Writing a Persuasive Appellate Brief: The Judicial and Advocate Perspectives

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WRITING A PERSUASIVE BRIEF: THE JUDICIAL AND ADVOCATE PERSPECTIVES

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Keeping Clerks Happy:  
Examples of effective (and less effective) techniques in appellate briefs

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Hon. Richard C. Wesley, Second Circuit Court of Appeals  
David Carpman, Law Clerk to Judge Wesley, 2012-13
Preliminary Statement/Introduction

1. Including an introduction or preliminary statement before the brief begins can be an effective way to frame what’s going on. This introduction frames the issue completely in the first paragraph and tells the story of the facts, the argument, and the district court’s decision in the following three paragraphs.

Preliminary Statement

Plaintiffs-Appellants are sophisticated investors who committed to invest in private commercial real estate partnerships on November 30, 2007, just as the global economy was entering a major economic crisis. After the recession affected the value of their limited partnership interests, Plaintiffs sought to use the federal securities laws to hold Defendants responsible for their unforeseen loss. The core of Plaintiffs’ allegations is that Defendants knowingly omitted from various documents provided to prospective investors the purported fact that certain properties intended for transfer to the partnerships had declined in value, and that upon the properties’ transfer, the partnerships would sustain an immediate loss.

As the District Court correctly held in dismissing the complaint, a critical flaw in Plaintiffs’ theory (among others) is that they are unable to allege, with the particularity required under Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (“PSLRA”), that the subject properties had in fact lost value by the time they invested in the partnerships, let alone that Defendants knowingly concealed that information. On appeal, Plaintiffs rest their case on a Lehman Brothers Form 8-K, dated June 9, 2008, which purportedly shows that Defendants had begun marking down the value of the subject investments by November 1, 2007, before Plaintiffs invested in the partnerships.

But the Form 8-K shows no such thing. The Form 8-K does attach a press release which shows a net markdown in Lehman Brothers’ aggregate “real estate held for sale,” but this is a broad financial reporting category encompassing holdings across the entire company. Significantly, this line item anticipates financial results for Lehman Brothers’ real estate holdings on a net basis: while some properties may have increased in value, others may have decreased, resulting in an expected overall loss. There is no basis to infer from the 8-K, as Plaintiffs promote, that each and every parcel of Lehman Brothers real estate, including the subject properties, lost value “across the board.” Rather, it could just as easily be inferred (indeed it is established by contemporaneous internal documents) that the partnership properties were among those that had gained value during this time period. Plaintiffs’ only support for their preferred inference is their repeated, conclusory allegation that it is so. This style of conclusory allegation is the exact pleading method Rule 9(b) was designed to prevent.

In the end, with the benefit of hindsight, Plaintiffs are seeking to use the securities laws to insulate themselves from the market’s global downturn. The fact of the matter is
that Plaintiffs had all the information necessary about the partnerships to make an informed investment decision before they decided to invest. They cannot now use the securities laws as insurance when their investment decisions were not as successful as they had hoped.

2. Effective framed introductions from two opposing briefs:

John Catsimatidis is the long-time owner of Gristedes Foods, Inc. ("Gristede’s"), a professionally managed company which, through a subsidiary, operates the Gristede’s supermarkets throughout the New York area. Catsimatidis also holds the honorary role of Chairman, President, and CEO. Although Catsimatidis remains somewhat involved in the company’s high-level financial management and strategic planning, he has not been involved in the day-to-day operations of the Gristede’s supermarkets for over a decade. He plays no role in hiring or firing store employees; he does not participate in setting store employees’ work schedules or assignments; he does not decide when store employees get paid or how much.

Despite the overwhelming record evidence that Catsimatidis does not supervise Gristede’s store employees or control the conditions of their employment, the district court concluded that the “undisputed” facts establish that Catsimatidis is their “employer” and thus personally liable for any violations of the Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”) that Gristede’s supermarkets may have committed.

That decision is incorrect. It is settled that individual officers or majority shareholders in a corporation are not automatically liable for all of the acts of the corporation. And while traditional, common-law veil-piercing is not required to establish personal liability for FLSA violations, Congress did not intend for officers or owners to be personally liable for such violations merely by virtue of their high-level control over general corporate affairs. Otherwise, virtually every senior officer or owner would be liable for the company’s FLSA’s violations— even those who bore no personal responsibility for the company’s violations. To prevent that result, the FLSA provides that a corporate officer is personally liable for a company’s FLSA violations only if the plaintiff proves that the officer exercised personal responsibility for the company acts that violated the statute, including by controlling the affected employees’ hiring and firing, the conditions of their employment, and the rate and methods of their pay. And, of course, a plaintiff cannot obtain summary judgment on the officer’s personal liability unless the evidence on the foregoing factors is all so overwhelmingly one-sided that no reasonable factfinder could possibly reject personal liability. Plaintiffs here came nowhere close to satisfying that standard. If anything, the record compels the opposite conclusion: Catsimatidis did not exercise the direct control over these plaintiffs’ conditions of employment that would be required to establish his personal liability for any FLSA violations committed by Gristede’s.

The district court concluded otherwise only because it asked the wrong legal
question. Rather than examine the "economic reality" of the relationship between Catsimatidis and store employees, as required by this Court's precedent, the court below simply looked to whether Catsimatidis had general control over the company. That high-level inquiry is contrary to this Court's well-established precedent, and would lead to personal liability for corporate employers' FLSA violations in many—if not most—cases involving companies with controlling shareholders who oversee the company's general operations, but who do not make day-to-day decisions about employment issues. The FLSA does not contemplate such disdain for the corporate form. Rather, the FLSA permits personal liability only when the corporate officer is personally responsible for the acts that violated the statute. Under the correct standard, it is Catsimatidis who is entitled to summary judgment, not plaintiffs. At a bare minimum, there are genuine disputes of material fact that preclude granting summary judgment in plaintiffs' favor.

The district court also erred in granting plaintiffs' motion for partial summary judgment under the NYLL because, as the New York courts have squarely held, the NYLL does not provide for personal civil liability of individual officers. The court below failed to address that issue at all.

The judgment below should be reversed.

vs.

The Fair Labor Standards Act (FLSA) includes the "broadest definition" of the employment relationship "that has ever been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945). It defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," and "employ" as "to suffer or permit to work." 29 U.S.C. § 203(d), (g). Based on this language, "[t]he overwhelming weight of authority" holds that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983) (emphasis added).

If anyone can be said to have "operational control" over a company, it is the defendant in this case, John Catsimatidis. Catsimatidis is the sole owner, President, CEO, and Chairman of the Board of Gristede's Foods, and with that authority maintains, as the district court put it, "absolute control of Gristede's, and all of its operations." SA-50. He considers himself the "boss" of the company, his employees recognize that he is the "head honcho," and he stated in open court that he is "their employer." Catsimatidis's position gives him authority to manage the company's finances, open and close stores, hire and fire employees, borrow money, buy and sell property, and even declare bankruptcy—all on his own initiative. As the district court concluded, "it is pellucidly clear that [Catsimatidis] is the one person who is in charge of the corporate defendant." SA-53.

Although Catsimatidis disputes some peripheral aspects of his authority, he does not deny that, as Gristede's sole owner, he possesses broad power over the company's operations. To the contrary, he admitted in the district court that he personally controls
the company’s finances and property, and told the district judge that he could shut down the business if he desired. Catsimatidis instead tries to downplay his involvement in the company’s day-to-day operations, arguing that he is less involved than he once was and that he was not “personally responsible” for the FLSA violations committed by his subordinates.

Catsimatidis’s argument misconstrues both the record below and this Court’s decisions interpreting the FLSA. First, Catsimatidis’s characterization of himself as a figurehead divorced from the company’s day-to-day operations flies in the face of the undisputed record evidence. That evidence establishes that Catsimatidis shares an office with the company’s executive vice president and other top management, from which he “generally presides over the day to day operations of the company.” SA-52. And Catsimatidis uses his authority to make decisions at all levels of company policy—from whether to open a new store or hire a high-level executive, to how best to display potato chips or what varieties of fish to sell at a particular store. Based on this record, the district court concluded that “there is no aspect of Gristede’s operations from top to bottom and side to side which is beyond Mr. Catsimatidis’ reach.” SA-53.

Second, Catsimatidis’s argument that he is not liable for the decisions he delegates to others is foreclosed by this Court’s decision in Herman v. RSR Security Services, 172 F.3d 132 (2d Cir. 1999). RSR held that the relevant question under the FLSA is not whether a corporate officer exercised “direct control” over the plaintiff employees, as Catsimatidis contends, but whether the officer “possessed the power to control” them. Id. at 139, 140 (emphasis added). Whether Catsimatidis chose to exercise his power directly or by delegation is beside the point, because the fact that authority is “exercised only occasionally ... do[es] not diminish the significance of its existence.” Id. at 139 (internal quotation marks omitted). Indeed, the FLSA’s coverage was designed to prevent employers from evading responsibility for FLSA violations by delegation to third parties—precisely the evasion that Catsimatidis seeks to achieve here.
3. In a case that may be procedurally complicated, it can also be helpful to include a preliminary statement that simply sets for the procedural posture:

PRELIMINARY STATEMENT

Plaintiff-Appellant Johnathan Johnson, by his pro bono counsel, respectfully submits this brief in support of his three appeals from: (1) an order of the United States District Court for the Northern District of New York (Hon. Thomas J. McAvoy, U.S.D.J.) denying Mr. Johnson’s motion for a preliminary injunction (Second Circuit Docket No. 11-2563 (Lead)); (2) the final judgment of the United States District Court for the Northern District of New York (Hon. William H. Stafford Jr., U.S.D.J., E.D. Fla.), dismissing the complaint sua sponte pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 42 U.S.C. § 1997e(c)(1) (Second Circuit Docket No. 11-3282 (Con.)); and (3) an order of the United States District Court for the Northern District of New York (Hon. William H. Stafford Jr., U.S.D.J., E.D. Fla.), denying Mr. Johnson’s post-judgment request for reconsideration (Second Circuit Docket No. 11-2946 (Con.)).
QUESTIONS PRESENTED/STATEMENT OF ISSUES

1. The first list of questions divides the case into way too many issues – not every alleged error in fact or reasoning needs to be framed as its own question. The responding list is much more comprehensible. (Also, don’t capitalize every word – ever.)

1. Did The District Court Err In Denying Qualified Immunity On Plaintiff’s Substantive Due Process Claim Because The Defendants’ Actions Did Not Violate Clearly Established Law Of Which A Reasonable Person Would Have Known?

2. Did The District Court Err In Relying On A Subjective Intent Standard When Considering Defendants’ Qualified Immunity Defense To Plaintiff’s Substantive Due Process Claim?

3. Did The District Court Err In Creating A Fact Not Supported In The Record And Inconsistent With The Undisputed Facts In The Record, i.e. That Defendants Intended To See Plaintiff’s Medical Records?

4. Did The District Court Then Err In Creating A Disputed Material Issue Of Fact Of Whether Defendants Intended To Harm Plaintiff Based On The Unsubstantiated Finding That Defendants Intended To See Her Medical Records?

5. Did The District Court Err In Recognizing A Substantive Due Process Cause Of Action Against Linda Rinker When She Had Already Been Dismissed From The Case?

6. Did The District Court Err In Denying Qualified Immunity To Defendants In Regard To Plaintiff’s 2007 First Amendment Claim Because The Court Misapplied The Clear Law Under Mt. Healthy, In That Mt. Healthy Applies To Bar Claims Regardless Of Retaliatory Motive?

7. Did The District Court Err In Denying Qualified Immunity To Defendants Where The Facts Establishing The Legitimacy Of Plaintiff’s Progressive Discipline Are Undisputed, Thereby Satisfying The Mt. Healthy Standard?

vs.

1. Did the defendants establish that undisputed facts entitle them to qualified immunity on the plaintiff’s First Amendment retaliation claim?

II. Did the defendants establish that undisputed facts entitle them to qualified immunity on the plaintiff’s substantive due process claim?

III. Does this Court lack appellate jurisdiction over defendant Rinker’s claim that the district court had no jurisdiction of her person as to the substantive due process claim?
2. The first question tries to include way too many facts and way too much argument, rendering it completely ineffective as a way to frame the case. The second example corrects these errors.

Whether plaintiffs, investors in real estate limited partnerships, allege securities fraud with sufficient particularity, and raise sufficiently strong inferences of defendants' scienter, with their collective allegations of: (a) 39 separate offering memorandum (PPM) statements of Defendants' skill and procedures to locate and acquire future real property investments for sale to investors' partnerships, called LBREP III, while omitting to mention that (i) most property investments Lehman intended to sell to LBREP III partnerships had already been acquired in early 2007, prior to the market decline in late 2007, (ii) that Lehman's SEC-filed Form 8-K showed that it began marking down the "Fair Value" of its entire portfolio of "Real estate held for sale" on November 1, 2007, i.e., a month before the first investors committed to buy their interests on November 30th, that (iii) Lehman's Form 8-K showed that the write-downs had continued for six months to May 31, 2008, during all but 3 days of which, when Lehman sold to LBREP III on May 28th, the properties sold to LBREP III were part of the "Real estate held for sale" that Lehman marked down in value, and that (iv) due to the limited partnership agreement (LPA) provision that Lehman would sell to LBREP III at Lehman's original acquisition cost, investors would inherit Lehman's losses (from markdowns) on the properties and sustain a certain loss their investment value;

[just one of three issues framed this way]

vs.

QUESTIONS PRESENTED

1. Whether the District Court correctly held that Plaintiffs failed to plead that Defendants acted with the requisite scienter for securities fraud because they failed to allege any facts demonstrating that Defendants knew or were reckless in not knowing that the LBREP III properties had lost value by the time Plaintiffs committed to the partnerships and in fact the only contemporaneous documents Plaintiffs rely on show that Defendants believed the LBREP III properties had actually increased in value during the relevant timeframe.

