Brief-Writing Workshop

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VII. Alex Kozinski, *The Wrong Stuff,* 1992 B.Y.U. L. REV. 325 (on CD)

Ten Steps to Improve Clarity[1]

1. NAME THE ACTORS IN THE SUBJECTS OF YOUR SENTENCES. WHENEVER POSSIBLE, PUT THE SUBJECT UP FRONT.

Example: To clarify its applicability, Congress amended the statute.
Better: Congress amended the statute to clarify its applicability.

2. ELIMINATE PASSIVE VOICE

Example: A law was passed by Congress.
Better: Congress passed a law.

(Note that I could have achieved this change by following Step 1 or 2.)

What's wrong with passive voice?

Longer:

Example: A duty of care was breached by the defendant when the floor was not mopped adequately.
Better: Defendant breached her duty of care when she did not mop the floor adequately.

Wimp factor:

Example: A meeting was held among the various defendants.
Better: The defendants met. *(assembled; congregated)*

Actor often unnamed:

Perhaps the most serious problem with the passive voice is that it fails to identify important actors. This sometimes reflects the writer's uncertainty and often leaves the reader confused.

Example: The decision was made to forgive Egypt's loans.
Better: __________ decided to forgive Egypt's loans.

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[1] Many of the principles presented in this guide derive from J. M. Williams, *Style: Ten Lesson in Clarity & Grace* (1981) and Richard C. Wydick, *Plain English for Lawyers.*

Obviously, you will occasionally choose to use the passive voice.

Example: A brick was dropped on the plaintiff.
(to underplay accountability)

Example: The right of privacy is guaranteed by our constitution.
(for emphasis)

Example: A bomb was discovered in the courthouse.
(actor unimportant)

3. WATCH OUT FOR NOMINALIZATIONS (when you turn a verb into a noun) IN THE VERBS OF YOUR SENTENCES; DESCRIBE THE ACTOR'S ACTIONS

Example: The decision will cause confusion in the law of preemption.
Better: The decision will confuse the law of preemption.

Example: According to my calculations, taxes will go up three percent.
Better: I calculate that taxes will go up three percent.

A good way to find these cluttering phrases is to look at all words that end in one of the following: -al, -ance, -ant, -ence, -ent, -ion-, -ment, -ity.

takes into consideration	consider
exhibits a tendency	tends
made a statement	stated
made a decision	decided
undertake the representation of	represent

4. SEARCH FOR INTERESTING AND COMPACT VERBS

Better: I calculate that taxes will go up three percent.
Better Yet: I calculate that taxes will rise three percent.

Example: She was truly upset.
Better: She was agitated.
She was enraged.

Example: The attorney did not listen whatsoever to his client's desire to accept the settlement.
Better: The attorney ignored his client's desire to accept the settlement.

5. ELIMINATE EXTRA WORDS

Example: The documents were fully and completely destroyed.
Better: She destroyed the documents. *(Using Rule 2)*

Example: It is important to note that her legal argument is quite unique.
Better: Her legal argument is unique.
Better Yet: She presents a unique legal argument. *(Using Rule 4)*

6. BE SPECIFIC

Even Better: She suggests a new analysis of the Education for Handicapped Act.
Even Better Yet: She proposes a unique definition of "handicapped" under the Education for Handicapped Act.

7. AVOID VAGUE REFERENCES AND UNINTENTIONAL AMBIGUITIES

Scan all uses of "this" and "that" for possible confusion:

Example: The Court applied *Higgins* correctly. This case is distinguishable.
Better: The Court correctly distinguished *Higgins* from the case at bar.

Avoid Unintentional Ambiguities:

Example: My client discussed your proposal to repave the road with his partners.
Example: Extensions are available to defendants only by the trial judge.
Example: All of the experts agreed that the accused has a deviant interest in young girls, as does Judge Freedman.

Avoid Unclear References

Example: One night while eating his dinner in his bedroom, an officer armed with an arrest warrant for Greenberg's brother, demanded entrance to his house and then his bedroom.

8. KEEP SENTENCES SHORT AND SIMPLE

Beware of Parallelism Problems:

Example: She served on the Committee on Professionalism, as a participant in the ABA trial division, and worked for the Ethics Committee.

Better: She served on the Committee on Professionalism, participated in the ABA trial division, and worked for the Ethics Committee.

Avoid Legalese:

Example: She did not fail to analyze the ratio decidendi of the opinion, viz, the best interests of the child were not underestimated by the legislature in not opening adoption records.
Better: She analyzed Court's reasoning that the legislature had considered the best interests of the child in closing adoption records.

9. WHENEVER POSSIBLE, AVOID SEXIST CONSTRUCTION

Example: The judge handed down his opinion.
Better: The judge handed down the opinion.

Example: If a student fails the bar exam, he may appeal.
Better: Any student who fails the bar exam may appeal.

But not: A lawyer must file their appeal within the jurisdictional time.

10. CHECK YOUR WORK

1) Circle verbs. Try to eliminate as many “TO BE,” “TO HAVE” and “TO MAKE” verbs as you can and substitute more active and descriptive verbs.

2) Screen for spelling errors (especially those that your computer will not spot (such as that/ than).

3) Check tense. Discuss cases in past; law in the present.

4) Check subject-verb agreement.

“Not only…but also”

A. Mr. Homer sued in the district court in a proposed class action to recover not only unlawful fees, but also fees that were unearned, unfair and deceptive when First Jefferson imposed and collected them.

B. The District Court correctly dismissed Appellant’s claims in that Appellant not only failed to respond to Appellees’ First Motion to Dismiss, but also the Second Motion to Dismiss.

Serial Comma

C. I dedicate this essay to my parents, Ayn Rand and God.

D. Corpsico agreed to deliver propellers, and parts of hulls and fuselages.

E. The Comma That Costs 1 Million Dollars (Canadian)

By IAN AUSTEN Published: October 25, 2006

***

Rogers argues that pole contracts run for five years and automatically renew for another five years, unless a telephone company cancels the agreement before the start of the final 12 months.

The dispute is over this sentence: “This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.”

The regulator concluded that the second comma meant that the part of the sentence describing the one-year notice for cancellation applied to both the five-year term as well as its renewal. Therefore, the regulator found, the phone company could escape the contract after as little as one year.

A CHECKLIST FOR REWRITING YOUR BRIEF

Professor Aviva Orenstein
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I. ORIENTING THE READER

A. *Table of Contents*. Does it outline a cogent argument? Does it orient the reader as to issues, procedural posture, and key law in the case?

B. *Questions Presented.* Do they mention key facts, encapsulate the arguments, and provide reasons? Are they nonetheless readable?

II. ORGANIZATION

A. *Headings and Subheadings.* Do they lay out a coherent argument? Are they full sentences? Are they sufficiently detailed, providing facts and reasons? Do they accurately summarize the text below?

B. *Topic Sentences.* Identify the topic sentence in each paragraph (ideally the first one). Make sure it summarizes the thrust of the paragraph.

C. *Reverse Outlining*. Create a "reverse outline" using these topic sentences. Reexamine the order and flow of your paragraphs. Factors determining the organization include: strength of argument, precedent, logic, and legal tradition (such as statutory arguments before constitutional ones).

D. *Paragraphs.* Reread paragraphs for internal structure. Have you deleted any logic steps in your argument? Do you use transitions?

