See 72a-73a (Greeley did not tell Officers he wanted to take door himself). Further, there is absolutely no evidence that the Officers instructed Mr. Greeley or the other neighbors to refrain from breaking down Ms. Schieber's door or to refrain from taking any other measures to assist her.

Nor is there any evidence that neighbors discussed taking the door themselves after the Officers left. See 221a, 222a (neighbors "did not seem agitated" and "did not express in any way a desire to do more"). Everyone dispersed to their own apartments, and Greeley heard no additional noises and felt no desire to approach Schieber's apartment or call police. 114a-115a; 78a-79a. Greeley testified that he did not consider breaking down the door again after police left because he considered it to be "in [the Officers'] hands to break down the door" and because he did not hear any more noises,

but he also stated that if he had heard more noise, he "probably" would have taken affirmative action. 86a.

The following afternoon, Schieber's brother came to Greeley's door and reported that Shannon had not met him for a scheduled lunch date. 79a. When Greeley told Schieber's brother about the noises he had heard, they forced Ms. Schieber's door open and discovered her body. 79a-80a.[54]

VII. MISCONCEPTION NO. 6: A LONG BRIEF IS BETTER THAN A SHORT ONE. THROW IN EVERY ARGUMENT YOU'VE DREAMED UP. USE LOTS OF COMPLICATED WORDS, LONG SENTENCES, AND LEGALESE TO IMPRESS THE JUDGE.

Busy judges do not want to drag home in their briefcases the legal brief version of *War and Peace* to read at night. "From the judges' perspective, conciseness is not aspirational, it is essential."[55] In a recent survey of members of the legal profession, including judges, "all ranked clarity and concision as the two most essential elements of good writing."[56] Supreme Court Justice Ruth Bader Ginsburg explained that busy judges "work under the pressure of a relentless clock,"[57] and therefore "[a] kitchen-sink presentation may confound and annoy the reader more than it enlightens her."[58]

A concise brief focuses the judge's attention on a few good arguments. The brief writer achieves that focus by editing out both weak arguments and extraneous words. "If your brief is unnecessarily long and complicated, it may not get read completely, or, worst of all, it may not be understood."[59] Weak arguments undermine the litigant's credibility. Failing to edit out weak arguments undercuts a brief's stronger arguments by suggesting the writer cannot

54. Brief of Appellants at 4-9, *Schieber*, 320 F.3d 409 (No. 01-2312). On appeal of the district court's denial of qualified immunity to the two police officers, the Court of Appeals for the Third Circuit reversed, holding that since the police officers had acted no more than negligently, there was no constitutional violation and, therefore, no need to reach immunity. *Schieber*, 320 F.3d at 423.

55. Robbins, *supra* note 3, at 279 (reporting that 90% of federal judges surveyed said that "conciseness is 'essential' or 'very important'").

56. Kosse & ButleRitchie, *supra* note 1, at 85.

57. Garner, *supra* note 10, at 10.

58. *Id*. *See, e.g.*, Duncan, *supra* note 13, at 1098-104 (detailing the time pressures of her heavy workload as a Texas appellate judge and the implications for writing briefs that are helpful to the court); Lebovits, *supra* note 17, at 64 ("[Among the t]echniques that fail with judges are … throwing in the kitchen sink instead of picking winning arguments and developing them … [and] offering up a historical treatise instead of arguing an issue.").

59. Howard J. Bashman, *A Concise Guide to Writing Better Appellate Briefs*, LEGAL INTELLIGENCER, Feb. 11, 2002, at 7 ("My advice is not to avoid complexity; instead, make complicated concepts understandable to someone who may be confronting the matter for the first time."). The Hon. Judith S. Kaye, Chief Judge of the State of New York, cautioned that a "crammed-to-the-rim brief tells me that the writer doesn't have any cohesive, well-supported arguments, or can't rebut the opposition's points, or hasn't thought through the case." Garner, *supra* note 10, at 12.

discern the difference and may not be a trustworthy guide to the relevant law and facts.[60]