2. Alternatively, whether the District Court correctly held that Plaintiffs failed to allege any actionable misstatements or omissions because the allegedly concealed information was disclosed in several documents provided to Plaintiffs before they committed to the partnerships.

3. Whether the District Court correctly dismissed the Section 20(a) claim against the Individual Defendants because, finding no primary violation, there could be no control-person liability.
3. The first example tries to include every relevant fact in the question presented – this is not the place for that!

QUESTION PRESENTED

1. When an out of state party solicits an individual residing in New York State, contacts that individual in New York State, sends a false statement to that individual in New York State upon which the individual relies in New York State, initiates meetings where the individual in New York State engages in the meeting in New York via video and/or audio conferencing with the out-of-state party, where the out of state party sends numerous emails, faxes and telephone calls directed to the individual in New York State, where the out-of-state individual thereby creates a continuous business relationship with the individual in New York State, do some or all of these actions by the out-of-state individual, either individually or viewed as a whole, establish jurisdiction over the out-of-state party under the New York State long-arm statute.

vs.

QUESTION PRESENTED

1. Whether the district court properly granted defendants Banca Caripe S.P.A.’s ("Banca") and Dario Mancini’s ("Mancini") motion to dismiss the action for lack of personal jurisdiction where plaintiff Max Pincione ("Pincione") asserted jurisdiction over these foreign defendants with no ties to New York.
STATEMENT OF THE CASE

1. The statement of the case should briefly tell both the substantive/factual and the procedural story of the case. These two examples do so simply and effectively.

This is not a typical prisoner § 1983 appeal. The District Court dismissed sua sponte Mr. Johnson’s complaint four years after the complaint had been filed, after Defendant-Appellant’s motion for summary judgment had been denied, and less than two weeks prior to the scheduled trial. The dismissal was not based on any intervening change in the law, nor was it based on any new facts or evidence. Rather, the case was reassigned to Senior Judge William H. Stafford, who was determined from the outset to avoid a trial in this prisoner § 1983 case.

Mr. Johnson’s complaint alleges he was transferred to Upstate Correctional Facility from Elmira Correctional Facility in retaliation for his having engaged in First Amendment protected activity. Specifically, Mr. Johnson was transferred after he sent a letter to Defendant-Appellee John Burge, the Superintendent of the Elmira Facility, indicating that he was the victim of an assault, giving notice of a future lawsuit, and requesting that Superintendent Burge preserve all evidence of the assault, including any video tapes. After receipt of the letter, Superintendent Burge confronted Mr. Johnson and told him that he was getting rid of him. Mr. Johnson was then transferred to Upstate Correctional Facility, where certain gang members had repeatedly threatened Mr. Johnson’s safety and well-being. In moving to dismiss Mr. Johnson’s claim, defendants did not dispute that Mr. Johnson’s conduct in sending a letter to Superintendent Burge was constitutionally protected activity. Mr. Johnson’s retaliation claim survived a motion for summary judgment, the case was reassigned to Judge Stafford, and trial was set for August 17, 2011.

Three weeks before the scheduled trial, Judge Stafford required expedited briefing on the issue of whether Mr. Johnson’s threat to file a lawsuit was sufficient to form the basis of a retaliatory transfer claim, because, under Lewis v. Casey, there is no constitutionally protected right to file frivolous lawsuits. (A- 132-33.) The day following expedited briefing on this issue, Judge Stafford dismissed the complaint because Mr. Johnson did not allege that he filed a “grievance” and because he failed to allege “what type of lawsuit he planned to file against whom.” (A-137.) Mr. Johnson filed a motion for reconsideration, which Judge Stafford summarily denied. (A-144.) This appeal followed.
Ms. Kelly commenced this action on October 17, 2011, by filing a Complaint in the United States District Court for the Eastern District of New York alleging harassment, discrimination and retaliation in violation of Title VII and the NYSHRL.

Specifically, the Complaint details multiple instances of a hostile work environment created as a result of widespread sexual favoritism stemming from Defendant-Appellee Lawrence Shapiro’s illicit affair with a subordinate, Kelly Joyce, as well as the detrimental effect that such widespread sexual favoritism had on the terms and conditions of Ms. Kelly’s employment. The Complaint also details Defendants-Appellees’ acts of retaliation – e.g., stripping Ms. Kelly of her titles, duties, responsibilities and authority, berating her in front of other employees, summarily terminating the employment of Ms. Kelly’s husband and son, and permitting Ms. Joyce to physically threaten Ms. Kelly and usurp her authority – in response to Ms. Kelly’s multiple complaints regarding Defendants-Appellees’ discriminatory misconduct and the hostile work environment that they created. Indeed, Defendants-Appellees reduced Ms. Kelly’s duties to a level where they were virtually non-existent after more than 28 years as a senior executive.


By this brief, Ms. Kelly does not appeal that part of the Order that dismissed her claims for discrimination and harassment under Title VII and the NYSHRL. As a result, the only aspects of the lower court’s Order at issue in this appeal are the dismissal of the claims for retaliation under Title VII and the NYSHRL, as well as the claim for aiding and abetting retaliation violations under the NYSHRL.
FACTS SECTION

1. Effective briefs spin the facts to their advantage without blurring the factual and argumentative portions of the brief. In this first example, all of the facts are framed in the writers’ favor, but there is no legal argument, quibbling with the district court or defendants, etc.

Because this appeal arises from an order granting summary judgment to plaintiffs on Catsimatidis’s personal liability, the record must be viewed in the light most favorable to Catsimatidis, drawing all inferences in his favor, resolving all ambiguities against plaintiffs, and disregarding all evidence favorable to plaintiffs that is subject to genuine dispute. See infra at 11-12. That said, the following facts are wholly uncontradicted.

Gristede’s supermarkets in and around the New York City area are operated by Namdar, Inc., which is in turn a subsidiary of Gristede’s Foods, Inc. A-2482 ¶ 2 (Catsimatidis Decl.). Gristede’s Foods, Inc. is a professionally managed company whose stock is indirectly owned by John Catsimatidis, who serves in the honorary role of Chairman, President, and CEO of the company. Id. ¶ 3. Catsimatidis’s involvement in the company is limited to high-level management issues; he focuses on “the big picture of trying to establish what Gristede’s image is and what it means to the consumer.” Id. ¶ 24. The business is operated on a day-to-day basis by Charles Criscuolo, Executive Vice President. Id. ¶ 3. For at least the last ten years, Catsimatidis has not been involved in the day-to-day operations of Gristede’s supermarkets. In fact, even the higher-level management responsibilities he previously assumed have been largely delegated to his Deputy. Id. ¶¶ 3, 6. During this period, Catsimatidis has not been involved in the hiring, firing, or disciplining of a single Gristede’s store employee. Id. ¶ 4. In fact, the only individual Catsimatidis has hired in the last decade is Robert Zorn, the Executive Vice President and Deputy to the Chairman of Red Apple Group, a holding company that owns United Acquisitions, which in turn owns Gristede’s Foods, Inc.

Catsimatidis has also not been involved in assigning duties to store employees or instructing them about how to operate the Gristede’s supermarkets. Id. ¶ 4. Nor has he been involved in supervising or controlling the work schedules or conditions of employment of any Gristede’s store employee. Although Catsimatidis has occasionally visited stores, those visits were focused on merchandising and product placement or served a public relations function. During these visits, Catsimatidis did not discuss payroll, wages, timekeeping, work schedules, or any similar matters with store employees. Id. ¶ 9.

Catsimatidis’s involvement with Gristede’s supermarkets’ affiliated unions has also been quite limited. He signed one collective bargaining agreement, sat on one union pension fund board, and is theoretically accessible to union presidents who know him. See JA-1802-03 (Catsimatidis Dep. 44:18-45:12); JA-2044-2123 (collective bargaining agreements). But to the extent Gristede’s has participated in collective bargaining negotiations, Gristede’s officers other than Catsimatidis have represented Gristede’s in those negotiations. JA-2483-84 ¶ 11 (Catsimatidis Decl.). And Catsimatidis has not been involved in any day-to-day issues regarding Gristede’s union employees, including issues
regarding hours and wages. Again, other Gristede’s officers are responsible for and perform these functions. *Id.* ¶ 12. Likewise, Catsimatidis has not controlled—or even been involved with—payroll and human resources issues. There are specific departments tasked with those responsibilities, and they perform all payroll and human resource related tasks. Catsimatidis does not supervise the individuals in those departments. *Id.* ¶ 15; see also *id.* ¶ 18. For at least the last ten years, Catsimatidis has not made any decision related to, or established any rule regarding, payroll or payment issues relating to store employees. *Id.* ¶ 16. Nor has he been involved in determining the amount, rate, or method of payment of store employees during that time period. *Id.* ¶ 19. Although payroll checks bear his electronic signature, he does not personally sign the checks or review them and has not done so for at least the last ten years. *Id.* ¶ 20.

Finally, Catsimatidis is not involved in maintaining Gristede’s employment records. *Id.* ¶ 22. Although his office is in the same building as the payroll and human resources departments, he rarely interacts with individuals in those departments and plays no role in the maintenance of those employee records. *Id.*
2. Making the facts section read like the discussion section – makes the brief seem messy, disorganized, and angry.

Maida testified that he determined and informed Ben-Levy within weeks of his return that Ben-Levy was going to be removed as Head of Systems. (A: 136-7;525). Maida further testified that he knew of no performance issues that precipitated this move; his only basis for the move was his understanding from HR (or Ben-Levy, which never occurred) that Ben-Levy was physically unable to complete the tasks associated with the Head of Systems role; and before learning of the alleged physical impediment (Maida could not recall with whom he spoke or when the conversation took place, i.e. before or after Ben-Levy completed his cardiac rehabilitation) he had no opinion as to whether Ben-Levy should be removed as Head of Systems. (A: 1 36-7;525;576;580-1 ; 584;675-82). This testimony is not even referenced in the Order below, nor is the fact that Glenn Jacoby, a member of upper-level management with supervisory authority over Ben-Levy, had asked Ben-Levy to stay on as Head of Systems. (A:137;525). There was no legitimate basis to remove Ben-Levy as Head of Systems and the reason testified to by Maida is demonstrably false, abjectly pre-textual and discriminatory per se. (A: 136;428;524-5).

Defendants now assert that the basis for the move was, in addition to concerns regarding his medical condition, a department-wide reorganization. However, that reorganization allegedly took place over the summer of 2007, several months before the demotion. (A:134;138;244;56 1 -2;568-9;573 ;575). Defendants provided no evidence that all managers were moved or demoted; presumably because other managers who were not over 40, had not gone on medical leave and had not complained about disparate treatment were not moved or reorganized. One need only to look at the comparators identified by Gaertner to know that Ben-Levy was treated more poorly than others similarly situated. The District Court simply accepted Defendants' reorganization justification without addressing the several month lag, the testimony of Maida and the successful completion of Ben-Levy's rehabilitation. These facts are not mere speculation and clearly are sufficient to defeat summary dismissal of Ben-Levy's case.
SUMMARY OF ARGUMENT

1. Effective summary of argument – clean, simple, states each point as a sentence.

I. The district court’s summary judgment order was erroneous because Catsimatidis was not the plaintiffs’ FLSA “employer” under the proper legal standard. At minimum, there were genuine disputed issues of material fact that precluded a grant of summary judgment in plaintiffs’ favor.

A. The “economic reality” test this Court has adopted to determine “employer” status under the FLSA requires a focus on the officer’s actual relationship with the particular employees in question. This focus achieves the statute’s objective of expanding liability without eviscerating the corporate form.

B. The district court did not apply the “economic reality” test or focus on Catsimatidis’s relationship with the store employees in question. Instead, it looked at Catsimatidis’s overall corporate control and supervision. That was plainly improper under this Court’s precedent. The district court’s approach would impose personal liability on virtually every senior corporate officer, in contravention of Congress’s intent in enacting the FLSA.

C. Had the district court applied the correct standard, it would have been clear that Catsimatidis was entitled to summary judgment. The undisputed facts demonstrate that he did not hire or fire the employees in question; he did not control their schedules or conditions of employment; he did not control the methods or rates of their pay; and he did not maintain their employment records.

D. At minimum, and regardless of the proper legal standard, there were genuinely disputed issues of material fact that precluded a grant of summary judgment in plaintiffs’ favor. There was considerable evidence in the record that Gristede’s supermarkets are professionally managed, and Catsimatidis’s involvement has been quite limited for over a decade.

II. The summary judgment order was erroneous as to plaintiffs’ NYLL claims for the additional reason that the New York courts have held that there is no personal liability for corporate officers under the NYLL.
2. Effective summary of argument in prose – straightforward, not too long, clearly sets out the questions at issue in the case:

The district court’s October 3, 2011 Opinion and Order should be vacated and/or reversed. As a threshold matter, the district court lacked jurisdiction over NNIC’s motion to disqualify counsel. Requests to disqualify counsel neither satisfy the requirements for a district court’s diversity jurisdiction nor do they raise a federal question. Indeed, such a request does not present a “case” or “controversy” under Article III of the United States Constitution. The district court’s order should therefore be vacated and the case remanded with instructions to dismiss for lack of jurisdiction.

Even assuming the district court had jurisdiction over NNIC’s motion to disqualify, the decision below should still be reversed. A federal district court does not have the power under the FAA to disqualify counsel in a private arbitration. Under the FAA, a federal court’s powers with respect to a private arbitration are limited to (1) compelling arbitration, (2) confirming an arbitration award, (3) appointing an arbitrator, and (4) vacating or modifying an award. A federal court has no other power to interfere in private arbitration, and has no power to sanction or disqualify counsel. The district court erred in doing so here.