III. USE OF AUTHORITY

A. *Case law.* Do you discuss cases fully, providing facts and analysis? Do you explain the analogy to your case? Avoid string cites except to illustrate a general claim about trends in the Courts.

B. *Precedential Value.* Do you distinguish between persuasive versus mandatory authority? Do you fairly discuss and distinguish important contrary authority?

C. *Standard of Review.* Does your argument incorporate the standard of review?

D. *Block Quotes.* Wherever possible, eliminate block quotes when discussing case law.

IV. FACTS SECTION

A. *Tone.* Do the facts appear neutral or are they unnecessarily argumentative? Eliminate legal arguments. Let the story speak for itself without characterization or commentary. Eliminate unnecessary adjectives.

B. *Content.* Are your facts complete? Have you included negative facts? Have you added emotionally persuasive facts, organized your argument, and chosen words to make the facts sympathetic to your client?

C. *Organization.* Generally, it is wise to organize facts chronologically. Use headings and subheadings if they will assist your reader.

V. TONE

A. *Eliminate bombast.* It convinces nobody and is irritating to read. Your brief should exude reasonableness. Ideally, it should serve as the template for the Court's published opinion.

B. *Civility.* Never attack the motives or integrity of the court below or your adversary. Where it is important, point out misstatements of fact or mischaracterizations of law.

C. *Avoid tentativeness.* If you don=t seem to believe your own argument, no one else will.

D. *Avoid the ALaw Review Syndrome."* Beware of long, neutral discourses on the law that read like law review articles.

E. *Do not recapitulate your opponent=s arguments*. Although you must address your opponent's arguments, don=t summarize them at length and then refute them later. If someone reading a page of your brief out of context would not know which side wrote the brief, you need to work on the persuasiveness of the brief.

VI. STYLE

A. *Follow Ten Steps to clarify writing.* Look for Typos. Do not rely exclusively on computer spell-checks. Read the memo aloud to catch subtle errors and missing words.

B. *Solicit an editor.* Establish a relationship with someone whose judgment you trust to exchange drafts. If you have a non-lawyer you trust, have that person read your draft for clarity.

VII. PERSONALIZE THIS CHECKLIST

A. *Know your own writing style.* What are your general strengths and weaknesses? What criticisms have you received about your writing?

B. *Be your own best editor.* Tailor this self-editing system to your specific needs.

TONE

A. Without question, Defendant's admission that he was **<u>in no way prejudiced</u>** is entirely fatal to his opposition to the motion by plaintiff for amendment of the pleadings.

B. The district court erred in its judgment. Could Congress, passing the Cigarette Labeling and Advertising Act have really intended to insulate tobacco manufacturer who intentionally concealed the lethal risk of smoking cigarettes?

C. The Prosecution accuses defense counsel of "mischaracterizing" the Record. (Brief of Defendant at 34, 37). Since the record speaks for itself, the prosecution's accusations require no rebuttal. To take up this Court's valuable time in a "point by point" rebuttal would be a waste of judicial resources.

D. Finally, in his second, yet apparently alternative, assignment of error, Bingham futilely submits that, "even if [he] failed to allege the necessary facts showing causation," it was incumbent upon the district court to "specif[y] any pleading deficiencies" and to order "him to amend" his complaint in order to attempt to cure same. This argument fails for an array of reasons which appellee need not belabor as they are all quite apparent and straight-forward. Nonetheless, as discussed in more detail below, in his argument on this purported error, Bingham again misrepresents the district court proceedings, misunderstands a district court's role in litigation, and misappreciates the purpose of judicial case management and goals of judicial economy to achieve the fair and speedy administration of justice.

E. **ARGUMENT**

I. Clinton's attempts to confuse the jury were properly rejected.

O'Sullivan's case was straightforward. The jury understood it. The judge understood it. Clinton claimed that it was confused. Admittedly, Clinton's witnesses seemed to know very little. Clinton president Bilbo Strain testified that he was not sure what debris hauling companies operated in Colorado Springs (R. 3015-16, transcript p. 453:24-454:1); he was unsure as to when he began dealing with O'Sullivan (R. 3026, transcript p. 464:3-5); he could not say whether any Clinton equipment or employees were ever used to haul debris from Colorado Springs (R. 3043, transcript p. 481); he did not know whether Grow had ever done any work in Colorado Springs (R. 3045, transcript p. 483-84); and he didn't know how much he paid to O'Sullivan (R. 3048, transcript p. 486:8-9). His long-time employee Donna Cooper, reportedly the most knowledgeable person at Clinton regarding the Colorado Springs job, testified that she was uncertain as to how the cubic yardage Clinton was actually paid for was determined since the monitors "recalculated everything." (R. 3146, transcript p. 547). Both Strain and Cooper however had to acknowledge that Clinton received more than $800,000 for cleanup efforts and that the only service provided by Clinton in connection with that service was invoicing. Cooper's testimony was confusing and contradictory. She admitted that Clinton only paid O'Sullivan $33,780.24 (R. 2688, transcript p. 159:19-23) and yet she claimed that O'Sullivan somehow owed Clinton more than $154,000 in reimbursement for which Clinton voluntarily made to O'Sullivan's subcontractors. (R. 2694, 165:17-22). Obviously, while it may have been lost on Ms. Cooper, the jury understood that O'Sullivan could not pay his crew until he got paid and Cooper's assertion that O'Sullivan owed Clinton reimbursement for amounts it had never paid to him was truly ludicrous. The jury properly rejected Clinton's feigned confusion.

ROAD MAPS

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2 **Sample # 1**
3

4 A. Table of Contents

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18 reasonable?...19

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B. Headings

Sample #2

IV. THE FIFTH CIRCUIT'S BROAD HOLDING THAT THE CREDIT AGREEMENT STATUTE DOES NOT APPLY TO AFFIRMATIVE DEFENSES TO WRITTEN CREDIT AGREEMENTS IMPROPERLY RESOLVED A MATTER OF FIRST IMPRESSION UNDER LOUISIANA LAW.

Sample #3:

ARGUMENT

WHETHER THE LOWER COURT ERRED AS A MATTER OF LAW IN FINDING THE OMISSION OF THE WORD, "LINE," FROM THE DEED OF TRUST, NOTICE OF SALE, AND TRUSTEE'S DEED HAS NO EFFECT ON THE VALIDITY OF THE LEGAL DESCRIPTION AND THE ENSUING FORECLOSURE IN LIGHT OF THIS COURT'S REQUIREMENT FOR A CORRECT LEGAL DESCRIPTION.

I. Whether an incorrect legal description is harmless is not based on expert knowledge, but on layman knowledge.

Sample #4:

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE AFORESAID *EXCEPTION OF NO CAUSE OF ACTION IN RESPONSE TO RECONVENTIONAL DEMAND*

Applicants have explicated three Assignments of Errors upon which they base their *Application for Supervisory Writs* before this Honorable Court. Each will be addressed in turn.

A. Applicants submit that the trial court erred in granting the *Exception* by finding that Applicants "had no cause of action to contest an executory proceeding, demand appropriate notice or conduct discovery associated with the alleged indebtedness that brought about executory proceedings..."

1. Discovery

Before beginning a discussion on the substance of the *Exception of No Cause of Action in Response to Reconventional Demand*, Respondent would like to inform this Court that the issue of discovery has never been raised before the trial court, and thus, is not ripe for review before this Court. . . .