Further, focus the court's attention on strong arguments by editing out words that do not advance your client's argument. "Wherever you can, you should cut fluff, Latin, old-fashioned words, and useless jargon."[61] In *Plain English for Lawyers*, Richard Wydick recommends an average sentence length below twenty-five words.[62] Aim to reduce the length of your sentences, your paragraphs, and your brief when you revise and edit. These editing steps will improve your brief.[63]

VIII. MISCONCEPTION NO. 7: DON'T WASTE TIME SPELL CHECKING OR PROOFREADING. LAWYERS HAVE MORE IMPORTANT THINGS TO DO.

This is about your credibility with the court. If you want the court to trust you on the important steps in the analysis—like what the governing law is and how your client's facts are analogous to some cases and distinguished from others—you need to sweat the details. As one judge cautioned, "[W]e judges tend to become suspect of any argument advanced by an advocate who produced shoddy work …. I have little trust in an advocate who files a document that contains misspellings [or] poor grammar."[64] One federal judge recently reduced a fee

60. The Hon. W. Eugene Davis of the U.S. Court of Appeals for the Fifth Circuit put it this way: "When some of counsel's multiple points of error are obviously weak or insubstantial, counsel loses credibility." Garner, *supra* note 10, at 7. *See also id*. at 14 (quoting the advice of the Hon. Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals, that "[i]rrelevant matters ought to be left out because they clutter up the logical path the writer wants the judge to follow …. [A] litigant can lose credibility when the lawyer advances weak arguments."); *id*. at 26 (quoting the Hon. William C. Whitbeck, Michigan Court of Appeals, as cautioning that "when I see a truly weak or throwaway argument, I tend to read the stronger arguments in the brief with a much more skeptical eye").

61. Schiess, *supra* note 14, at 17. *See also* RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 9-24 (1998) (providing methods to omit surplus words); Eich, *supra* note 13, at 25 (cautioning one not to overuse "double-identification," as in: "To secure the note, Smiths executed a mortgage ('the mortgage') for certain real property ('the real property') ….").

62. WYDICK, *supra* note 61, at 38.

63. Cohen, *supra* note 10, at 46 ("To keep your briefs short, use short sections, short paragraphs, short sentences, and short words. Briefs with long sections often ramble. The reader and the writer may lose track of the point. By trimming and breaking sections down into sub-points with separate headings, you can stay organized and focused."). *See also* Lebovits, *supra* note 17, at 66 ("Writing something short, concise, and pointed is harder than writing something lengthy or rambling …. A lengthy brief suggests that a lawyer didn't do 'enough work on the finished product.'") (citation omitted)).

64. Robbins, *supra* note 3, at 278 ("The care with which an advocate proofreads a brief is usually indicative of the care with which he has made his argument"). *See, e.g.*, Howard Bashman, *How Appealing's Twenty Questions for the Appellate Judge*, http://howappealing.law.com/20q/ (follow "Tenth Circuit Judge Paul J. Kelly, Jr." hyperlink) (last visited June 8, 2007) (quoting the Hon. Paul J. Kelly, Jr. of the U.S. Court of Appeals for the Tenth Circuit: "'We review hundreds and hundreds of briefs every year; you don't want us distracted from the merits by missing verbs, misspelled names, incorrect citations, improper grammar or sentences that run for pages.'"); Lewis, *supra* note 33, at 340 (survey of federal and state appellate judges in New England showed agreement that too many attorneys do not sufficiently proofread briefs); Barger, *supra* note 12, at

award by $150 per hour because the attorney's sloppy written work demonstrated disrespect for the court: "Throughout the litigation, [the attorney] identified the court as 'THE UNITED STATES DISTRICT COURT FOR THE EASTER [sic] DISTRICT OF PENNSYLVANIA.' Considering the religious persuasion of the presiding officer, the 'Passover' District would have been more appropriate."[65]

If you do not take time to make edits that could have been done in thirty seconds, you suggest to the court that your brief is so unimportant, it was not even worth thirty seconds of your time to fix glaring errors. To illustrate, we provide three sentences below in quotations followed by an explanation of what a thirty-second edit could reveal.