The district court also erred because its disqualification order was beyond the scope of the court’s inherent powers. The district court incorrectly believed that it had the inherent power to disqualify counsel in a private arbitration, and also incorrectly concluded that it could apply its Local Rules to alleged conduct in an arbitration. A court’s inherent powers do not extend to sanctioning parties or counsel in proceedings not before the court, and the district’s Local Rules are similarly confined to actions by counsel in proceedings before that court.

The district court also abused its discretion by ordering disqualification of counsel. The court failed to hold NNIC to the high standard of proof required for attorney disqualification, and it mistakenly attributed conduct by Inso’s former arbitrator to Inso and its counsel. As a result, the court incorrectly believed that the e-mails at issue related to “live and contested” matters in the arbitration at the time they were sent to Inso’s counsel, and also incorrectly found that Inso’s counsel violated non-binding private guidelines applicable only to arbitrators. And, despite sanctioning counsel with disqualification for conduct taken solely to protect Inso’s interests, the district court did not find that counsel acted in bad faith, which is required for such a sanction.
STANDARD OF REVIEW:

1. When the standard of review is well understood, as will be the case in the vast majority of appeals (particularly those from grants of dismissal under 12(b)(6) or grants of summary judgment), there is no need to explain it extensively. If you feel the need to be any more detailed than the following examples, it is probably best to do so in the actual discussion section, as it is likely to be an issue in the case:

   The standard of review applicable to a sua sponte dismissal made pursuant to 28 U.S.C. § 1915(e) or 42 U.S.C. § 1997e for failure to state a claim is de novo. See Giano v. Goord, 250 F.3d 146, 150 (2d Cir. 2001). To survive dismissal for failure to state a claim, a complaint must simply "give the defendants fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quotation marks and citation omitted); Fed. R. Civ. P. 8(a)(2). Especially "when the plaintiff proceeds pro se, as in this case, a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations." McEachin v. McGuinnis, 357 F.3d 197, 200 (2d Cir. 2004); see also Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (noting courts are "obligated to construe a pro se complaint liberally"). The court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. See Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994).

2. This Court reviews a district court's decision to grant summary judgment de novo. Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Miller, 321 F.3d at 300.

   On a motion for summary judgment, "all factual inferences must be drawn in favor of the non-moving party." Miller, 321 F.3d at 300. This means the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of [Catsimatidis]." Terry v. Aschroft, 336 F.3d 128, 137 (2d Cir. 2003). It also means the Court must "mak[e] all credibility assessments in his favor," McCarthy v. N.Y. City Technical Coll., 202 F.3d 161, 167 (2d Cir. 2000), and "must disregard all evidence favorable to [plaintiffs] that the jury is not required to believe," Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 151 (2000); see In re Dana Corp., 574 F.3d 129, 152 (2d Cir. 2009).
ARGUMENT:

1. You will not always be able to cite direct authority for every argument you make. Nonetheless, when you only cite a case that cuts against your argument, followed by extensive arguments devoid of citation (particularly when those arguments refer to the Constitution or legal principles), it highlights the novel and unsupported nature of the argument.

When conducted in the United States, wiretaps by federal law enforcement are largely governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C.§§2510-2520], including a provision which requires the Government to provide a defendant with a copy of the court order and accompanying application for the interception. 18 U.S.C.§2518(9). However, this Court has held that those provisions do not automatically apply outside the United States. See Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Maturo, 982 F.2d at 60. It is clear, therefore, that if the Jamaican wiretap orders had been authorized by a United States District Court Judge for execution in this country, then the affidavits would have been turned over to the defense. No different result should obtain where the wiretap orders were authorized by a foreign justice and the intercepted conversations themselves used by the United States Government in its case in chief against the defendant. The fundamental unfairness of a defendant's inability to challenge critical evidence of this nature is outrageous. It is unfathomable that the Government should be able to use evidence of this type without any oversight by a United States judge by hiding behind the fact that the eavesdropping warrant was issued by a foreign court even where a review of the record reveals that it was done at the behest or with the assistance of American law enforcement.

The arguments put forth by the Government and the district court against disclosure of the requested documents are flawed. The issue should not be viewed as the Government being forced to request documents from the Jamaican government solely for the purpose of giving them to a third party – the defense – just because the Government did not intend to use the documents in their direct case. The Government and the district court themselves should have wanted to obtain the documents from the Jamaican government so they could conduct their own review of them. If a trial is truly the truth-seeking function it was created to be, then the Government and the district court should have wanted to have those affidavits and applications to ensure that the interception orders were properly obtained by Jamaican authorities. The Government should not seek to introduce and base a conviction on evidence that was illegally or unethically obtained. And without reviewing those underlying affidavits and applications, there was no way of knowing that they were properly obtained.

The Government wants us, meaning the American people, and specifically Mr. Lee, to take the word of the Jamaican government that the wiretaps were legally obtained just because they were authorized by a Jamaican court. In opposition to Mr. Lee's motion to suppress the wiretap evidence, the Government argued that "the existence of the court authorization for the wiretaps, [demonstrates that] the JCFND/VU properly followed the
law of Jamaica when intercepting the defendants over wire communications...” [Govt's Opp. to Motion to Suppress at p. 9 (A115)] and that “the JCFND/VU followed its own laws and did not act improperly under Jamaican law”. Id. at 12 [A118]. This argument is ridiculous given that in the United States, even though a judge authorizes a warrant, there is a review process to which a defendant is entitled before the evidence obtained from the search is used by the Government in court. We do not just take anyone’s word for it. Just because a warrant is obtained in a foreign court should not mean that the defendant is not entitled to constitutional protections. To do so is to give the Government entirely too much freedom and the ability to circumvent the Fourth Amendment by going out and getting other nations to obtain evidence with limited if any oversight by American courts. By allowing this type of evidence to be admitted at trial with no review, the Government is being given the option of having another nation with whom we have a close law enforcement relationship such as Jamaica get a wiretap or other search order and then use the evidence obtained pursuant to that order in their direct case. We do not know what kind of rights the people of the issuing country have and we certainly do not know if they value the rights of their citizens the way that we do in this country. In other words, by allowing this, we are giving American law enforcement the ability to circumvent our Constitution with little if any oversight and that is not what our Constitution guarantees American citizens.
GENERAL THINGS NOT TO DO:

1. Don’t rely so much on citations, abbreviations, and your own shorthand that your brief ends up looking like it is written in code:

As in AFEC, 131 S.Ct. at 2816-17&n.5, Vermont law imposing political-committee burdens neither bans nor otherwise limits spending for political speech. See BLUE.43-44. Nevertheless, strict scrutiny remains preferable to exacting scrutiny post-Citizens United. BLUE.45-46; compare BLUE.43-44 (describing political-committee burdens that are “onerous” under Citizens United) and MCCL-III, 692 F.3d at 872 (“onerous”) with AFEC, 131 S.Ct. at 2824 (applying strict scrutiny post-Citizens United to “a substantial burden” on political speech (citing Davis v. FEC, 554 U.S. 724, 740 (2008) (citing, in turn, MCFL, 479 U.S. at 256)); MCCL-III, 692 F.3d at 875.

Even if exacting scrutiny applies, RED.14-15; RED.20; CDGREEN. 20; BLUE.46; BLUE.56, Vermont law imposing political-committee burdens is unconstitutional as applied to VRLC’s speech, because VRLC is neither under the control of, nor does it have the major purpose of nominating or electing, candidates. BLUE.53-55; see MCCL-III, 692 F.3d at 872.

Saying the Supreme Court has not applied the major-purpose test to state law, CD-GREEN.19, is unpersuasive, because the Supreme Court has not accepted such a case. BLUE.52. Pages 914-16 of Citizens United do not address the test, RED.25-26, because they address non-political committee reporting requirements, not full-fledged political-committee burdens. BLUE.48; see MCCL-III, 692 F.3d at 875 n.9.

Holding that the test does not apply to state law “cannot be right[,]” BLUE.52. And even if the test were a Buckley narrowing gloss, RED.21-22; CD-GREEN.15-16; contra BLUE.51, it would still apply to state law. MCCL-III, 692 F.3d at 872. Madigan holds otherwise, 697 F.3d at 486-91, by disregarding MCCL-III. See id. at 470 n.1.
2. Don't belittle your opponent with snide, colorful, or "humorous" remarks – it makes you look immature, and it makes your arguments fail even harder if they are incorrect:

Repeatedly, defendants taunt plaintiffs for their Opening Brief having omitted to mention the "internal documents" showing that LBREP III properties had gained 2.4% in value by June 30, 2008. Thus, the "2.4% report" would seem a good place to begin to dismantle defendants' argument, but alas, that must wait until defendants' reading of the Form 8-K is considered.

The response to this merry line of argument is this: . . .

The irony of defendants' obvious pleasure in pointing out that plaintiffs actually "relied on" the "2.4% report" purporting to show a 2.4% value increase is that plaintiffs' intention was to illustrate the absurdity of a claim that LBREP's properties were gaining value as the U.S. and Global market were in steep decline.
3. Be careful with citations. It’s not a big deal if some unusual document is not cited perfectly according to bluebook standards as long as it looks like you put some effort into it, but basic federal and state cases should be cited correctly and consistently. Avoid these common errors:

a. Federal cases should not use superscript:

   *John Morrell v. Frozen Food Express, Inc.*, 700 F.2d 256, 258 (5th Cir. 1983).

b. Do not use inconsistent citation styles within the same brief (or the same sentence!):

   “The *prima facie* case under the Carmack Amendment is straightforward: a plaintiff must show “(1) delivery in good condition; (2) arrival in damaged condition; and (3) the amount of damages.” *REI Transport, Inc. v. C. H. Robinson Worldwide, Inc.*, 519 F.3d 693, 699 (C.A. 7(Ill.) 2008), citing *Am. Nat’l Fire Ins. Co. v. Yellow Freight Sys.*, 325 F.3d 924, 929 (7th Cir. 2003)

c. Do not use parallel citations for Supreme Court cases (even though Westlaw often displays them this way in published cases). If there is a U.S. Reporter: citation available, use that; if not, use the S. Ct. citation. The same is true for state cases: pick one reporter (and only one reporter) and stick to it:


How to Write an Introduction

By David J. Perlman*

Keep Your Eye on the Goal.

The purpose of an introduction is nothing less than to proclaim immediately why you must win. Besides this, there are three additional objectives: to convey what the case is about, to create a meaningful context for the facts and argument that follow, and to engage the reader.

The last three are, in a sense, secondary because if you’ve achieved the first, you’ve gone a long way toward achieving the others. If you convey why you must win, you’ll convey

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Chairs’ Column

By Crystal G. Rowe, Publications Chair and David J. Perlman, Editor

This issue focuses on written advocacy. It begins with two articles exploring the relatively neglected topic of weaving a theme into a legal brief. Although the articles approach the subject from different angles, they intersect on three points: that a theme is a compelling statement of why you should win, that it transcends legal doctrine, and that the rules dictating the structure of an appellate brief can impede its expression. The issue then delves into the impact of technology, beginning with a groundbreaking article on the implications of judges reading not merely on computer screens but on tablets such as iPads. Next are two articles discussing hyperlink citations. The first touches on the practical considerations and persuasive advantages of hyperlinks. The second is a story of pragmatic and creative problem-solving, of how the demands of legal practice generated a new approach to briefing — in this case, hyperlinks to the video record of a trial judge’s rulings and comments from the bench. Technology is a factor in the next article, on using time-
...continued from page 1 – How to Write an Introduction

what your case is about and create a context for the succeeding material. At the same time, you’ll plant in the reader an expectation — a desire to see a more complete exposition of why you must win — and thus you’ve hooked him on at least that intellectual level.

Still, being attentive to all four goals will aid in constructing a powerful introduction.

Distill the Facts Down to Their Moral Essence.

If there’s a single sentence that immediately states why you should win — that presents the theme — it ought to be the first. And if you get the first sentence right, you’ll likely get the introduction right, at least the difficult, first part of the introduction, before the summary of the argument.

But how do you write a single opening sentence that distills the entire case, explains why you should win, and inspires the reader to continue? The starting point is a deep understanding of the facts and how they implicate an underlying sense of fairness. Achieving this is similar to formulating a litigation or trial strategy. Usually, only by total immersion can you identify a compelling theme.

Beyond the preliminary work, three general rules apply to articulating the theme in the introduction. First, the opening sentence — and the rest of the first paragraph — should concern specific people, places, occurrences, or actions. These attract and hold attention. They are generally more compelling than abstractions.

Secondly, while focusing on concrete facts, you want to appeal to a fundamental sense of right and wrong — usually, the shared moral beliefs that form the foundation for legal rules and doctrine.

Thirdly, the first sentence should focus on the opponent’s wrongful conduct and not your client’s innocence. We’re impelled to justice by bad acts. The degree of your client’s victimhood will be clarified later.

Start with Deep Conviction.

Examples will demonstrate what makes an opening sentence, and by extension, an introduction, effective.

...continued from page 1 – Chair’s Column

lines, charts, and diagrams; for without computers, we couldn’t create such visual aids or insert them into a text, and these illustrations also hold the promise of hyperlinks and inter-active engagement. Then, within a thoughtful summary of CAL’s Midyear ABA presentation on brief-writing, there lies a fresh nugget on the issue of whether citations should appear in the body of a brief or be relegated to the notes. The penultimate article is a vibrant review of the latest book on legal writing, a work that values teaching by examples more than dictum. Finally, our brief-writing issue gazes ahead to the next step — preparation for oral argument. Yet, this final article also closes the circle, for it reminds us that the best way to steel yourself for a bulletproof oral presenta-

tion is to dig deep, and yet again, unearth an underlying principled theme.

For this collection of notes from the field, we thank each of the authors as well as ABA Publications Specialist Jo Ann Saringer.