C. Issues Presented

Sample #5

Whether the district court erred in denying Ivan Garcia-Lopez's motion to suppress the evidence of crime seized from his home because the search unconstitutionally exceeded both the scope of the arrest warrant and consent and did not qualify as a either a protective sweep or search incident to arrest.

Sample #6

ISSUES ON APPEAL

I. The Jury Selection and Service Act has strict requirements for challenging noncompliance, and failure to meet these requirements forecloses challenges. A procedurally-correct challenge can succeed only if defendants establish a substantial failure to comply with the Act's provisions, that is, a jury that is not randomly selected or is not chosen based upon objective criteria. Because defendants did not timely comply with the procedural requirements of the Act, is their objection waived? If not, can defendants prevail when they do not allege, must less demonstrate, jury selection was based upon anything other than randomness and the application of objective criteria?

D. Summary of Argument

SAMPLE #7:

Appellant argues violation of due process, errors related to late filed business records affidavit and motion in limine, abuse of discretion in failure to hear evidence of juror misconduct related to the Motion for New Trial, lack of legal and factual sufficiency as to Appellants, abuse of discretion due to failure of trial court to allow publication, in full, of videotapes, jury misconduct, errors related to the pleading amendment, improper voir dire disqualification of jurors, improperly granted trial amendment, errors related to the charge, and error in allowing the guardian ad litem to testify and make recommendations.

SAMPLE #8:

SUMMARY OF ARGUMENT

Insureco promptly paid Mrs. Jones the full $40,000 accidental-death benefit properly due her for an "Other Accident" as the policy provides, and the district court has erred in awarding her $110,000 in additional death benefits for a "Common-Carrier Accident," instead of dismissing her claim. The Insureco policy clearly and explicitly defines "Common-Carrier Accidents" and distinguishes them from "Other Accidents." The policy expressly limits "common-carrier vehicles" to five specific types: "airplanes, trains, buses, trolleys, and boats." Indisputably, helicopters are not "airplanes" and thus are not "common-carrier vehicles" as the Insureco policy defines the term.

In addition to not being on the limited list of "common-carrier vehicles" so defined, the helicopter carrying Mr. Jones as a passenger cannot meet the second prong of the policy definition of "Common-Carrier Accidents." It did not "operate on a regularly scheduled basis between predetermined points or cities" as the Insureco policy further requires. At the time of the crash, the helicopter was on a federally regulated "non-scheduled" chartered flight as an "air taxi" operating "on demand" without a flight plan.

The district court has found ambiguity in the Insureco policy's definition of "Common-Carrier Accidents" where none exists. In stating that "[a] taxi is not a common-carrier vehicle," the policy merely amplifies or reinforces its requirement that the five listed "common-carrier vehicles" must "operate on a regularly scheduled basis between predetermined point or cities." An "air taxi" operating on demand on a non-scheduled basis to carry passengers between varying points of embarkation and destination as the charterer requests certainly does not meet this requirement.

Moreover, by expressly excluding a "taxi," Insureco did not thereby transform the limited list of five specific "common-carrier vehicles" into an illustrative or non-exclusive list that includes helicopters. Even in its sense of being a motor vehicle for hire, a "taxi" is a prime, commonsense example of a vehicle that cannot meet the Insureco policy's two-pronged test for a "common-carrier vehicle," because (1) it is not one of the five vehicles specified in the list and (2) it operates on demand and not on "a regularly scheduled basis between predetermined points or cities." Louisiana law does not require Insureco to define every term in the policy or to itemize and exclude every other alternative vehicle and means of transportation that likewise do not fit the definition. A superfluous exclusion does not control or change the policy definition, but merely makes it "doubly sure."

Contrary to the district court's reading of the policy, Insureco has not "excluded" Mr. Jones's accident from coverage. Rather, Insureco has afforded coverage and benefits to Mrs. Jones as the

policy provides. No exclusion or ambiguity exists for the court to strictly construe against Insureco and in favor of the insured. Insureco has clearly defined the terms of its policy, and the court must apply the policy definition as written.

When read as a whole, the Insureco policy clearly distinguishes between "Common-Carrier Accidents" and "Other Accidents" and provides different lumpsum accidental-death benefits for each defined category. The various sections of the Insureco policy setting forth its limitations, benefits, and definitions work together in tandem to provide tiered levels of benefits for covered aviation accidents. The policy affords coverage for all fatal aviation accidents to covered persons who are fare-paying passengers aboard licensed "aircraft," but limits the $150,000 accidental-death benefit to defined "Common-Carrier Accidents" when covered passengers die of injuries aboard "airplanes" operating on a "regularly scheduled basis" on flights "between predetermined points or cities." The $40,000 accidental-death benefit for "Other Accidents" as defined in the policy applies to covered passengers who are fatally injured aboard other aircraft or on chartered, on-demand, or non-scheduled flights. Insureco has the right to structure its policy in this way to provide different levels of accidental-death benefits to its insureds, depending on the circumstances of the particular fatal aviation accident.

In attempting to clarify a non-existent ambiguity, the district court has frustrated these various provisions of the Insureco policy and has put them at odds with each other, instead of allowing them to work in harmony as the entire policy intends. The court below has erroneously applied a threshold criterion for entry-level coverage under the "Limitations and Exclusions" section of the policy (the insured's status as a fare-paying passenger during a flight in a licensed "aircraft") to wrongly expand the meaning of "Common-Carrier Accidents." Even though the policy definition clearly limits aviation "Common-Carrier Accidents" and the $150,000 accidental-death benefit to covered passengers who are fatally injured aboard "airplanes" operating on "a regularly scheduled basis between predetermined points or cities," the district court nevertheless includes within its scope any form of "aircraft" such as helicopters flying "on demand" as an "air taxi" on a "nonscheduled" operation. This effectively entitles any covered passenger in any type of aircraft to the $150,000 accidental-death benefit for a common-carrier accident, regardless of the circumstances of the crash. That result is flatly contrary to the policy as a whole. The district court has obliterated the Insureco policy's distinctions and definitions, instead of giving each provision its intended meaning.

In sum, the district court erred in awarding Mrs. Jones an additional benefit to which she is not entitled under the policy provisions. This Court should reverse the summary judgment in plaintiff's favor, grant Insureco's motion for summary judgment, and dismiss this suit at plaintiff's cost.

Sample #9:

STATEMENT OF THE CASE

This case concerns fairness and basic constitutional rights. The District court excused Mr. Aziz from the first day of his properly demanded jury trial, but later used his excused absence against him. On the day of trial, the District Court—enraged by a sudden withdrawal of Defense Counsel and Mr. Aziz's scheduled absence—allowed Plaintiffs to steamroll Defendants by entering a default judgment against Smith and conducting an uncontested bench trial against Mr. Aziz. Defendants—left without recourse—appeal to the Court to remedy this civil rights debacle by vacating the judgment and remanding the case for proper trial on the merits.

Sample #10

SUMMARY OF THE ARGUMENTS

The District Court's sua sponte default judgment entered on the day of a scheduled and demanded jury trial is void for violating Smith's due process rights. Specifically, the Court denied Smith's due process rights based on the "combined circumstances" surrounding the default judgment because:

- Smith filed a sufficient answer before default entry, making any default invalid.
- The District Court entered the default judgment sua sponte and without the prior notice required by Fed. R. Civ. P. 55.
- The District Court violated Smith's right to a jury trial because Smith never waived his jury trial demand. The default judgment was ordered based exclusively on the absence of Smith's Counsel.