Sentence One:	"The plaintiff in *Smith* arrived at the injured person's side after medical treatment had begun, which the court held was too late for them to state a claim for negligent infliction of emotional distress."
Thirty-Second Edit:	Here, there is a subject—pronoun disagreement between "the plaintiff" and "them."
Sentence Two:	"The defendant is a corporation, it wants to file a motion to dismiss the claim."
Thirty-Second Edit:	This is a run-on sentence.
Sentence Three:	"In the instant case, the factual record suggests that in this particular circumstance, Ms. Kaite's complaint is likely to be able to state a claim."
Thirty-Second Edit:	This sentence is wordy. A better version would read: "Ms. Kaite's complaint is likely to state a claim."

IX. MISCONCEPTION NO. 8: IF YOUR LAW OFFICE HAS A FORM BRIEF OR THERE'S A SIMILAR BRIEF IN THE WESTLAW BRIEF BANK, JUST COPY AND FILE IT. WHY WASTE YOUR VALUABLE TIME MAKING SURE IT FITS YOUR CASE?

Brief banks can be an efficient litigation tool, if used cautiously. However, cite-check and proofread carefully when you borrow a brief from another case. Make sure the legal points made in the brief are up-to-date, accurate, and fit your facts. Citing superseded law or failing to change the litigants' names or the

35 (to write a bad brief, fill it with proofreading errors: "[m]ake enough mistakes, and you increase your chances of distracting the judges from noticing anything meritorious that you might have inadvertently included in the brief"); Duncan, *supra* note 13, at 1135 (explaining that proofreading requires checking for misspellings and typos, fixing punctuation, and ensuring consistency in capitalization, and that "[e]ach is critical to your credibility and your reader's ability to concentrate on the substance of the discussion").

65. Devore v. City of Philadelphia, No. Civ. A. 00-3598, 2004 WL 414085, at *2-3 (E.D. Pa. Feb. 20, 2004).

pronouns are all telltale signs of slipshod use of a canned brief.[66] As Bryan Garner points out, "Besides wasting the court's time, a sloppy motion suggests that the writer is sloppy in other ways as well (in analyzing legal problems, in preserving clients' rights, and so on)."[67]

X. MISCONCEPTION NO. 9: MAKE IT REALLY PERSONAL. GET CAUGHT UP IN AND INFLAMED BY YOUR OPPOSING COUNSEL'S HORRIFIC MISDEEDS.

An effective brief is tailored to the needs of the reader—the court. The court does not have the time or inclination to mediate your interpersonal disputes. It wants to reach the right result, not punish a mean lawyer who has made your life miserable for the last six months.

Attorneys sometimes accuse one another of mischaracterizing or misrepresenting legal or factual information to judges. Inflammatory characterizations and adjectives mean nothing and can very easily backfire by irritating the judge. The judge wants to see for herself whether your opponent has misled the court about something or acted unfairly. Your facts should speak for themselves without inflammatory characterizations, if you present them in a compelling manner.[68]

XI. MISCONCEPTION NO. 10: TRY TO TRICK THE COURT BY IGNORING PESKY BINDING CASE LAW OR RECORD FACTS THAT UNDERCUT YOUR ARGUMENT.

According to one federal judge, most briefs "ignore or gloss over obvious weaknesses in their argument and fail to address the compelling counterpoints of the other side."[69] There are both carrot and stick reasons for tackling the tough law and tough facts. The stick is the Rules of Professional Responsibility, which you certainly do not want to ignore.[70] But even leaving sanctions aside, ignoring binding law or bad facts is a bad litigation strategy.

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66. The authors are grateful to the Hon. Cynthia Covie Leese, a former judge on the New Jersey Superior Court, for these insights. She explained that "[a] classic and pervasive example of the use of outdated authority occurred when the summary judgment standard in New Jersey was reformulated" and, for many years, attorneys continued to cite the superseded standard, likely because they failed to update form briefs. E-mail from Hon. Cynthia Covie Leese to author Sarah E. Ricks (Aug. 24, 2006) (on file with author).