Also, we would remind readers that one of the most rewarding ways of participating in CAL is becoming a Publications Committee member or contributor. Anyone interested can contact Publications Chair Crystal G. Rowe (crowe@k-glaw.com), Appellate Issues Editor David J. Perlman (djp@davidjperlmanlaw.com), or website coordinator Kim Dimarchi (kdemarchi@lrlaw.com).
Let’s start with a relatively dry case, which is probably more challenging than a dramatic one. Here’s a negative example from a fictional securities class action: Plaintiff Smith represents a class of persons owning stock during the relevant time period, from year 1 until year 2, and he asserts a claim against Board Members X, Y, and Z for violation of Rule 10-b5. This statement is incontestable but dull. Already, the brief is dead. Better to focus on the defendants’ act: Drug Company board members X, Y, and Z sold their stock when they learned at a board meeting, but before the public announcement, that Drug Company would be denied FDA approval for its prospective breakthrough drug. Even this bland, matter-of-fact sentence sparks a bit of ire against the defendants. Without reference to legal norms, it communicates that they preferred themselves over the public for self-interested reasons.

A second example comes from an actual case and is more specific. It’s from an appellee’s brief, when the court already knew something about the facts. In this particular case, when a company’s insurance came up for renewal, it reduced its coverage limit. It then suffered a loss exceeding the new coverage amount. After the insurer denied a claim made under the predecessor policy with higher limits, the company sued. The company then lost on summary judgment. Here are the first two sentences from the insurer’s brief on appeal:

Insured, seeking a bargain when premiums were on the rise, got exactly what it paid for — reduced coverage. Now that it has incurred a loss, Insured wants the coverage it opted not to buy.

The opening is factual and concrete. There is no mention of policy provisions, policy periods, or reporting periods. There are no citations. Rather, the facts invoke, without directly stating, a fundamental principle, indeed, a cliché — you get what you pay for.

The first sentence describes a customer controlling cost by opting for less insurance. It implies that he was going cheap, “seeking a bargain” in response to rising premiums. These facts — buying less insurance and rising premiums — though completely irrelevant to the governing policy provision are critically significant to the theme. The second sentence communicates that the Insured is irrational for suing since it wants something it didn’t pay for. The second sentence also provides a motive for its invalid insurance claim and groundless lawsuit — a loss that exceeds the coverage amount.

Though the opening is factual, it doesn’t include a single fact that would distract from the theme. It doesn’t specify what the loss was. It doesn’t list dates when anything occurred. It’s simple and direct. Moreover, focusing on the opposing party’s bad acts, it encourages the reader to continue. He wants to learn how this could be — that a corporation could expect to get what it didn’t buy — and he wants to see justice done.

Another example comes from a case in which a company sued two former officers who, after their employment terminated, started a competing business. The officers hadn’t signed a non-compete covenant, and the complaint asserted claims for unfair competition and misappropriation of trade secrets. Yet the claims were strained — for example, the typical allegation that defendants stole customer lists was meaningless since it was obvious from the companies’ product that customers would be publicly known.

On a motion to dismiss on behalf of the two departing officers, the key fact favoring them was extra-legal — that is, beyond what was necessary for application of legal doctrine. Specifically, the plaintiff company was controlled by the officers’ father. In other words, this was a family rift, driven not by business judgment and economic considerations but by an irrational impulse. Even readers in the professional roles of judge and law clerk would be wary of a father suing his sons, suspecting a perversion of the normal paternal instinct. Such a lawsuit would be difficult to justify unless the sons — both of them, no
less—had committed a very grave offense. Thus, the brief began: This is a lawsuit brought by a father against his two sons.

Of course, the brief went on to argue the law. But that first sentence goes deeper. It strikes an almost mythical chord: This is a lawsuit brought by a father against his two sons. It explains why the suit was meritless—because it was the product of warped fatherhood. Also, it recasts the defendants as the victims deserving empathy. Yet, it doesn’t go so far as to demonize the father or cast explicit judgment. It simply states a fact. Certainly, it would have been easy to begin the brief on the level of legal doctrine, which is what the court’s opinion properly turned on. But it would have been myopic to ignore that on a more elemental level the defendants should win simply because they were two sons sued by their father.

Here’s the first sentence from a brief in a similar case but where the departing officer had no familial relationship with the corporation’s owners: Having terminated its CEO Jones without cause, thereby signaling that Jones was of no value to its continuing business, Company now invokes a covenant not to compete to prevent him from earning a living.

Here the Defendant should win because the Company’s actions are inconsistent, as well as selfish, and Jones is entitled to a livelihood. The Company can’t have it both ways—fire him despite excellent job performance—and then ask the court to hold him in occupational handcuffs. Although this opening refers to legal concepts, it still functions mainly on the factual and common sense level. Specifically, it does not mention the governing legal rule: that a covenant not to compete, as an agreement in restraint of trade, is subject to the rule of reason.

Place The Introduction Up Front.

Although it goes without saying that an introduction comes first, the federal and Supreme Court appellate rules, to say nothing of state appellate rules, dictate the required sections of a brief without mentioning an introduction. Recognizing an introductions’ persuasive significance, the committed advocate won’t be defeated by the rules’ silence. There are two options for including an introduction: creating either a separate section labeled “introduction” or inserting an introduction as a subsection at the start of a required section such as the “statement of the case.”

Especially in the former instance, you should ensure that the clerk won’t reject the brief for having a section beyond the mandated sections. If it is indeed a separate section, the introduction can appear before the “statement of the case.” This location can be effective even though it sacrifices absolute primacy since a court is unlikely to expect advocacy or theme-setting in any prior section, except perhaps the questions presented.

An interesting example is petitioner’s brief in the recent, widely reported Supreme Court case of Maples v. Thomas, concerning a missed habeas deadline when a law firm’s mailroom returned trial court correspondence unopened. The Supreme Court brief was by Gregory C. Garre and three Latham & Watkins colleagues. The introduction is a separate section, as you can see through this link:

http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-63_petitioner_brief.pdf

Transform the Question Presented into an Introduction

An advocate can work persuasive wonders with the question or issue presented. Lawyers have long used the question as an abbreviated introduction to communicate why they should win. Typically, they’ve weighted a question with a few favorable facts so that the answer seems self-evident. Bryan Garner suggests the alternative of re-formulating the question as a three-sentence syllogism; the first sentence would be the major premise or rule of law, the second, the minor premise or facts to which the law is applied, and the third, the conclusion couched as a question.
Yet still more can be done to transform the question into an introduction. An example, both masterful and creative, of rendering the question as a potent introduction comes from a brief filed by Council of Appellate Lawyers Board Member Kannon Shanmugam. Since it was a U. S. Supreme Court brief, the question appeared first, even before the requisite tables, and was perfectly positioned for an introduction. Shanmugam told me that his goal was to explain, through a presentation of the critical facts, why reversal was merited.

Here is the question presented in the Petitioner’s merits brief in *Smith v. Cain*, which the Court decided in Petitioner’s favor on January 10:

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the only person brought to trial. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney’s office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants.

Petitioner was linked to the crime solely on the basis of an identification by one of the survivors. At trial, the witness testified he was certain about his identification. But materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other subsequently disclosed materials included statements by other witnesses casting doubt on the witness’s testimony; a statement by an apparent perpetrator seemingly denying petitioner’s involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual. The question presented is as follows:

Whether the failure of the Orleans Parish district attorney’s office to produce the foregoing information before petitioner’s trial violated his right to due process … because the information was material to the issue of guilt.

Yes, indeed, it’s a question presented, aptly in due context. And the right answer, though never stated, is perfectly clear. Though the question reads smoothly, such craftsmanship didn’t come effortlessly. Shanmugam said that he and his Williams & Connolly team spent many hours revising and editing the question presented so that every word counted.

Although the first sentence conveys that the murders were committed by a group, we learn in the stunningly short second sentence that only one person was arrested and tried: *Petitioner was the only person brought to trial*. This, in a jurisdiction, where the district attorney habitually withholds exculpatory evidence: *He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney’s office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants*. Thus, in three sentences, we sense where the story is headed. We understand the implicit argument.

The narrative continues for another paragraph, fleshing out the disturbing details — how the defendant was linked to the crime solely on a witness’ identification and how the prosecution withheld evidence of the witness’ and other’s doubts. By starting with the conjunction “but” — once considered an offense — the second paragraph’s third sentence delivers the factual punch, the essence of the moral argument embedded in the narrative: *But the materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators*.

Then, finally, only in the third paragraph, after this narrative prelude, is the reader ready for the question: *Whether the failure of the Orleans Parish District Attorney’s Office to produce the foregoing information before petitioner’s trial violated his right to due process … because the information was material to the issue of guilt*.
“Talking questions” aren’t reserved for dramatic stories like Smith. Here is a question from a cert petition in a patent case, Association for Molecular Pathology, v. Myriad Genetics, Inc., which was filed on December 7, 2011 by Christopher A. Hansen and fellow ACLU attorneys:

Many patients seek genetic testing to see if they have mutations in their genes that are associated with a significantly increased risk of breast or ovarian cancer. Respondent Myriad Genetics obtained patents on two human genes that correlate to this risk, including any naturally occurring mutations of those genes, on the theory that simply by removing (“isolating”) the genes from the body, they have invented something patentable. Petitioners are primarily medical professionals who routinely use standard genetic testing methods to examine genes, but are prohibited from examining the human genes that Myriad claims to own. This case therefore presents the following questions:

1. Are human genes patentable?

Despite its neutral tone and incontestable character, the first sentence raises empathy for the women assessing their cancer risk. Focusing on a victim, this sentence doesn’t really violate the rule to lead with the bad actor. Rather, the opening sentence lays the groundwork for the second sentence, giving the second sentence the punch that portrays the opposing party, Myriad Genetics, as a bad actor. By the middle of the second sentence, we know that Myriad is wrong for trying to profit from the women’s misfortune: Respondent Myriad Genetics obtained patents on two human genes...

In making this point, the second sentence, like the first, begins as facially neutral, until the reader reaches the final clause: ... on the theory that simply by removing (“isolating”) the genes from the body, they have invented something patentable. A contemptuous tone creeps in with on the theory. That tone is then reinforced with simply by removing (“isolating”), reaching a crescendo with they have invented something patentable.

The parenthetical quote — (“isolating”) — is especially shrewd. It’s the petitioner’s parroting of Myriad’s rationale for a patent, and, as you read on, the mockery extends to the word invented through aural association, that is, through alliteration (the initial “i”) and the repeated laminal sounds of “n” and “t.” It’s as if invented was also placed in quotes — “invented” — marking it as a mere pretense or fiction undeserving of serious recognition.

The sentence expresses growing but contained outrage as writer and reader contemplate Myriad’s claiming an inventor’s property interest in genetic material created through human biological processes. The third sentence begins by grounding us again in neutrality by merely identifying the party-victim, the medical professionals whose mission, of course, is to care for potential cancer victims mentioned at the outset.

Yet, despite the return to neutrality, the final clause strikes with an ironic sting in its reference to the human genes that Myriad claims to own. How can anyone, corporations especially, own human genes? The question presented: are we patentable?

Never Stop Experimenting

Shanmugam’s and Hansen’s questions are inspirational models, demonstrating that rules dictating a brief’s structure needn’t be limitations. Indeed, sometimes a writer can harness an extra measure of expressive force by pushing against convention. The lesson is, experiment. Test the limits. It may take hours or days to get a single passage right. But here, where we daily labor, in the cultural smithy of legal practice, new paradigms are forged.

Until Next Time

Thank you for staying with me. Now, between us, when we meet again, there’ll be no need for an introduction.

(1) Instead of “they,” “it” would have been grammatically preferable since the pronoun refers to Myriad Genetics.
MAKING YOUR APPELLATE POSITION MORE APPEALING: THE IMPORTANCE OF FRAMING THE ISSUES

By Deena Jo Schneider

I had the pleasure of moderating the program at the 2012 AJEI Summit entitled “Making Your Appellate Position More Appealing: The Importance of Framing the Issues.” The participants in this program were not only experienced in framing issues for appeal but able to speak with authority on what courts prefer in this important aspect of briefing.

The members of the panel (which I organized with Matthew T. Nelson, another member of the Council of Appellate Lawyers) were Judge Stephen A. Higginson of the United States Court of Appeals for the Fifth Circuit, who was previously a federal government lawyer specializing in appeals and a law school professor and a clerk for Judge Patricia M. Wald of the District of Columbia Circuit and for Supreme Court Justice Byron R. White; Justice Deborah G. Hankinson, who served on both the Court of Appeals and the Supreme Court of Texas before returning to private practice, where she specializes in appellate law; and Associate Professor Judith D. Fischler of the Louis D. Brandeis School of Law at the University of Louisville, where she teaches legal writing and women and the law.

I also have worked primarily on appellate matters as a private practitioner with Schnader Harrison Segal & Lewis LLP but have litigated numerous legal issues at the trial level as well, including positioning them for eventual appeal.

Judge Higginson began the program by offering his preliminary thoughts on framing appellate issues. Identifying the issues to be presented on appeal is just the initial step; preserving those issues below and elaborating upon them in the appellate brief are even more important. As one of the eleven mandatory elements of a federal appellate brief under Rule 28(a) of the Federal Rules of Appellate Procedure, the statement of issues should not only draw the reader in initially but also serve as the thread that unites the brief’s other elements, gaining in strength and persuasiveness along the way. While the statement is carefully crafted in the brief, at oral argument a skillful lawyer will often depart from that formulation and focus on the danger that could result if the court rules against him.

Judge Higginson generally thinks not of an issue but a question presented, which is the term used by the United States Supreme Court. An appellate lawyer will typically argue that a particular question should be analyzed in one of three ways: (1) existing law requires the Court to answer the question in favor of my client, (2) the specific facts of this case require an answer favoring my client, or (3) the only workable rule or answer to the question that would be fair going forward is the one I am advocating. A good lawyer should consider each of these temporal dimensions (the past law, the present facts, and future cases) in deciding how to present the question. In responding to questions at the end of the program, Judge Higginson stated that the best approach for the brief will usually be the first of these options. The other options may work better at oral argument, where the lawyer is trying to reassure the court that the answer to the question he is urging is fair to his opponent and will make sense in other circumstances. Judge Higginson would not re-characterize the presentation of a question in a reply brief, as opposed to oral argument, because there is a risk that the court will say that is improper.