Sample #11: <u>PRELIMINARY STATEMENT</u>

This Memorandum of Law is submitted on behalf of ABC Rubber Corporation (hereinafter referred to as "ABC"), by and through counsel. Smith & Jones in opposition to the Motion for Summary Judgment filed on behalf of Becker Metal (hereinafter referred to as "Becker") in the above-captioned matter. Becker seeks relief which is not available at common law nor is such relief contemplated pursuant to the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 9 U.S.C. Section 201, <u>et seq</u>.

ABC filed a complaint seeking confirmation of a Final Award of the Appeal Committee of The London Rubber Exchange ("the Final Award") pursuant to the Convention. Pursuant to the Final Award, Becker has been ordered to pay ABC $308,253 plus simple interest from May 13, 1983 through the date of the Final Award at the rate of U.S. Prime plus one percent.

Sample #12:

PRELIMINARY STATEMENT

In this motion for summary judgment, Becker Metal ("Becker") asks the Court to apply the well-settled doctrine of setoff to correct an obvious inequity. Separate arbitration proceedings occurred between Becker and Smith, Inc., with Becker being owed a net amount of approximately $300,000. Nevertheless, Becker is faced with the prospect of having to pay hundreds of thousands of dollars because the award rendered against Smith, a bankrupt, is largely uncollectible and because the other arbitration award directs that Becker make payment to ABC Rubber Corporation ("ABC"), Smith's assignee. Unless the two awards are set off against each other, the party that is entitled to a net recovery (Becker) will be required to make a net payment.

Setoff is a remedy favored in the law, and this is especially so when one of the parties is, like Smith, bankrupt. Moreover, setoff is permitted even when there is a technical lack of mutuality among the parties. Thus, the award in Becker's favor against Smith can be set off against the award made payable to Smith's assignee – which has no greater rights than Smith and which is subject to all defenses assertable against Smith, including setoff.

Sample # 13:

A. THE FIFTH CIRCUIT'S COMBINED CIRCUMSTANCES TEST DICTATES THAT THE DEFAULT JUDGMENT ENTERED AGAINST SMITH IS VOID AS A MATTER OF LAW

In the seminal Fifth Circuit case regarding default judgment voidability, Bass v. Hoagland, the plaintiff sued to enforce a judgment entered in Kansas Federal Court. In the Kansas Federal Court, the defendant answered and requested a jury trial. *Id.* at 207. Defense Counsel subsequently withdrew from the proceeding. *Id*. The Kansas Federal Court called the case for trial and Bass nor his Counsel appeared, resulting in the Kansas Federal Court entering a default judgment in the exact amounts asked for in Plaintiff's petition. Id. at 209.

On appeal to the Fifth Circuit, Defendant argued that the default judgment was void because he received no notice prior to its entry and the trial court had deprived him of his properly demanded jury trial in violation of the Seventh Amendment. *Id.* at 208-209. The Fifth Circuit agreed, explaining that while no jury trial right exists when a default occurs, Bass had not defaulted because no default can occur—even for failure of a defendant and its counsel to appear at trial—if the defendant fulfills its obligation to file a sufficient answer. The court also held that—even if the court entered a proper default judgment—the judgment would be void for on due process grounds for failing to provide default judgment notice required under Fed. R. Civ. P. 55. Id. at 208.

SAMPLE #14

ISSUE NO. 1. Hawley has sued the City asserting numerous state law claims and an excessive force claim under §1983 for alleged violations of Hawley's Eighth and Fourteenth Amendment Rights.

Under Issue No. 1, Hawley sets out his various claims against the City and the basis for such claims. In essence, Hawley brings state law tort claims and a 42 U.S.C. §1983 excessive force claim against the City (hereinafter simply referred to as "1983 claim").

The district judge declined to exercise supplemental jurisdiction over Hawley's state law tort claims and, pursuant to *Heck v. Humphrey*, dismissed Hawley's 1983 claim. Because the district judge did not exercise jurisdiction over Hawley's state law tort claims, upon remand, same will be remanded to the state district court for further proceedings.

As noted, the district judge dismissed Hawley's claims under *Heck*. It is not clear to the City why Hawley is discussing each claim and making arguments relative to same. He simply needed to note the basis for his claims and briefly discuss the facts, if at all. Hawley spends seven (7) pages of his brief making arguments, which, by and large, appear to be that the officers in question were, at worse, negligent in their attempt to apprehend Hawley on the night of the events in question. The City would dispute virtually every fact asserted by Hawley under Issue No. 1, but same is only necessary if this case is not dismissed under *Heck*. However, the case would be remanded to the district court for further proceedings. Likewise, the City might dispute many of the legal arguments asserted by Hawley under Issue No. 1. Again, same are not issues unless this Court holds that Hawley's claims should not be dismissed under *Heck*.

1 **Sample 15:**

2 How probable cause limits the scope of the object of a search was illustrated by the Supreme
3 Court in *United States v. Ross*: "Just as probable cause to believe that a stolen lawnmower may be
4 found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe
5 that undocumented aliens are being transported in a van will not justify a warrantless search of a
6 suitcase." 456 U.S. 798, 824 (1982). The Court made this illustration despite the fact that people
7 sometimes keep lawnmowers in their bedrooms and people sneaking into this country may be found
8 hidden in suitcases.[2]

9

[2] *See, e.g.*, *Mo. Home Damaged by Lawnmower Fire in Bedroom*, ST. LOUIS POST-DISPATCH, Dec. 6, 2010, http://www.stltoday.com/news/local/metro/mo-home-damaged-by-lawnmower-fire-in-bedroom/article_c5788764-0198-11e0-9b45-0017a4a78c22.html (blaming a fire that destroyed a home on a man smoking a cigarette while working on a lawnmower in his bedroom); *Border Agents Find Woman Hiding in Suitcase*, ATLANTA J. CONST., Jan. 8, 2014, http://www.ajc.com/news/news/border-agents-find-woman-hiding-suitcase/ncghm/#__federated=1 (illegal alien found hidden in suitcase while being transported in SUV crossing the border into the United States from Mexico).

Sample 16:

Appellee cites only one case in support of its position, *Carrillo v. Vera,* 2000 WL 35729499 (Tex. App.-Corpus Christi 2000) (not designated for publication). Appellee fails to note that this is non-published opinion and, therefore, of no precedential value. Rule 47.7(b), Texas Rules of Appellate Procedure. Nevertheless, the case is distinguishable because the County Clerk in that case gave full notice to the appellant of the effects of untimely payment of the filing fee. As discussed above, in the instant case the County Clerk gave no such notice, either directly or indirectly.

To the extent that the opinion in *Carrillo v. Vera* is indistinguishable, its reasoning is faulty and it should not be followed. The case does not discuss whether Rule 506.1 (g) applies to Rule 510 because it did not involve an eviction appeal.

In fact, to the best of Appellant's knowledge, the issue whether Rule 506.l(g) applies to eviction appeals under Rule 510 is a question of first impression. Appellant after diligent research can locate no case that directly holds either in favor of or against this proposition. This Court should ameliorate the effects of this lurking "trap for the unwary" by holding that it does. Otherwise, Appellant has lost its right to a trial on the merits in County Court due to a Clerk's letter suffering from the defects discussed below.