67. GARNER, *supra* note 8, at 392.

68. Robert J. Kapelke, *Some Random Thoughts on Brief Writing*, 32 COLO. LAW. 29, 30 (2003) ("It is not effective advocacy to accuse an opponent of 'fraudulently misrepresenting the law' or of making legal arguments that are 'idiotic' or 'sheer lunacy,' terms that show up in briefs from time to time. If an opponent's argument lacks substance, this should be demonstrated through deadly logic, not vilification."). *See also* STARK, *supra* note 6, at 134-35 ("The more you belittle your opponents or comment on their ethical and moral inadequacies, the more you degrade yourself in the eyes of the court.").

69. Robbins, *supra* note 3, at 269.

70. JOHNS, *supra* note 33, at 209 (cautioning that "[a]ddressing adverse authorities is required both as a matter of professional responsibility and persuasiveness"); Fischer, *supra* note 26, at 5-20 (discussing cases where attorneys were disciplined for misrepresenting facts or law to courts).

Here is the carrot: You want the opportunity to explain bad law or bad facts. If you leave it to your opponent to point them out, you may never have the opportunity to do so and you will communicate to the court that you believe that case or those facts are fatal to your client's position. As Judge Fred Parker of the U.S. Court of Appeals for the Second Circuit cautions, "[B]y failing to mention contrary precedent in the opening brief, the advocate makes that precedent more weighty than it perhaps should be."[71] Similarly, you want to address bad facts, either to lessen or neutralize their impact on the case or, even better, to "turn the facts around [to] make them part of your case."[72]

Keep in mind the long-term benefit of establishing a trustworthy reputation with the court. Chances are that you or your law firm will appear before this judge again. "[V]iew every brief as a chance to build your and your firm's credibility with the court."[73] Use this opportunity to build a reputation with the court for honesty and helpfulness by showing the court how to overcome the hurdles to deciding in your client's favor.[74]

XII. CONCLUSION

It is not easy to imagine yourself in the place of another. Yet writing effective briefs requires the writer to imagine how the reader—a judge or a law clerk—is likely to react to the unfamiliar legal and factual information set out in the brief. Recognizing some of the common misconceptions about brief writing can help

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71. Fred Parker, *Appellate Advocacy and Practice in the Second Circuit*, 64 BROOK. L. REV. 457, 464 (1998). *See, e.g.*, JOHNS, *supra* note 33, at 209 (rather than ignoring an opponent's authorities, Johns recommends that a writer succinctly "[s]how the court that your opponent's cases are factually distinguishable, that your case falls within an exception to the rule in your opponent's cases"); EDWARDS, *supra* note 6, at 167-68; GARNER, *supra* note 8, at 406 (explaining that, while "[l]awyers are required to know the law and are duty-bound to cite adverse controlling authority … [i]n fact, it's good practice to cite that authority *before* your opponent raises it because … confronting those problems head-on lets you lead off that discussion with an argument about why the adverse authority shouldn't apply or control in your client's case"; "[i]f you let your opponent raise the authority first—or, worse, leave it for the court to raise—you'll have to not only defend your position but also explain why you didn't cite it"); *id.* at 407 (confronting weaknesses increases credibility and avoids "starting the discussion on the defensive"); NEUMANN, *supra* note 6, at 304-07.

72. Cohen, *supra* note 10, at 47. *See also supra* notes 40-54 and accompanying text (discussing techniques for and examples of persuasively framing facts).

73. Cohen, *supra* note 10, at 48.

74. Byington, *supra* note 24, at 17.

> An attorney's credibility requires years to establish and a single moment to destroy. Likewise, a brief loses credibility the instant it starts to mislead the reader. A brief can mislead by misrepresenting legal authority, exaggerating the facts, misquoting something, not providing a spot cite or mischaracterizing portions of the record. As a general matter, the reader's perception of the writer's credibility will affect how the brief is read.

Id. For example, Professor Judith Fischer points out that courts have publicly commended the professionalism of lawyers' briefs. *See* Fischer, *supra* note 26, at 4 (referencing, among others, a Seventh Circuit opinion commending counsel for the exceptional quality of their briefs).

the writer to appreciate the reader's position and help the writer tailor the brief to meet the reader's needs. While drafting effective briefs takes creativity and time, avoiding the common mistakes outlined in this article can help even busy lawyers managing a high volume practice to file more effective briefs.