One of the biggest challenges for an appellate lawyer is the issue that is not directly presented but seized on and made the focus of the case by an active appellate court. It is particularly important that the appellee’s lawyer consider and answer not just

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the issues specifically stated by the appellant but those that may be lurking in footnotes or subparts of the arguments. Issues also are sometimes developed for the first time in the reply brief or even at oral argument. The appellee may argue that those issues are improper and even move to strike them, but sometimes the court will consider them anyway or even elicit them through questioning. The lawyer confronted with this situation should seek to respond to new issues when they arise, perhaps by requesting leave to file a supplemental brief or submitting a Rule 28(j) letter.

Justice Hankinson noted that her experience serving at two levels in the appellate system demonstrates that no one size fits all situations with respect to drafting and presenting the issues. The function of an intermediate appellate court hearing appeals as of right is error correction, whereas a high court operating with discretionary review must first decide whether to take a particular case. A lawyer crafting the statement of issues in the first situation generally is trying to persuade the court to rule in his client’s favor; his goal in the second situation is to get the court’s attention and convince it that deciding his case is important to its jurisprudence. Similarly, an appellate judge deciding the issues will frame them differently depending on whether he is sitting on an intermediate or discretionary court.

Professor Fischer summarized her empirical research into how lawyers draft issue statements, which is published under the title Got Issues? An Empirical Study about Framing Them, 6 J. Ass’n Legal Writing Dirs. 1 (2009), available at http://www.alwd.org/LC&R/CurrentIssues/2009/pdfs/Fischer.pdf. Her study examined issue statements in briefs filed in the highest courts in six different states, analyzing the number of issues presented and length of a single issue, the clarity of the statements, the number and structure of the sentences used to state a single issue, the opening words that occurred most frequently, how the parties were identified, and the extent to which facts were included and persuasion was employed. She saw a wide variation among the statements she studied and developed drafting recommendations for appellate lawyers based on the ones that seemed most effective, some of which she summarized during her later remarks.

The program then turned to specific drafting and strategic questions, starting with how many issues to include in a single appeal and how to order them. Justice Hankinson strongly endorses the general rule that the fewer the issues (and the shorter the briefs), the better. The best approach in any particular case depends on how it proceeded at trial and how many points need to be addressed on appeal for the client to prevail. To determine the optimal order of the issues, the lawyer should develop the critical decision tree that the court must follow to decide the case. Dispositive issues should be stated first, followed by remand points. The brief’s table of contents should set forth the decision tree as a road map for the court, including sufficient details to show the legal and record analysis involved and which issues need to be answered to resolve the appeal. Justice Hankinson considers the table of contents the second most important part of the brief after the statement of issues: it serves as the starting point for the court in deciding the case and may also impact whether a court of discretionary jurisdiction takes the case.

Professor Fischer agrees that it is better to restrict the number of issues presented except in the exceptional case where that would disadvantage the client. Judge Higginson recommends listing first the issues that are particularly compelling, such as ones where the court below ignored controlling law or an intervening decision makes clear how the case should now be decided. He would also give priority to an issue that the highest court in the jurisdiction has agreed to hear or on which co-equal courts are split. In presenting a conflict of authority, a lawyer should try to determine the optimal basis on which to ask the court to decide the issue; that choice may determine the substantive outcome of the case.

Judge Higginson noted that a common problem judges and law clerks see is separate identification of an issue that is fairly comprehended in another issue so does not need to be listed independently. As a lawyer is working to simplify the list of issues to be presented, it is useful to develop a separate list of issues he is not asking the court to decide. This list can sometimes be used effectively at oral argu-
ment to reassure the court that it can reverse or affirm the decision below without overreaching.

The next topic discussed was the most effective form of an issue statement, including whether to begin with “whether” and whether to use more than one sentence in stating a single issue. Judge Higginson said that while syntax is not particularly important to him, he would generally start with whether and then add clauses referring to the standard of review, the facts, and the law, assuming they are helpful to the client’s position. By the time the court finishes reading those clauses, it is likely to feel it has no choice but to rule on the issue the lawyer is presenting in the way he desires. It is important not to ask for relief the court cannot give (for example, because the issue is not fairly presented or is controlled by existing law). The appellee’s lawyer will often want to rephrase the issue to raise waiver or other procedural concerns or to point out the favorable record on the issue, which may suggest that the decision below was well-considered and should not be disturbed.

Justice Hankinson does not endorse using any particular issue format across the board; as with the number and order of issues, what will be most effective depends on the case. Some of the variables are whether the party is seeking correction of error by an intermediate court or discretionary review of an important legal issue by a court of last resort, whether the answer to the question is driven by law or fact, and how much context is necessary to avoid abstraction. The most important consideration is clarity, which is achieved over time as a result of critical thinking about the case. The initial statement of the issues should be recrafted multiple times as the lawyer completes his analysis, research, and writing. Once the arguments are matured, they will show the lawyer how to lay out the road map for what the court must decide and how the court should do that; this may result in some final fine-tuning of the issue statement.

None of the panel members favored use of the “deep issue” statement advocated by Bryan Garner among others, which includes in separate sentences for a single issue a statement of the applicable law, a recitation of the relevant facts, and the question the court is being asked to answer, stated in a way that makes clear what the answer should be. Justice Hankinson expressed the view that this approach may seem disrespectful to the court in suggesting that there is nothing for it to do other than apply the stated law to the recited facts. Each section of a brief is designed to serve a particular purpose. She does not consider the statement of issues the appropriate place to lay out the entire case in the hope that the court will stop reading, but believes that a short version of the key law and facts are more effectively presented in the summary of argument. When representing an appellee, she is happy to see a deep issue statement from the appellant, because it gives her the opportunity to seize control of the appeal with an issue statement that provides the court a road map to rule in her client’s favor.

Professor Fischer added that in her opinion a single-sentence statement of the issue generally provides more clarity than the deep issue approach. The single sentence also gives the lawyer a better opportunity to show the relationship between the law and facts and the question the court is being asked to decide. Judge Higginson agreed that a good advocate can generally present an issue in one carefully crafted sentence, which may require deep thinking.

Professor Fischer asked whether the other panel members preferred beginning the statement of an issue with a phrase invoking the standard of review such as “whether the trial court erred in holding ...” as opposed to merely presenting the actual question to be decided. Judge Higginson responded that the second more direct approach may make the case look simpler and have some attraction from the appellant’s standpoint. The instinctive response to a more complex question is likely to be that there was no error, and this may be a better tactic for an appellee. On the other hand, a short direct question presented that goes for the jugular is often more effective at oral argument, where the issue can be recharacterized to highlight its impact on future cases. A point he has only come to realize since going on the bench is the number of gatekeeper reviews that occur before appellate briefs are submitted to a merits panel. It is important to frame the issues in a way that will not motivate one of the early screeners to
conclude that the case is appropriate for dismissal or summary disposition.

Judge Higginson noted that the Solicitor General of the United States suggests that lawyers finish their briefs seven days before they are due so there is time for rewriting. Legal writing can always be improved, and a lawyer should work to make his product as good as it can be. That is more important than the format of what is written.

Judge Higginson also observed that it is critical to do the homework necessary to present the appeal in light of what happened in the trial court. An appellate lawyer who is new to the case may make powerful arguments that were not preserved well below. On the other hand, the trial lawyer continuing to handle a case on appeal sometimes is tempted to relitigate an important point that was lost before the jury. Both of those types of issues are forfeited and should be avoided.

In discussing interlocutory appeals, Justice Hankinson noted that the lawyer seeking interlocutory review should first consider the legal standard for such review. Interlocutory appeals are generally a form of extraordinary relief, and the justification for seeking that relief should be clearly spelled out in the statement of issues. As in other situations, the key is to provide the court with the optimal presentation and organization of the case, identifying the core issue to be decided and the sub-issues that are not as essential.

With respect to issues raised for the first time in a reply brief, Judge Higginson remarked that he found it helpful as an advocate to bring to oral argument not just an outline of his own presentation but a separate page listing at the bottom a few points he wanted to cover no matter what else was said, including rebuttal of any issues that had been raised since his brief was filed. During the argument, he made notes on this page of his opponent’s arguments and also the judges’ questions, which he considered much more important. He would focus his argument on the questions from the bench and then use the yellow light that went on near the end as a reminder to check the bottom of the page and make any of his key points that had not yet come out. As for issues raised for the first time by the court, he recommends relying on veteran judges to recognize that the court cannot reach points that were not preserved below. Justice Hankinson agreed that the statement of issues is a good way for appellate lawyers to keep judges focused on the questions properly before them, which is especially important in a discretionary court.

In response to a question from the audience, Justice Hankinson emphasized that an appellate lawyer needs to explain to the client that raising every possible issue on appeal will not increase the likelihood of winning but is more likely to weaken the brief by making it too long and diffuse. Similarly, a lawyer asked to argue an issue that was not preserved below (often for good strategic reasons) should point out that this will damage the client’s and his credibility and not advance the cause. When the other side engages in these tactics and prevails, it is the lawyer’s job to help the client understand that there was a breakdown in the process. Even knowing that this may occur, it is still better to work within the rules because that helps the system to function as it should and also provides the best chance of success.

Another audience question asked what portions of the briefs judges consider most important in developing the issues. Judge Higginson stated that he reads the reply brief first where there is one, followed by the summary of argument and the decision on review. Although other judges may focus on different sections of the briefs or read them in a different order, he considers the summary critical. Justice Hankinson agreed that the summary of argument is very important, but she personally read the issues first and then the table of contents.

The objectives of this program were to identify different ways to frame appellate issues and provide insight on what approaches may work best in different cases and different stages of the appellate process. In my view, the panelists provided significant guidance on these points speaking from their perspectives as judges, advocates, and teachers. The conversation was lively and interesting. I for one was sorry to see it end.
I. This excerpt is from the “Facts” portion of the brief.

The . . . Board's Notice Decision . . . upheld []'s discovery proceedings, and assessed . . . taxes due . . ., but waived a . . . penalty. . . . Appellee appealed the . . . Board's decision . . . .

The Honorable North Carolina Court of Appeals scheduled the matter herein for oral arguments for . . . . See N.C. Ct. App. Court Calendar by Panel, Sent Date: . . . . . . . At these oral arguments the Court, sua sponte, raised the issue of the preemption of N.C. Gen. Stat. § by N.C. Gen. Stat. § . . . See Cited Portion of Transcript of Oral Argument, . . . (unable to be appended hereto, pursuant to N.C. R. App. P. 28(d)(1)(c), see Note at Appendix p 3). Within its subsequent opinion, the Court barely mentioned [], citing it only once in 13 pages, and then for the purpose explaining []'s rationale for determining that [] did not qualify for an exemption . . . .

This single citation of N.C. Gen. Stat. § . . . occurs within the "Facts & Procedural History" of the Court of Appeals' opinion, and tracks the language of the statute. The Court below did not seek to interpret the statute, or to apply it to the facts of the case. . . . Rather than applying this statute to the facts, the Court's opinion instead seeks to “establish a test to determine ownership for purposes of . . . . The disputed statute, . . . forms no basis for the "test" cited above. . . . Per the explicit language of said statute, the General Assembly enacted pursuant to its exclusive constitutional grant . . . .

With its opinion below, filed . . ., the Court of Appeals affirmed the Commission's decision reversing the . . . , thus exempting the subject property, . . ., from . . . .

Appellant timely sought discretionary review by the Honorable Supreme Court of North Carolina (Appellant-Petitioner's Petition for Discretionary Review), said discretionary review was granted, and the case was certified to the Supreme Court by Order dated . . . Order Allowing Petitioner-Appellant's Petition for Discretionary Review ( . . . ) (appended hereto, . . . .

II. This excerpt is from the “Argument” portion of the brief.

THE JUDGMENT OF THE HONORABLE NORTH CAROLINA COURT OF APPEALS IN THIS MATTER IS AN UNCONSTITUTIONAL AND ERRONEOUS USURPATION OF LEGISLATIVE POWER UNDER ARTICLE I, SECTION 6 OF THE CONSTITUTION OF THE STATE OF NORTH CAROLINA, IN THAT THE COURT OF
APPEALS IMPROPERLY APPLIED N.C. GEN. STAT. § [REDACTED], WHICH THE GENERAL ASSEMBLY CLEARLY INTENDED TO PREEMPT BY ENACTING N.C. GEN. STAT. § [REDACTED]. THUS, THE COURT OF APPEALS VIOLATED THE SEPARATION OF POWERS DOCTRINE BY IGNORING THE WILL OF THE STATE OF NORTH CAROLINA'S POLITICAL BRANCHES.

Standard of Review

"It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated. Piedmont Triad Reg’l Water Auth. v. Sumner Hills Inc., 353 N.C. 343, 348, 543 S.E.2d 844, 844, 848 (2001). "[W]hen a constitutional question is implicated, de novo review is appropriate. Id. (citing State v. Rogers, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000)). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of [the lower tribunal]. See In re Greens of Pine Glen Ltd. P’ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

The above-captioned matter certainly implicates constitutional questions of paramount importance, and thus, de novo review of these questions by the Honorable Supreme Court of North Carolina is the correct standard. The decision below of the Honorable North Carolina Court Appeals amounts to a gross usurpation of the exclusive constitutional legislative authority "to [REDACTED] By intruding upon this exclusive grant of legislative authority, the Court of Appeals violated the North Carolina Constitution’s separation of powers provision. See N.C. Const. art. I, § 6. For these reasons, the Supreme Court ought to reverse the Court of Appeals erroneous decision in this matter, and find that [REDACTED].