Sample #17:

STATEMENT OF THE CASE

While the factual circumstances surrounding the underlying claim (which is not before this Court on appeal), are unresolved and somewhat convoluted, the facts surrounding those issues which are part of this appeal are rather sparse and implausible.

Sample # 18:

I. THE UNION DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION THROUGH ANY PERFUNCTORY OR NEGLIGENT CONDUCT

II. THERE IS NO EVIDENCE OF ANY HOSTILITY OR BAD FAITH TOWARD PLAINTIFF BY THE UNION

A. THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT IN THIS CASE

COUNTER-STATEMENT OF FACTS

Plaintiff Carol Smith was employed by Liberty Linen in New Orleans, Louisiana as a general laborer from May 7, 1979 to July 25, 1999 (J.A. 134a). Liberty Linen is a textile processing company that launders industrial garments and linen for hospitals, hotels, barber shops, restaurants, and industry. The linens are either owned or leased by Liberty Linen (J.A. 209a). Liberty Linen and Local 10 are parties to a collective bargaining agreement that covered plaintiff and approximately 144 other employees (J.A. 209-210a).

Over the course of her twenty years of employment, Plaintiff worked on various jobs and at various locations (J.A. 141a-146a, 169a-170a). She concedes that she was unable to perform at the level of her fellow employees (J.A. 151a, 203a), and performed approximately 60 to 65 percent of

1 the productivity level while others were at 90 percent. No other employee was as consistently low as
2 60 to 65 percent (J.A. 152a-153a).
3 Plaintiff suffered from epilepsy during the entire course of her employment (J.A. 136a).[3] She
4 acknowledges that the medication she took to control the epilepsy caused her drowsiness, impaired
5 her ability to remember and concentrate (J.A. 99a, 155a-156a), slowed her motor functions and
6 interrupted her coordination (J.A. 158a).[4]
7 In 1992, Company vice-president Roger Covera learned from plant manager Matthew Shuster
8 that plaintiff was well under the new production standards that had been established as a result of
9 changes in the industry (J.A. 219a-220a). Covera sought to find a job where plaintiff could be
10 productive (J.A. 221a).
11 Plaintiff was moved to hanging garments which was simpler than her previous assignment.
12 She was in that position for 4-6 months, during which she performed at under 50% of the production
13 quota (J.A. 221a-226a). Management then gave her the job of sorting hangers. She only remained in
14 that position for two weeks because she could not place the hangers on the correct racks. This caused
15 a disruption on the production line, because the hangers must be placed on a conveyor properly or
16 they will not drop to the next conveyor smoothly. Fellow employees complained, because plaintiff
17 slowed production and therefore directly affected their piece-rate bonuses (J.A. 225a, 227a, 239a-
18 243a). Next, plaintiff was put on "dry fold," where she was required to fold miscellaneous laundered
19 items. She stayed in that position for five months and ran at 50% of the production quota (J.A. 228a).
20 The Employer then decided to create a position for the plaintiff who was then given the task
21 of counting the clean linen in stacks of 25 for route delivery. Plaintiff could not produce accurate
22 counts, and customers complained. In addition, there were complaints about the fact that some of the

[3]Plaintiff claims in her statement of facts that she was handicapped "apparently from birth" (brief, at 4). However, the record shows plaintiff stating the epilepsy was caused by a bout with encephalitis at age 7 months (J.A. 108a, 130a).

[4]In her statement of facts, plaintiff states, "Plaintiff had some difficulties with co-employees who insisted on ridiculing Plaintiff because of her handicap. (Appendix page no. 86A)" (brief, at 4). However, page 86a of the appendix says nothing of the kind. On page 89a , plaintiff acknowledges that other employees were complaining about her slowness, but says nothing about ridicule based on a handicap.

linens included in the stacks had large holes in them, making them unacceptable. Plaintiff was in this position for four or five months and had a productivity rate of 40 to 45 percent. (J.A. 229a-231a).

Next, plaintiff was put on the "small piece ironer," which involved feeding small cloth items into a flat work iron piece of equipment. She could not reach production and stayed at approximately 55 percent of the quota (J.A. 231a-234a). When the Company reached the end of its alternatives, she was terminated (between J.A. 243a and 244a).

During the five months prior to her discharge, Liberty Linen's management and Plaintiff's shop steward Ethel Hess talked with plaintiff about her problems with low productivity (J.A. 204a). Plaintiff admitted that she could not make the production quotas (J. A. 205a; see also J.A. 327a-328a). Hess told Plaintiff that if her production did not increase, she would have to let her go (J.A. 159a, 173a, 198a). She was also told by plant manager Matthew Shuster that "if you don't speed up, we are going to have to do something" (J.A. 153a, 170a-171a). Plaintiff was unable to reach the production quotas (J/A. 154a). Plaintiff did not speak to any union representatives about these warnings concerning her productivity problems (J.A. 173a).

On July 25, 1986, plaintiff was discharged by Shuster. Plaintiff contacted the Union, Local 10. [Rest of Facts omitted]

<u>ARGUMENT</u>

I. THE UNION DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION THROUGH ANY PERFUNCTORY OR NEGLIGENT CONDUCT

Plaintiff's claims against the Union are broadly alleged as follows:

(1) Local 10 did not, despite her request, submit her case to arbitration after the July 31, 1986 meeting. It was only after plaintiff filed her complaint with the New York Human Relations Commission that the Union submitted the grievance to the Grievance Committee.

(2) Union vice-president Smith was hostile toward plaintiff and made derisive remarks.

(3) The Union's representation before the Grievance Committee was inadequate and perfunctory because: (a) it failed to locate and present any witnesses on plaintiff's behalf; (b) it failed to argue that plaintiff's shift from job to job adversely affected performance; (d) it failed to argue the medical evidence supported plaintiff's position.

Although plaintiff's brief alleges a number of ways in which the Union supposedly breached it's duty to her, there is no comprehensible argument that could possibly explain why the decision of the District Court's summary judgment grant should be reversed.

Given its most generous construction, plaintiff's argument appears to be that the record discloses a genuine dispute of material facts, and/or that the facts presented which were presented were sufficient for a jury to find a breach of the duty. However, plaintiff has completely failed to support that argument.

It is a fundamental axiom of federal labor law that because a union is authorized to act as the exclusive bargaining agent for the employees, it has a duty to insure the provision of fair representation in the negotiation, administration and enforcement of the collective bargaining agreement. Findley v. Jones Motor Freight, 639 F.2d 953, 957 (1981). To establish a breach of the duty, an employee must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 385 U.S. 171, 190 (1967); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 47 (1979); Riley v. Letter Carriers Local No. 380, 668 F.2d 224, 228 (3d Cir. 1981).

The key principle ignored by the plaintiff, is articulated in Bazarte v. United Transportation Union, 429 F.2d 868 (5th Cir. 1970). In that case, an employee sued the union for failing to process his grievance properly. In holding for the union, the Court stated as follows:

> It is therefore essential to plaintiff's claim that there should have been proof of "arbitrary or bad faith conduct on the part of the union in processing his grievance." It follows from this that proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation. 429 F.2d at 872 (citations omitted).