Applicable Rules

The Constitution of North Carolina mandates that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. art. I, § 6. This provision has long been interpreted to mean that "[e]ach of these coordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere its constitutional power and duty." State v. Holden, 64 N.C. 829, 829 (1870). This is so because “good government and the protection of rights require that the legislative, executive, and judicial powers . . . should be apportioned to separate and mutually independent departments of government. Person v. Bd. of State Tax Comm’rs, 115 S.E. 336, 339 (N.C. 1922) (citation omitted).

Further, as applied to the judiciary: “A defect of jurisdiction exists where courts . . . pass[] upon subjects which, by the Constitution . . . are reserved for the exclusive consideration of a . . . political tribunal[.]” Burroughs v. McNeill, 22 N.C. 297, 301, 2 Dev. & Bat. Eq. 297, 301 (1839) (citations omitted). In these cases, jurisdiction is defective because, "[t]he exercise of power here would be a usurpation . . . and the instant that the court perceives[] that it is exercising . . . a[n] . . . ungranted power, it ought to stay its action,” and if such action is not stayed, it “is, in law, a nullity.” ld. “[T]he explicit declaration of the Legislature is the law, and the courts must not depart from it[.]” Sch. Comm’rs of Charlotte v. Bd. of Alder. of Charlotte, 158 N.C. 191, 194, 73 S.E. 905, 908 (1912) (citation omitted).
It is also a long-standing principle that a judge’s personal opinion regarding a particular statute is irrelevant, and when passing upon said statute a court is obligated to refrain from interfering with the constitutional edicts of the legislature. See State v. Revis, 193 N.C. 192, 194, 136 S.E. 346, 347-48 (1927). “It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject,” because, “so long as the law-making body stays within the bounds of the Constitution, its acts are free from judicial interference. Thus, “[c]hanges in [the statutory law] must be wrought . . . by the people or by their representatives in the lawmaking department,” and, “[T]he Legislature is responsible the electorate and not to the courts. Person, 115 S.E. at 345. “When a court . . . constitutes itself a superlegislative body and . . . rewrite[s] the law according to its . . . notions of enlightened legislation, it destroys the separation of powers,” because this usurpation “upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government.” State v. Cobb, 262 N.C. 262, 265, 136 S.E.2d 674, 677 (1964). The General Assembly is far better suited than the courts to craft policy, in that, “legislatures have certain tools that make them uniquely well-situated to reach fully informed decisions about the need for broad public policy changes in the law.” Rhyne v. K-Mart Corp., 358 N.C. 160, 168, 594 S.E.2d 1, 9 (2004) (citation omitted).

The N.C. Constitution requires: “Only the General Assembly shall have the power to [classify property for taxation, which power . . . shall not be delegated], and "The people of this State shall not be taxed . . . without the consent of themselves or their representatives in the General Assembly, freely given." N.C. Const. art. I, § 8. Pursuant to these provisions, the Supreme Court of North Carolina has long held that “[t]he power to levy taxes is vested exclusively in the legislative department of the government.” Person, 115 S.E. at 339 (N.C. 1922) (citing N.C. Const. art. V). In Person, the Supreme Court further held: “Within constitutional limits the power of the Legislature in matters of taxation is supreme, and its action cannot be revised or annulled by the judicial department,” and “It must always be conceded that the proper authority to determine what should and what should not constitute a public burden is the legislative department of the state.” Id. (citations omitted). This is so because, often involves the weighing of social policies and the determination of the respective values to be assigned various conflicting but legitimate business enterprises,” and, “under the doctrine of the separation of powers such functions have traditionally been allocated largely to the determination of the legislative branch of government.” Henderson County v. Smyth, 216 N.C. 421, 422, 5 S.E.2d 136, 137 (1939) (citation omitted). “[W]ithin wide limits, the determination of . . . matters [taxation] by the legislative powers is binding upon the courts.” Id. Therefore, “[t]he judiciary is without power to [classify property for taxation] or devise a scheme of [taxation]. This is a legislative and not judicial function.” Henderson County v. Smyth, 216 N.C. 421, 422, 5 S.E.2d 136, 137 (1939) (citation omitted). “[I]t is apparent that the courts have no jurisdiction over an action which has for its purpose the [classification]” because, “under the Constitution, it is within the exclusive power of the legislature to provide the method and prescribe the procedure.” Id. Pursuant to N.C. Gen. Stat. § [classification] when an appellate court reviews a decision of the Commission, “the court shall . . . interpret constitutional and statutory provisions[.]” N.C. Gen. Stat. § [classification].
Finally, “a provision in a statute providing an exemption from, otherwise imposed, is to be construed strictly against [redacted] and in favor of the State.” In re Clayton-Marcus Co., Inc., 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974). “[W]hen the statute provides for an exemption ... any ambiguities are resolved favor of [redacted] is the rule; exemption the exception.” Cape Hatteras Elec. Membership Corp. v. Lay, 708 S.E.2d 399, 404 (N.C. Ct. App. 2011) (citation omitted).

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Indeed, if the shoe were on the other foot—i.e., if [redacted] appellant had failed to plead or argue this issue below—this court would be quick to find waiver. 

See, e.g., [redacted] The court should act no differently when the appellee has waived the issue, both in its pleadings and in its briefing on appeal.

If this court is going to move the target on appeal in this manner, there’s not much an appellant can do about it except to exclaim “good grief” when this court (as Lucy) snatches the football away just as Charlie Brown (the appellant) steps in for the kick. But at the very least, this court should remand this case for a trial and findings on the issue this court believes should be addressed.
Order of the Supreme Court of Texas and the Court of Criminal Appeals

Misc. Docket No. 99-9012

Standards For Appellate Conduct
At the request of the Council of the Appellate Practice and Advocacy Section of the State Bar and the Board of Directors of the State Bar of Texas, and based upon their submissions to our courts, the Supreme Court of Texas and the Court of Criminal Appeals hereby adopt and promulgate the attached Standards of Appellate Conduct. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In Chambers, this 1st day of February, 1999.

Standards For Appellate Conduct

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.

Lawyers' Duties to Clients

A lawyer owes a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.
2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.
3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become too closely associated with clients that the lawyer's objective judgment is impaired.
4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.
5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.
6. Counsel will not foster clients' unrealistic expectations.
7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.
8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.
9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.
10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.
11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.
12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.
13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.
Lawyers' Duties to the Court

As professionals and advocates, counsel assist the court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the court by respecting and maintaining the dignity and integrity of the appellate process.

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

4. Counsel will advise the court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all court appearances, and will be prepared to assist the court in understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Lawyers' Duties to Lawyers

Lawyers bear a responsibility to conduct themselves with dignity toward and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

1. Counsel will treat each other and all parties with respect.

2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

3. Counsel will not request an extension of time solely for the purpose of unjustified delay.

4. Counsel will be punctual in communications with opposing counsel.

5. Counsel will not make personal attacks on opposing counsel or parties.

6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

7. Counsel will not lightly seek court sanctions.

8. Counsel will adhere to oral or written promises and agreements with other counsel.

9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

10. Counsel will not attempt to obtain an improper advantage by manipulations of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

The Court's Relationship with Counsel

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.

2. The court will take special care not to reward departures from the record.

3. The court will be courteous, respectful, and civil to counsel.

4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.

5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.

6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.

7. Members of the court will demonstrate respect for other judges and courts.
client should win. The reader similarly has clearly internalized that a very persuasive way to present the “why” of the case is by using a theme communicating equity and justice and righteousness in one or two pithy sentences. Lastly, the reader in having understood the necessity of the “why” and internalized what, exactly, the “why” is, has taken these understandings and internalizations and determined exactly why the client should win the appeal. Now what?

The theme should be used to frame and imbue every element of the brief itself. From being clearly expressed in the introduction, to being alluded to in the statement of the case and the statement of facts, to coloring the assignments of error and statement of issues, the theme should then triumphantly return to tie the case together in the conclusion.

Effective theming in the brief unfortunately does not guarantee victory on appeal. Following the prescribed requirements for your brief guarantees that you are presenting the “how.” Making sure that the theme of your case is clearly presented in the brief guarantees that you are presenting the “why.” Successfully integrating both into the brief gives the client the best opportunity for victory on appeal.

(5) The reader may also have noted that the article does not discuss specific themes used in appellate briefs. For those, I recommend reading Judge Aldisert’s Winning on Appeal (2d. ed. 2003) at § 14.4, Professor Beazley’s Practical Guide at § 10.1, and Bryan A. Garner’s The Winning Brief (Oxford 1999) at 62-63.

(6) Judge Aldisert has asserted that a busy judiciary is another reason to consider strong theming: “You had better sell the sizzle as soon as possible. The steak can wait.” Winning on Appeal at § 10.8.

**Writing Appellate Briefs for Tablet Readers**

*By Robert Dubose*

**Introduction - why courts’ reading technology matters**

Over the past two decades, technology has profoundly changed the way Americans read. Once we read entirely on paper. Now we read more on screens.

As researchers have discovered, screen reading has changed our reading habits. In response, web designers and electronic publishers changed the look of electronic documents. Most documents on the Internet look different from books, magazines, or newspapers. Texts are shorter. Paragraphs are shorter. Headings are frequent. Structure is more visible.

In my 2010 book, Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World, I argued that the switch from paper to PCs requires lawyers to rethink legal writing. Most law schools teach a legal writing style geared to paper readers – long text, long paragraphs, and complex, lengthy development of arguments. Yet, as countless web pages illustrate, PC readers prefer something different – a highly structured text that is easy to read rapidly. I argued that, to communicate with screen readers, legal writers need to make briefs look more like web pages.

Two years later, paper and the PC have new competition – the tablet computer. Led by the iPad2 (and now, the iPad3), the tablet has become a widely used reading technology. In 2011, tablet sales reached about 60 million units. Of those, about 38 million were iPads. Tablet sales are forecasted to outpace PC sales within three years. Because of their small size and portability, tablets make it easier to read news, books, and legal briefs when out of the office.

This paper will explore what tablet-reading means for appellate brief writers. It will (1) survey technology...
gies judges currently use to read briefs, (2) explain how the experience of tablet reading affects reading habits, and (3) suggest tips to make briefs easier to read on a tablet.

I. How are appellate judges reading today?

I have been asking this question of appellate judges across the county for a few years. The answers vary, and they have been changing rapidly. Appellate judges fall within one or more of these categories:

- **Paper readers.** Two years ago, most appellate judges I asked were reading briefs exclusively on paper. Yet within the past year, judges who read briefs exclusively on paper have become the minority. Judges who do still read on paper give several reasons. Some have no choice; their court’s files are maintained on paper and briefs are only available on paper. Some resolutely prefer paper over screens, even though their courts manage files electronically. And some judges alternate between reading on paper and screens; they are more likely to read briefs on paper when they need to study a complex issue in depth.

- **PC readers.** In courts that use e-filing and electronic document management, a majority of judges are reading on PC screens. I practice in Houston, where only two years ago all appellate court files were maintained on paper, and all briefs were read on paper. Today, the courts have adopted e-filing and electronic document management and moved into a new courthouse where every justice has dual PC monitors. Most appellate justices in Houston now read briefs primarily on screens.

- **Tablet readers.** In 2011, I began hearing reports of appellate judges who read at least briefs on iPads. Judges are more likely to read on an iPad when their court uses electronic document management, when the individual judge reads briefs out of the office, and especially when the court has purchased iPads for the judges. But most iPad readers do not read on iPads all of the time. When judges with iPads are in the office, most report that they are more likely to read on paper or on a PC screen.

The reading media of judges, and court staff, is currently in flux. To find out what reading technology is used in the courts in which you practice, ask the judges and court clerks. Be prepared for their answers to change overnight whenever the court adopts a new technology.

II. Reading environment and habits for three reading technologies.

Whether a brief is read on paper or a screen, the words are the same. Why would the reading technology change the reading experience? The answer lies in each technology’s reading environment.

1 - Paper reading: studying text

Try a thought experiment. Visualize a person studying.

You probably pictured a student, professor, or maybe even a judge, deep in thought, pouring over a paper or a book. This is because paper is the reading technology synonymous with studying. A paper reader is typically immersed in a single text, slowly absorbing its meaning. Paper readers tend to do one task at a time. They tend to read more slowly, more carefully.

Before screen reading, slow and careful reading was the norm. Some people read rapidly, but they were unusual. I remember seeing books and courses in the 1980s that offered to teach readers how to speed read. Like most people, I could not speed read. I envied a college roommate who read books twice as fast as me.

For paper-reading lawyers, the equivalent of study was research. When I first worked in a law office, the only way to research was with “the books.” Research was slower. I might start with a treatise, which provided a map of the law. Then I would review the table of contents in the West Digest, looking for the right headnote. As I narrowed down to the specific
issue, I started reading cases. Book research required readers to start with the big picture before narrowing to the particular issue.

Most electronic researchers work differently. Electronic research allows the researcher to jump into the specific issue by entering a few search terms that lead to the specific parts of a case on that issue. Electronic research is faster. It does not require the researcher to understand the specific issue in the larger context. It does not require as much deep thought.

Study was slow, inefficient, and difficult. Yet it gave us a deeper understanding of books. For legal researchers, it gave us a deeper understanding of the law.

2 - PC reading: rapid information gathering and multitasking

The PC creates a different reading environment because so much more information is available and easier to access. In a paper environment, the amount of information is finite. In a paper-based office, we could read the papers in front of us, the books on the shelf, and perhaps the books in the library. The amount of information was finite.

In contrast, information on a PC is limitless. The Internet provides access to more information than we could read in many lifetimes. Also limitless are the opportunities for communication, entertainment, and distraction. Most of us read much more than we did 20 years ago simply because there is much more to read.

For instance, in the pre-Internet law office, written communication was by letter. Even with a fax machine, I sent far fewer text communications each day than I do today by e-mail. E-mail makes communication faster and easier. So we compose more text than we did in the age of paper. And we must read that much more text too.

The PC also gives us quicker access to information. Search engines such as Google allow us to type a few words and find the information we need within seconds. We do not have to think as much to find information.

By the late 1990s, web designers had learned that the Internet’s information explosion had changed the very mechanics of reading. Paper readers had generally read left-to-right, line-by-line. Yet when web designers tracked the eye movements of screen readers, they found that readers were more likely to skim text, focus only on a few portions of the page. This heat map demonstrates what web designers refer to as the “F-Pattern”:

Screen readers most frequently look at the red areas—the first few lines of the text, the headings, the first sentences of paragraphs, and a line running down the left side of the text. The surrounding yellow areas are read by only some readers. And words located in grey areas at the end of the paragraph, or toward the end of the text, are not likely to be read by anyone.

There are two lessons of the F-pattern:
- **Screen readers do not read everything.** Especially with long texts, web designers find that screen readers do not read; they skim.

- **Screen readers look for structure.** Screen readers spend much of their reading time looking down the left side of the page for signs of structure such as paragraph breaks, the beginning of headings, bullet points, and lists. Understanding the structure helps the screen reader process the information more quickly.

In a PC environment, skimming is a necessary adaptation because of the increased amount of information. The PC has created a culture of rapid information gatherers. Screen readers do not have the time, or patience, to read word-for-word. They need to read rapidly to be able to read everything that they want to read.

Another important feature of today’s PC is the ability to multitask. Starting in the late 1980s, multitasking operating systems, such as Windows, made it possible for computers to run more than one program at once. Multitasking enables users to rapidly jump from one program to another.

In a work environment, the impact of multitasking is significant. For instance, I work with two computer monitors. At any moment, I am likely to have open at least 10 windows, including my Outlook Inbox, a handful of emails that I need to address, Westlaw, and two or three documents, either in MS Word or Acrobat.

Studies suggest that this new multitasking environment is not ideal for high-level thinking. When we read in a PC environment, we tend to get distracted by emails or by information on the Internet. With each distraction, it becomes more difficult to follow the thread of a long text, or a densely structured argument.

If our readers are reading in the same sort of environment, it becomes more challenging for us as brief writers to communicate complex legal information to them.

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**3 - Tablet reading: faster information gathering, but more focus**

There have been few published studies about how tablet reading may differ from PC reading. In 2011, as more and more judges reported that they liked reading briefs on iPads, I did some first-hand research. I began using an iPad for reading news, books, and briefs. I found a different reading environment from a PC, and I noticed my reading habits changing yet again.

I expected that reading on an iPad would resemble reading on a computer. In theory, the volume of information should be the same. Both a PC and an iPad are typically connected to the Internet, and therefore to the same world of information. But I found that the iPad makes rapid information gathering easier, more fun, and even faster.

**Portability.** The iPad makes screen reading portable. Studies have found that people who read books on computers tend to read them during the day. Yet people who read books on iPads tend to read from 7 pm to 11 pm. This is because the iPad is easier to read at dinner, on a sofa, or in bed. It also makes reading much easier when traveling.

Compared to a PC or laptop, the iPad makes it easier to open up the device and start reading immediately. For instance, when I take a laptop to a hotel, I need to turn it on, secure a Wi-Fi connection, and then go to the Internet. The process can take 5 to 10 minutes. With an iPad it takes me less than 5 seconds to turn it on by simply opening the cover and pressing an icon to take me to content. The iPad is the perfect device when a user has 60 spare seconds to read.

Most judges who have reported using iPads extensively are judges who read briefs while traveling or out of the office. IPads are particularly useful for circuit court judges who travel to a different city for oral argument.

**Apps.** iPad applications, or apps, make the user’s favorite information sources available more quickly. For instance, to use Westlaw on a PC, the user must
go through several steps: (1) opening the Internet browser, (2) opening the favorites bar, clicking the link to Westlaw, and then (3) entering a password. The Westlaw app for iPad allows the user to skip the first two steps. Although the difference only saves a few seconds, the app makes information sources seem much more accessible.

Apps on tablets are also creating a new way of reading media. Aggregation apps, such as Flipboard, make it easier to process a large quantity of media and information more rapidly. On Flipboard, each of the user’s favorite media sources has its own tile:

When a user touches a tile for a media source, the source opens with four or five short article summaries. Users are able to touch any summary to see the full text article.

In my experience, iPad apps encourage rapid review of summaries to gather information as quickly as possible. Apps have changed my reading habits by making more sources of information more accessible. As a result, I have been gathering information on an iPad much faster than on a PC.

No windows. Compared to a PC, an iPad discourages multitasking within the device itself. It does not allow users to open separate windows running different programs. Although two programs can run at once, a user cannot “see” both programs in the same way as with windows.

In my experience the absence of windows makes a difference. The iPad discourages multitasking, and is better for focused reading than a PC – even if the focused reading is at a rapid pace.

Smaller screen. Tablet screens are smaller than PC screens. For many texts, such as Internet pages, not as much content fits on a single iPad screen. The iPad does make it easy for users to adjust text size and orient text horizontally or vertically. This makes it possible, using an iPad app such as iAnnotate to view an entire brief page on a single screen. But the reader must orient the iPad vertically and size the text fairly small.

When I read a brief on an iPad, I typically size the text so that less than half of an ordinary paper page is visible on the screen at one time. This makes it harder to see where a particular sentence or argument fits within the larger body of text. As a result, visible structure is very important for tablet readers.

III. Advice for writing to tablet readers

The tablet environment encourages focused, rapid information gathering. Tablet users read quickly, often for short durations. Like PC screen readers, they need visible structure in order to convey the overall context of the particular argument they are reading.

These are a few tips for making the brief easier to read for tablet users. Although these tips are focused on the needs of tablet users, they will not detract from the reading experience for PC or paper readers.

1. Visible structure.

The F-pattern shows that screen readers need structure to process information rapidly. This explains why web designers provide extensive structural cues on Internet pages for the benefit of screen readers.

In a tablet environment, the need for structure is even greater. Tablets encourage rapid information gathering and speed reading. Yet with a smaller
screen, it is easier for readers to lose their “place” – that is, to fail to see the relationship of a particular paragraph or sentence with the overall argument.

Useful structural tools include:

- **Frequent headings.** Particularly in an argument, headings are very useful to give the reader the overall logical structure. Because a tablet screen is smaller, tablet readers need frequent headings to remind them of their place in the argument.

- **Outlines.** Outlines help show the overall structure of the argument.

- **Topic sentences.** The F-pattern shows that screen readers are more likely to read the first sentence of paragraphs. This lesson is also true of iPad users, who tend to be rapid information gatherers. A useful topic sentence is one that persuasively summarizes the argument of the paragraph.

- **Lists.** Lists are useful to delineate separate arguments or support. Lists show structure-oriented readers how many points support an argument and where each new point begins.

- **Bullets.** Bullets points are useful to delineate examples or support where the number of points is not important.

2. **Short bookmarks.**

When I ask judges who read briefs on tablets for advice, the one suggestion they almost always give is: “use bookmarks.” A bookmark is a feature in Adobe Acrobat that allows a user to jump from a heading in a table of contents to the corresponding heading in the brief. Different programs, including Acrobat, iAnnotate, and other reading apps, make it easy for readers to see the overall document structure in a bookmark pane, which shows an outline much like a table of contents. For instance, this image of iAnnotate includes a bookmark pane that outlines the argument.

Tablets require an extra step in bookmarking. When Microsoft Word or Word Perfect converts an outline-structured brief to Acrobat, they convert the full text of marked headings to bookmarks. This is not a problem for PC readers because an ordinary-length sentence will fit in the bookmark pane. But it is a problem for tablet readers. On the smaller screen of a tablet, only the first five or six words of a heading will appear in the bookmark pane.

The solution is to edit bookmarks for tablet readers. Even if the brief heading is sentence-length, it is possible to truncate the bookmark. For instance, this entire argument heading may be bookmarked:

The statute of limitations bars Sharpwell’s claim of minority shareholder oppression.

On a PC, the entire bookmark would be available in the outline navigation pane. But on a tablet, it is too long. The solution is for the brief writer to truncate the bookmark to:

Limitations – oppression.

Headings are a good idea whether the brief is read on paper or on a screen. On a tablet, careful attention to bookmarks will make an e-brief easier to use.

3. **No footnotes/some hyperlinks.**

A number of judges have reported that footnotes are
very difficult to read on a tablet. Because of the
smaller screen, footnotes often do not appear on the
same screen as the footnoted text. Judges report that
it is difficult to scroll back and forth between the
footnotes and the text. In the tablet era, the best ad-
vice is to avoid footnotes.

In contrast, most tablet readers report that they pre-
fer some hyperlinks, especially links to important
contracts, statutes, and cases. Since tablets have lim-
ited memory, judges are unlikely to have the entire
record on a tablet. If a tablet-reading judge wishes to
see a cited document, a hyperlink is the only feasible
way to make it available.

There are some technical hurdles for hyperlinking
documents for e-filing and ultimate use on a tablet:

- Hyperlinks to supporting documents are not
  likely to survive e-filing unless the supporting
documents are incorporated in the same .pdf file
  as the brief.

- Briefs with too many attachments are too big to
  be stored on most tablets, which have far less
  memory than the average PC. As a result, it may
  be necessary to select only your best support for
  hyperlinking.

For tablet-using courts, it is important to communi-
cate with court clerks about how to prepare, and file,
hyperlinked documents in a way that makes it possi-
ble for tablet-using judges to use the hyperlinked
briefs.

Conclusion

There is room for debate about whether technology’s
effect on reading is beneficial or harmful to the law.
On one hand, lawyers have long valued the act of
studying law. That is why most American bar asso-
ciations require several years of legal study before an
attorney may be licensed. Technology is discourag-
ing study and deep thinking at the same time that it
encourages rapid information gathering. Because we
are observing this transition as it happens, the effect
of technologies on reading may appear disturbing.

On the other hand, rapid information gathering is a
necessary adaptation to this new rapid, information-
rich environment. Lawyers and judges are knowl-
edge professionals. By using electronic research,
communication, and document management, law-
yers and courts can gather more information in less
time. For instance, although I had a much deeper
understanding of the law when I researched from
“the books,” I cannot imagine giving up the speed,
and breadth of information available through elec-
tronic research. I rarely go back to the books to do
research, just as most lawyers rarely go back to let-
ters mailed on paper.

Whether these changes are beneficial or harmful, the
reality for brief writers is that the reading habits of
our audience are changing. To communicate and
persuade, we must be able to understand how judges
and law clerks are reading and adapt to make our
writing usable for all styles of reading.

As the recent explosion of tablet computing demon-
strates, reading technology is changing rapidly. For
brief writers, it is important keep up with the
changes. We must learn which technologies appel-
late courts are using. And we should ask judges
about how to make briefs more useful in their new
reading environment.
Painting with print: 
Incorporating concepts of typographic and layout design into the text of legal writing documents

Ruth Anne Robbins
The Journal of the Association of Legal Writing Directors is a publication of the Association of Legal Writing Directors. Its mission is to advance the study of professional legal writing and to become an active resource and a forum for conversation between the legal practitioner and the legal writing scholar. The Journal is dedicated to encouraging and publishing scholarship (1) focusing on the substance of legal writing, (2) grounded in legal doctrine, empirical research, or interdisciplinary theory, and (3) accessible and helpful to all “doers” of legal writing: attorneys, judges, law students, and legal academicians.

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Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents

Ruth Anne Robbins

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Editor’s Note: Because the topic of this article is how typography and layout affect the reception of written text, the article’s typography and layout conform with the author’s suggestions rather than adhering to the page design and heading conventions of J. ALWD.

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I. Introduction
“A good picture is equivalent to a good deed.” Rather than debate the relative worth of pictures compared to words, as does the faux Chinese

proverb/cliché on point, attorneys should instead look upon the words on the pages of their lawyering documents as textual pictures unto themselves. Although including charts or other graphics will undoubtedly enhance documents in certain situations, as we well know, attorneys cannot submit a handful of pictures and call it a legal document. But visual effects do enhance learning. Research done by Edgar Dale on the effectiveness of learning based on various means for communicating information resulted in the creation of the widely cited learning pyramid. Not surprisingly, learning by listening appears at the top of the pyramid, with the lowest retention rate. The use of effective visual or audiovisual techniques presumably increases learning retention. Moreover, the look of words themselves affects visual perception. Thus, even with text alone, legal writers can create a picture using typography as paint on the canvas of the page.

In reality, the first thing the reader sees is the overall pattern of light and dark on the page. The careful and considered use of textual effects can help set a persuasive and positive mood for the document itself: a form of *pathos* or emotional appeal. Moreover, as part of establishing the *logos* of the substantive arguments contained in the document, the argument must be

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2. The so-called proverb, “One picture is worth a thousand words,” was written in 1921 by Frederick R. Barnard, the national advertising manager at Street Railways Advertising Company. First used as a marketing slogan, it was edited in 1927 to its current form. The current form appeared next to an advertisement for Royal Baking Powder and was accompanied by Chinese lettering admittedly, according to the marketing manager, as a ploy to create a “Chinese proverb.” See Daryl H. Hepting, What’s a Picture Really Worth, http://www2.cs.uregina.ca/~hepting/proverbial/history.html#27ad (Mar. 1999) (citing The Home Book of Proverbs, Maxims and Familiar Phrases (Burton Stevenson ed., Macmillan Co. 1948)).


5. See sources cited in supra n. 4.


presented in a visually effective manner so the reader can more easily understand the argument and retain more of the material. Visual effects thus are as critical an element of persuasion as proper grammar and adherence to the rules of court and citation form.