It is beyond question that tactical decisions or mistakes in the presentation of an arbitration case cannot be the basis for a claim against a union. In Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975), the Court of Appeals reversed a lower court's finding that the union had breached its duty of fair representation because it had failed to raise a crucial defense in a joint committee hearing to the charges against the plaintiff. The Court of Appeals found that, "At most, the failure to raise the defense was an act of neglect or the product of a mistake in judgment." 524 F.2d at 294.

1 **Sample #19:**

2 POINT I

3 ConAgra's MOTION SHOULD BE DENIED

4

5 Local Rule 12(I) of the U.S. District Court Rules for New Jersey provides in pertinent

6 part:

> 7 A motion for reargument shall be served and filed within fourteen (14) days after
> 8 the filing of the court's order of judgment on the original monition. There shall be
> 9 served with the notice a memorandum, setting forth concisely the matters or
> 10 controlling decisions which counsel believes the Court has overlooked. No oral
> 11 argument shall be heard unless the Court grants the motion and specifically directs
> 12 that the matter shall be reargued orally.

13

14 This language was recently interpreted by the Third Circuit in Merrell-National

15 Laboratories, Inc. v. Zenith Laboratories, Inc., 579 F. 2d 186 (3rd. Cir. 1978). First, Merrell

16 stressed the importance of providing an accompanying memorandum setting forth the matters

17 allegedly overlooked by the court. It is important to note that, ConAgra did not even satisfy this

18 preliminary requirement; it failed to provide this court with a memorandum accompanying its

19 motion.

20 Second, Merrell also stands for the proposition that the party making the motion must

21 demonstrate new facts. In Merrell, the district court granted reargument based on the movant's

22 submission of factual affidavits. At the time of the motion, movants appeared to be raising "two

23 major factual issue not raised in the prior proceeding." Id. at 189. The trial court granted

24 reargument "reluctantly," id. at 790, and, as it turned out, improvidently. The Court of Appeals

25 for the Third Circuit reversed, holding:

1 The defendants' motion to redetermine the injunction is denied. Indeed the papers
2 in support of defendant's motion point to no new legal matters and the "new" facts
3 in opposition presented by defendant at this time are facts which should have been
4 available to them at the time of the prior hearing and which they should have
5 outlined therein. No reason was given in their brief or at oral arguments as to why
6 why these facts are now presented to the court for the first time. Furthermore,
7 plaintiffs have successfully disputed the accuracy and completeness of t the
8 defendants' "new" facts.

9 Id.

10 Merrell is dispositive in this case. In flagrant contravention of Rule 12(I), no new facts
11 have been proffered in the case at bar. Plaintiff cannot under the guise of "new" facts reassert old
12 arguments. Indeed, the court has been the beneficiary of no more than mere reiteration of prior
13 factual arguments by the Plaintiff. (Compare Plaintiff's complaint II.A, record at 5, and Plaintiff's
14 motion for rehearing, record at 137). Additionally, no reason has been provided why the Plaintiff
15 waited until this late juncture to provide these facts.

16 In sum, Plaintiff was not in compliance with Rule 12(I) or the holding in Merrell.
17 Plaintiff's motion for reargument must therefore be denied.
18

1 Writing Exercise

2 **VI. RIGHT OF PUBLICITY**

3

4 Dana Carvey plays the Church Lady, a character on television who has a particular demeanor, 5 appearance, and attitude. The character is most famous for the phrase, "Isn't that special," which is 6 delivered in a withering tone.

7 Carvey invested significant time, talent and energy in developing this persona and identifiable 8 phrase. Therefore, there is a strong argument that Nabisco violated the Carvey's right of publicity by 9 adapting the "Isn't that special!" campaign for Ritz crackers. Carvey should have been compensated 10 for the use of his personally developed phrase. As a result of the non-compensation, Carvey suffered 11 harm. As the court held in *Carson v. Here's Johnny Portable Toilets Inc.*, 698 F. 2nd 831, 835 (6th 12 Cir. 1983),

13 14 15 16
> [a] celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used.

17

18 The *Carson* court delineated various ways in which Carson's right of publicity had been 19 appropriated. The court explained that:

20 21 22 23 24 25 26 27 28 29 30 31
> "A celebrity's identity may be appropriated in various ways. It is our view that under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes....It is not fatal to the appellant's claim that he did not use his name....Certainly appellant Carson's achievement has made him a celebrity which means that his his identity has a pecuniary value which the right of publicity should vindicate. Vindication of the right will tend to encourage achievement in Carson's field. Vindication of the right will also tend to prevent unjust enrichment by persons such as appellee who seek commercially to exploit the identity of celebrities without their consent."

32

33 *Id.* at 837.

34

35 The similarities between the Carson case and the case at bar are obvious. Both involve 36 famous individuals with signature phrases. Under *Carson,* the Carvey's phrase, "Isn't that special," 37 clearly falls under the tort of publicity.

Symposium on Humor and the Law

THE WRONG STUFF

Alex Kozinski[5]

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A member of the BYU Law Review called a few months back and invited me to address you today. "Sure," I said, "I'll do it, but what can I possibly talk about that would be of interest to the students and faculty of BYU Law School?" "Why don't you juggle some porcupines or pull a piano out of a hat?" the law review member replied. "The truth is, we don't really care what you say; what we really want is the cover boy from California Lawyer."

Well, I have my pride. I don't want to be lumped in with the Tom Cruises and Kevin Costners of the world. I want to be loved for my intellect, not just my face. So I decided this is my opportunity to shed that go-go image by giving a speech on the dullest topic possible. The Mating Habits of the Human Tapeworm and The Use and Abuse of "Thou" in the King James Version of the Bible were among the possibilities I considered. The problem is that I don't know anything about those subjects. Instead, I decided to talk on a totally irrelevant topic that I know a little something about: How to Lose an Appeal.

Now, you might agree that I hit upon the ideal irrelevant topic, for how many lawyers would actually want to lose a case, particularly on appeal? But my law clerks pointed out that there might actually be such cases; history provides at least one well-documented example.

It happened right after Lyndon B. Johnson's Senate primary campaign in 1948. Now we're talking about the heyday of good ole boy politics: when a Texan so cherished his right to vote he exercised it as many times as possible, often in the same election. Anyway, some of LBJ's boys got caught with their fingers in the ballot box and a federal judge issued an injunction keeping Johnson off the ballot in the general election. Naturally, LBJ was agin it, so he ordered his boys to figure out a way to get rid of that little ol' injunction before the election. The problem was that the Fifth Circuit was likely to sit on the case for a while, so even if they eventually held for LBJ it would turn out to be too late.

One of LBJ's boys, a guy named Abe Fortas, came up with a creative solution: throw the appeal. Why take chances on what some crotchety Fifth Circuit judge might do when you could be pretty

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[5]. Judge Kozinski sits on the United States Court of Appeals for the Ninth Circuit. He presented this article as a lecture at Brigham Young University, J. Reuben Clark School of Law on January 21, 1992.

sure of getting Justice Black to issue a stay? So old Abe wrote a stinker of a brief and presented it to a circuit judge Abe knew was predisposed to deny the stay. Sure enough, the plan worked and Johnson eventually became president--and appointed Abe Fortas to the Supreme Court.

Now, I know that every one of you out there has Supreme Court ambitions—don't deny it—so when that once-in-a-lifetime career opportunity knocks and you are required to lose an appeal, will you have what it takes to do the pooch? Not to worry; I'm here to tell you that you too can lose an appeal, no matter how good your case. But don't try to improvise; what I'm about to give you is the tried and true stuff, honed over years of bitter experience.

First, you want to tell the judges right up front that you have a rotten case. The best way to do this is to write a fat brief. So if the rules give you 50 pages, ask for 75, 90, 125—the more the better. Even if you don't get the extra pages, you will let the judges know you don't have an argument capable of being presented in a simple, direct, persuasive fashion. Keep in mind that simple arguments are winning arguments; convoluted arguments are sleeping pills on paper.

But don't just rely on the length of your brief to telegraph that you haven't got much of a case. No. Try to come up with something that will annoy the judges, make it difficult for them to read what you have written and make them mistrust whatever they can read. The possibilities are endless, but here are a few suggestions: Bind your brief so that it falls apart when the judge gets about half way through it. Or you could try a little trick recently used by a major law firm: Assemble your brief so that every other page reads up-side down. This is likely to induce motion sickness and it's always a fine idea to have the judge associate your argument with nausea. Also--this is a biggie—make sure your photocopier is low on toner or scratch the glass so it will put annoying lines on every page. The judge won't even be able to decipher what you wrote, much less what you meant.

Best of all, cheat on the page limit. The Federal Rules of Appellate Procedure not only limit the length of the briefs, but also indicate the type size to be used. This was pretty easy to police when there were two type sizes—pica and elite. But these days it is possible to create almost infinite gradations in size of type, the spacing between letters, the spacing between lines and the size of the margins.

Now if you don't read briefs for a living, one page of type looks pretty much like another, but you'd be surprised how sensitive you become to small variations in spacing or type size when you read 3,500 pages of briefs a month. Chiseling on the type size and such has two wonderful advantages: First, it lets you cram in more words, and when judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief. But there is also a second advantage: It tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.

So, if you do things just right, you will submit an enormous brief with narrow margins and tiny type, copied with a defective photocopier onto dingy pages, half of which are bound upside down with a fastener that gives way when the judge is trying to read the brief at 35,000 feet. You can lose your appeal before the judge even reads the first word.

But what if you think the judges might nevertheless read your brief and find a winning argument? You go to step two. Having followed step one, you already have a long brief, so you can conveniently bury your winning argument among nine or ten losers. I saw a wonderful example of this recently. It was the duel of the Paul Bunyons; who could fell more trees in pursuit of their cause? There were several appeals, motions and petitions for extraordinary writs—the whole shebang. What there was not was a winning argument, until a diligent law clerk searched through the rubble and found an issue that stood a good chance of winning.

Now, eager beaver law clerks like that don't come along in every case, but still there's a risk: What if a clerk—maybe even the judge—should happen to stumble onto your winning argument? To guard against this, winning arguments should not only be buried, they should also be written so as to be totally unintelligible. Use convoluted sentences; leave out the verb, the subject, or both. Avoid periods like the plague. Be generous with legal jargon and use plenty of Latin. And don't forget the acronyms in bureaucratese. In a recent brief I ran across this little gem:

LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP.

Even if there was a winning argument buried in the midst of that gobbledygoop, it was DOA.

But let's face it, a good argument is hard to hold down. So what you want to do is salt your brief with plenty of distractions that will divert attention from the main issue.

One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients. No, that's there just to satisfy the case and controversy requirement. What is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent.

The reality, you see, is that most legal disputes are dreary dull, but everyone loves a good fight, particularly when the gloves come off. I often find myself chortling with delight when I read a passage such as this from a recent appellee's brief:

With all due respect for my colleague, I have to tell this court that it's been told an incredible fairy tale, packed with lies and misrepresentations.

Of course, the other lawyer responded in kind. Pretty soon I found myself cheering for the lawyers and forgot all about the legal issues.

But let's say your opposing counsel is too smart to get into a hosing contest with you. No matter. You can always create a diversion by attacking the district judge. You might start out by suggesting that he must be on the take because he ruled against you.

Or that he is senile or drunk with power, or just plain drunk. Chances are I'll be seeing that district

judge soon at one of those secret conferences where judges go off together to gossip about the lawyers. I find that you can always get a real chuckle out of the district judge by copying the page where he is described as "a disgrace to the robe he wears" or as "mean-spirited, vindictive, biased and lacking in judicial temperament" and sticking it under his nose right as he is sipping his hot soup. District judges love to laugh at themselves, and you can be sure that the next time you appear in his courtroom, the judge will find some way of thanking you for the moment of mirth you provided him.

But let's say you have such an excellent case that despite all of this, you are still likely to win, if only the judges read the relevant statutory language. Well that's easy: Don't quote the language; don't append it to your brief. In fact, don't even cite it. What you want to do is start out by discussing policy. Judges love policy; it gives us a sense of power. So instead of talking about what Congress did, talk about what it should have done. Then cite a bunch of floor statements, particularly from those Senators or Representatives who opposed the legislation. Finally, include large block quotes from the testimony of witnesses before a committee considering similar legislation but in a different Congress.

Block quotes, by the way, are a must; they take up a lot of space but nobody reads them. Whenever I see a block quote I figure the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer. Let's face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.

Now, assuming you have taken my advice to heart and done everything just right—or rather just wrong—pretty soon you'll get confirmation of the fruit of your efforts. Sometime after the briefing is completed, you'll receive an order notifying you that your case has been submitted on the briefs. Once you get this notice, you can kick off your shoes, relax, and start working on your cert petition; an unpublished disposition flushing your case is practically in the mail.

But let's say the unthinkable happens and you get notice the case is scheduled for argument. Well, then you have to start sweating. In our court, cases get taken off the argument calendar only if all three judges agree. So getting an oral argument notice indicates that, despite your worst efforts, at least one of the judges thinks there might be a spark of life in your appeal. This means you'll have to move to phase three, and this time you can't take any chances.

Now most lawyers will say, "Look, you don't have to tell us how to make a bad argument: you just get up and stutter, or insult the judges, or ignore their questions." Well, those might be good ways of getting you chewed out, but it won't necessarily kill your case. No, bad oral advocacy takes preparation and practice; like doggerel poetry, it also requires some imagination.

The first thing you must do at this stage is know the record like the back of your hand. There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different.

The law doesn't matter a bit, except as it applies to a particular set of facts. So you will find that judges at oral argument often have a lot of questions about the record. Which makes sense. After all,

we can read the cases just as well as you can. Often, one or another of the judges has written the key case, so what can the lawyer really contribute to the panel's understanding of it?

But each case is different insofar as the facts are concerned; where the lawyer can really help the judges—and his client—is by knowing the record and explaining how it dovetails with the various precedents. Familiarity with the record is probably the most important aspect of appellate advocacy.

Now this is all good and well, you will say, if you're trying to win on appeal, but why bother knowing the record if you're trying to lose? Well, it's simple: you have to know where the gold nuggets are hidden so that you can skillfully divert the judges' attention away from them. By the same token, if the judges start delving into an irrelevant portion of the record, you want to keep them talking about that.

Now a principle very few lawyers seem to grasp is that there are no perfect cases, or very few indeed. By the time a case gets up on appeal, there is usually some validity to each side's position, and there are some holes or flaws in even the best case. Nevertheless, this isn't soccer or hockey; there are no tie scores. In a competition between two imperfect cases, the winner winds up being the case that is second-worst.

A good way to improve your chances of losing is to overclaim the strength of your case. When it's your turn to speak, start off by explaining how miffed you are that this farce—this travesty of justice—has gone this far when it should have been clear to any dolt that your client's case is ironclad. Now the reason this is a good tactic is that it challenges the judges to get you to admit that there is just some little teensy-weensy weakness in your case. So if you overstate your case enough, pretty soon one of the judges will take the bait and ask you a question about the very weakest part of your case. And, of course, that's precisely what you want the judges to be focusing on-- the flaws in your case.

Now, having directed the judge's attention exactly where you want it, you have to press your advantage—or rather your disadvantage—by seeing if you can turn the judge into an advocate for the other side. After all, you know darn well that after oral argument the judges go off to a little room and decide your case. What better way to assure a loss than to get one of the judges to become an advocate for your opponent?

So how do you turn that flickering spark of interest into a firestorm that will reduce your argument to ashes? What I have found works really well under such circumstances is this: once the judge starts to ask a question, raise your hand in a peremptory fashion and say, "Excuse me, your honor, but I have just a few more sentences to complete my summation and I'll be happy to answer your questions." This will give the judge a chance to dwell on the question, roll it around in his mind and brood about it. If you're clever you never will get back to the judge's question. Let the judge stew while you keep droning on about how airtight your case is and how silly it is to even be arguing about it.

After a while the judges will catch on that you plan to use up your time by yakking rather than answering questions and they will start getting more insistent. When you feel you've got them good and lathered, move into the next phase: stonewalling. What you want to avoid at all costs is giving a

short, direct answer to the question. Instead, tease the judge, equivocate, make him rephrase the question. The point is to get the judge really committed to the question so that the lack of a good answer will take on monstrous significance. A good way to start is by ridiculing the question: "I was afraid the court would get sidetracked down a blind alley by this red herring." Mixing metaphors, by the way, is always a good idea; it makes it look like you're spinning your wheels after you've missed the boat because you went off on a wild goose chase.

An alternative to stonewalling—and one of my personal favorites—is cutting off a judge's question. Doing this gives you several important advantages. First, it's rude, and if you're out to lose your case, there is really no substitute for offending the guy who's about to decide your case. Beyond that, cutting off the judge mid-question sends an important message: Look here your honor, you think you're so clever, but I know exactly what is going on inside that pointed little head of yours. Then again, cutting the judge off gives you an opportunity to answer the wrong question. When I pointed this out to a lawyer one time, he told me, "Well, if that's not the question you were asking, it should be." And finally, cutting in with an answer while the judge is still phrasing the question gives you an opportunity to answer without thinking--always a good idea if you want to come up with something really stupid.

The next oral argument ploy involves the record. As I said before, it's important for you to know the record just so you can tell when the judge is getting anywhere near that winning argument. But there is a big difference between knowing the record and sharing your knowledge with the judge. It helps to keep your understanding of the record a big secret; this will give the judge and his clerks a chance to go chasing through the fourteen boxes of documents looking for that needle in the haystack. Here is a good example of how best to handle inquiries about the record if the judge gets too insistent:

JUDGE (exasperated): Look counsel, you claim there is no disputed issue of fact on this point, but isn't it true that the affidavit of Joe Jones, submitted by opposing counsel, directly contradicts your client's affidavit?

LAWYER: Well, your honor, I'm not really sure.

JUDGE: Let's not guess. The affidavit appears at page 635 of the Excerpts of Record. Why don't we read it together and you can explain to me what it says.

LAWYER: Your honor, I don't have the Excerpts.

JUDGE: That's OK, counsel, you can go over to your briefcase and bring it to the lectern. I'll wait.

LAWYER: Well, what I mean, your honor, is I didn't bring the Excerpts with me to court.

JUDGE: I see; well, what did you think we were going to do here today, have coffee and donuts and talk about the weather?

LAWYER: To be truthful, I thought we were going to talk about the law. I wasn't counsel in the district court so I'm not really all that familiar with the record, but if you say the affidavit is in there, how can I deny it?

JUDGE: Well, let's talk about the law then. Isn't it the law that you can't get summary judgment if there is a disputed issue of fact? And the affidavit seems to establish a disputed issue of fact.

LAWYER: But that's true only if you believe the affidavit. I can tell you for a fact it's a lie. In any event it's hearsay since it describes out of court conduct, and it's not the best evidence.

By this time you can probably see steam coming out of the judge's ears, which is a good time to

move onto your next tactic: start making a jury argument. The truth is that oral argument can be tiring and the judges need a little comic relief once in a while. Few things are quite as funny as hearing an appeal to passion during an appellate argument. But if you try it, remember that a jury argument is no good at all unless you have the client (and his wife) sitting in the front row nodding. Of course, a lot of clients are not very sympathetic looking, which is all right because appellate judges have no way of knowing what your client really looks like. So you could just pay some sympathetic looking homeless person twenty bucks to sit in the front row and nod.

When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand that you have to say all these things to keep your client happy, but we also understand that you know, and we know, and you know we know, that your case doesn't amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition.

* * * *

Well, I could go on and on with this topic, but it seems to me that if you win your case after all the pointers I've given you, you ought to give up practicing law and start playing the lottery. But for most of you it will work. So when the call comes and you get ready to follow in the footsteps of Abe Fortas, you too can prove you have The Wrong Stuff.

2 **[new heading]III. NABISCO VIOLATED CARVEY'S RIGHT OF PUBLICITY BY**
3 **APPROPRIATING HIS UNIQUE COMIC PHRASE WITHOUT COMPENSATION**
4

5 **[topic sentence]** Courts have recognized that a unique phrase identified in the public mind with a
6 famous persona can serve as the basis for a right of publicity. **[organization: presenting law first;**
7 **giving reader complete facts of Carson case]** In *Carson v. Here's Johnny Portable Toilet, Inc.,* 698
8 F.2d 831 (6th Cir. 1983), the court ruled that the defendant, a manufacturer of portable toilets
9 violated the famous comedian's right to publicity by naming it's product "Here's Johnny" and
10 advertising it as the "world's foremost commodian." *Id.* at 833. **[Eliminating block quote]** The
11 Court held that the adoption of the comic's identifiable phrase violated Carson's right of publicity. It
12 specifically rejected the argument that the tort of publicity is restricted to appropriation of voice or
13 likeness. Instead, the Ninth Circuit reasoned that an identifiable phrase, like an identifiable voice or
14 appearance, created and nurtured by a public persona, deserves protection. *Id.* at 835.

15 **[topic sentence]** In this case, Nabisco violated Dana Carvey=s right of publicity by using his
16 phrase "Isn't that special" without compensating him for it. **[presenting facts of this case]** Plaintiff
17 developed the phrase and made it famous. The phrase is identified in the public mind with his
18 character, the Church Lady, particularly when the method of delivery is nasal and condescending.

19 **[applying law to facts in this case]** As with the phrase, "Here's Johnny!," Carvey has
20 invested time and talent in publicizing his phrase and identifying it with a unique comic persona. The
21 cases are strikingly similar. Both involve appropriation of comedians'= signature phrases. The
22 careful reasoning of the Carson case should apply to the case at bar. As in Carson, the plaintiff=s
23 Aidentity has a pecuniary value which the right of publicity should vindicate.@ *Id.* at 837. Nabisco
24 should not be allowed to capitalize on Carvey's hard-earned famous phrase without compensation.