Arguably, visual effects also influence the writer’s ethos,8 the credibility of the writer and the writer’s argument. A reader who knows something about basic design principles may react negatively to a document that does not incorporate those basic principles. Lawyers are taught to use every part of a document as an opportunity to persuade. Textual design of the document should be approached with the same attitude, i.e., how can it help the lawyer persuade an audience?

This article seeks to help attorneys do good deeds for their readers by using the look of the words themselves to create a visually effective textual “picture” in lawyering documents. Because I intend to prove that the arguments and suggestions for better textual visuals are not opinion but are grounded in science, the article examines interdisciplinary research. The article also looks at accepted practices in graphic design. The research helps explain that principles of document design should not be considered “optional” or rejected as merely subjective speculation. In fact, most of the accepted principles of document design are grounded in scientific study.

The article begins with some explanation of learning theory and the principles of document design. This part of the paper will discuss some of the “whys” behind font and layout principles. Applied psychology studies have conclusively explained some concepts; others are maxims that graphic artists have agreed upon, even without hard science supporting the conclusions. Like lawyers, these visual design experts use their craft to persuade an audience about something. The article then analyzes some common myths about the visual design of legal briefs and concludes with a synthesized list of suggestions for lawyers to use in their documents. The article also includes an appendix charting the format rules of the state and federal appellate courts, along with the answer to whether an attorney can employ the synthesized design techniques in a particular jurisdiction.

A. Persuasion includes looking good on paper — literally
Persuasion is the backbone of a lawyer’s job. Attorneys who are able to appeal to their audience will establish a measure of credibility, ethos, that will enhance the overall effectiveness of the argument. Although many articles written for the practicing attorney stress the conclusion that “adults are visual learners,” what is more important is the finding that everyone benefits from a visually effective document. Visual persuasion works because we remember best when

8. Id.
we are presented information in images. Because the words on a page present a typographical image by themselves, attorneys must understand the concepts of artful and logical document design. “The regular, repeating patterns established through carefully organized pages of text and graphics help the reader to establish the location and organization of your information and increase legibility.”

Undoubtedly, there will always be critics who argue against changing the current conventional text design of legal documents. In truth, some of this article advises the reader to change the usual formatting of headings and points of emphasis in a legal document; those changes may make the resulting document somewhat “different” in appearance from many legal documents, although not very different from many other published documents. No substantive content or precision will be lost, however, when the writer makes these changes. Proponents of plain English have successfully countered the traditionalist argument based on the ceremonial value of extra and cumbersome language in legal documents. Similarly, proponents of visual effectiveness can withstand the traditionalist argument based only on the value of adhering to conventional norms.

To be fair, there is a growing awareness in the law of the need for visual persuasion. But most of the articles related to lawyering focus on using actual graphics in a jury trial or a persuasive document. There has been less focus on the visual effectiveness of the text itself. The Seventh Circuit Court of

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9. Susumu Kobayashi, Theoretical Issues Concerning Superiority of Pictures over Words and Sentences in Memory, 63 Perceptual & Motor Skills 783, 784 (1996) (discussing Allan Paivio’s “dual coding theory” of memory, that humans activate independent imaginal and verbal codes but that pictures are more likely to be redundantly—dually—encoded and thus better remembered).


Appeals’ website is a notable exception, providing litigants with some advice on typography.\textsuperscript{13} Otherwise, however, only a handful of publications aimed at the practicing bar have addressed the visual effects of text in written advocacy.\textsuperscript{14}

B. We are already behind the curve

Attorneys are often the last to wake up to trends. Our counterparts writing in other professional disciplines are years ahead of us in the scholarship. For example, two business schools, The Wharton School at the University of Pennsylvania, and the University of Minnesota, published studies more than two decades ago on the effectiveness of visual presentation. Those studies concluded exactly as you would expect: visual presentation matters.\textsuperscript{15} Similarly, the National Law Enforcement Trainers Association has published short articles about the use of good typography in presentations.\textsuperscript{16} Moreover, the United States Geological Society has started dictating the use of good visuals in internal memos.\textsuperscript{17} Even European highway traffic experts are using typography principles to design safer roadway signs.\textsuperscript{18} Visual persuasion is a recognized tool. Attorneys need to catch up.

II. The Science Behind the Advice

Making a textual document visually effective means making the document as readable as possible. The more readable the document, the more likely the reader will remember the content. Understanding the scientific studies that form the basis for textual design concepts should help the skeptical legal reader accept the resulting advice about how to visually structure a persuasive

\begin{itemize}
  \item \textsuperscript{13} United States Court of Appeals for the Seventh Circuit, \textit{Guidelines for Briefs and Other Papers}, http://www.ca7.uscourts.gov/Rules/type.pdf (accessed Mar. 18, 2004) [hereinafter \textit{Guidelines for Briefs}]. The website includes information on the difference between monospaced and proportionally spaced fonts, an explanation of the problems with all capital letters in the headings, and an explanation of how fonts are sized. \textit{Id.}
  \item \textsuperscript{14} See e.g. Garner, \textit{infra} \textsuperscript{n. 11}, at 65-73; Sheila A. Huddleston, \textit{Putting the Right (Type) Face on Your Appeal}, 27 Conn. Law Trib. 43 (Oct. 22, 2001).
\end{itemize}
Psychologists have long been interested in reading, how it is learned and how it is best effectuated. Beyond the obvious questions about how a child learns to read, researchers in the field also study adult reading. As early as 1885, psychologists conducted studies of reading in proficient adults.19 The psychologists break reading down into subparts: word identification, recognition, and perception. Word identification and recognition are interrelated, both referring to the recognition of words that are either immediately identifiable based on frequent encounters or recognizable based on infrequent encounters. Perception is the result and leads to understanding of the word’s meaning.20

The relevant psychological and educational studies fall into one of two categories: (A) legibility and (B) organization. Legibility refers to the effects of typographical features on the efficiency of reading perception. Organization involves the overall visuals: the macro structure (or large-scale organization) of a document, particularly the layout design and the use of “advance organizers” and “topical signals,” which we know as roadmaps or summaries and headings. At this point, I need to caution the legally trained reader who is expecting the argument to begin with the macro concepts before moving into the micro issues. This article varies that approach for good reason. All layout maxims derive from the legibility studies, and thus, this article’s readers will have a more difficult time understanding the big picture until after they understand the finer details.

A. The little things do matter: Legibility of text
Legibility is measured by the ease of reading. The most prolific and probably the most conclusive studies were conducted from the late 1920s through the early 1960s. Most of those studies were initially published in the Journal of Applied Psychology. The most famous of the field’s scientists were Miles A. Tinker and Donald G. Paterson. Drs. Tinker and Paterson studied legibility as measured by the speed of reading.21 Factors affecting the speed of reading include the type and size of font, the width of line, and the ratio of ink to white space on the page. Generally, the speed studies involved subjects reading passages that intentionally included one word that “spoiled” the text’s meaning by being out of context.22 The results of the various studies have had a profound effect on graphic designers.

19. Miles A. Tinker, Bases for Effective Reading 15 (U. of Minn. Press 1965) (summarizing his scientific studies on reading and legibility of text).
20. Id. at 10-11.
21. Id. at 115.
22. Id. at 118. For example, there is a one-word spoiler in the following selection: “My mother and I had a nice day together last week. We had lunch at a wonderful little restaurant that I knee. Then we saw a movie.”
1. Stop screaming at me in rectangles: Why all capital letters just don’t work

Perhaps one of the most far-reaching conclusions Drs. Tinker and Paterson reached involved the use of all caps. Contrary to what many people might think, the use of all caps actually dramatically decreases speed of reading as compared to sentence case letters. Sentence case refers to the types of letters you would normally see in a sentence such as this one when it is not written in all caps. During repeated tests on adults, the studies indicated that the use of all caps lengthens the reading time by 9.5% to 19%. The average reader took about 12-13% more time to read all caps. That translates to 38 words/minute slower than using sentence case. Moreover, when the psychologists asked the participants for their opinion of legibility, 90% of the participants preferred lower case type.

In case you didn’t want to read that last paragraph, here it is again, this time in sentence case:

Perhaps one of the most far-reaching conclusions Drs. Tinker and Paterson reached involved the use of capitalization. Contrary to what many people might think, the use of all capital letters in a heading (“all caps”) actually dramatically decreases speed of reading as compared to sentence case letters. Sentence case refers to the types of letters you would normally see in a sentence such as this one. During repeated tests on adults, the studies indicated that the use of all caps lengthens the reading time by 9.5% to 19%. The average reader took about 12-13% more time to read all caps. That translates to 38 words/minute slower than using sentence case. Moreover, when the psychologists asked the participants for their opinion of legibility, 90% of the participants preferred lower case type.

23. Id. at 136. Initial tests done in 1928 studied legibility of all caps using 1.75 minute reading intervals. Miles A. Tinker & Donald G. Paterson, Influence of Type Form on Speed of Reading, 12 J. Applied Psychol. 359 (Aug. 1928) [hereinafter Tinker & Paterson, Influence of Type Form]. Later, in response to critiques, Tinker and Paterson re-ran the studies in 1955 using reading intervals of 5, 10 and 20-minute periods. The results were largely the same. Miles A. Tinker & Donald G. Paterson, The Effect of Typographical Variations Upon Eye Movement in Reading, 49 J. of Educ. Research 171,181 (1955); Miles A. Tinker, Prolonged Reading Tasks in Visual Research, 39 J. Applied Psychol. 444 (Dec. 1955).

24. Miles A. Tinker, Legibility of Print 57 (Iowa State U. Press 1964) (synthesizing several decades of psychological research, mostly studies he personally conducted, on typeface and speed of reading). As a side note, this preference certainly bodes well for the ALWD Citation Manual, which specifies lower case letters for citations in law review articles (I couldn’t resist the plug). ALWD & Darby Dickerson, ALWD Citation Manual 13 (2d ed., Aspen Publishers 2004).
I would be willing to bet that you glanced at the opening paragraph of this section and thought about skipping right over it, certain that you could understand the gist of the article without having to read that paragraph. Or maybe you did skip right over it. “Too much work” your brain told you. Exactly the point: 12-13% more work. And, as every attorney knows, more work for the busy reader equals an unhappy reader. That alone proves the thesis. We should retire the use of all caps in our documents. Using all caps adds nothing to the document and, in fact, detracts from the overall effect. Most people who use them are doing so because they want to include some “contrast” in their documents but have not thought through the best way to do so. In sections III and IV of this article, I will discuss in more detail the importance of “contrast” in document design. Suffice to say at this point that contrast is an important goal. Using all caps, the only choice when we had typewriters, is not the way to achieve it today. Word processors afford us a variety of more legible — and thus better — alternatives.

Psychologists have postulated theories about the all caps phenomenon. The most commonly cited reason for the slow down is the way we see and read words. Some scientists believe that adults read at least in part by the shape of the word, primarily the top shapes of words. The legibility depends on the ascenders; letters above the midline such as “b” and “t” rather than descendents such as “p.” For example, look at this graphic.

You can probably easily read these words despite the deletion of the bottom half.

The same is not necessarily true if you erased the top halves of the words; without the top half, the words are harder to read. The use of all caps precludes reading by shape and instead shows the reader only monotonous rectangles. Our eye naturally wants to glide over and ignore the letters because they are the same height. In order to counteract this tendency, the reader is forced to stop and read each individual letter because there is no distinction

2003) (specifying that most information in legal citations be presented in ordinary type with italics or underlining used for specific elements rather than the large and small capital letters once used for book titles and law reviews).

25. See infra pts. III and IV.
26. Lohr, supra n. 10, at 100.
between the letters.\footnote{29} This takes extra time, not something the legally trained reader often has to spare.

\section*{MONOTONOUS RECTANGLES}

Primarily, the upper contour of the word determines the recognizability of a shape. Although in normal reading people do not read solely by shape perception, we do tend to recognize more “sight words” by shape than by individual letters.\footnote{30} Sight words are those words very familiar to the reader. Young readers often learn to memorize sight words such as “and” “the” “or.” As we mature, our sight word list expands.\footnote{31} Presumably, lawyers have added legal terminology to their list of sight words: “negligence,” “statutory,” and the like.

The experts did not just perform their studies in a vacuum, but instead voiced the real-world implications of their studies: “in view of the evidence . . . that capitals greatly retard speed of reading in comparison with lower case . . . it would seem that all-capital printing should be eliminated whenever rapid reading and consumer views are a consideration.”\footnote{32} As the author of a popular layperson design book advises, “the PC is not a typewriter.”\footnote{33} Now that typewriters are a thing of the past, it is time for attorneys to retire the ill-suited practice of using all caps in headings, boilerplate, and any other place where the object is to emphasize rather than de- emphasize the content. Many other disciplines have embraced this advice, and law should now do the same.\footnote{34}

\begin{itemize}
\item[29.] Tinker, supra n. 24, at 57; Lohr, supra n. 10 at 100.
\item[30.] © Lynch & Horton, supra n. 10, at http://www.webstyleguide.com/type/case.html. For a discussion on the scientific theory, see Tinker, supra n. 24 at 60; Miles A. Tinker & Donald G. Paterson, Influence of Type Form on Eye Movements, 25 J. Experimental Psychol. 528 (Nov. 1939).
\item[31.] Tinker, supra n. 19, at 21-22.
\item[32.] Id. at 21.
\item[33.] Tinker, supra n. 24, at 61.
\item[34.] Robin Williams, The PC is Not a Typewriter (Peachpit Press 1992) [hereinafter Williams, The PC is Not a Typewriter]; see also Robin Williams, The Non-Designer’s Type Book 47 (Peachpit Press 1998) [hereinafter Williams, The Non-Designer’s Type Book]. She is a graphic designer, not the prolific comedian.
\item[35.] Even those attorneys responsible for updating the state UCC provisions should advise against the common usage of all capitals to satisfy the requirement in Section 2-316 that the exclusion or modification of an implied warranty be done by “conspicuous” language in the writing. Instead, using layout such as suggested at the end of this article will better guarantee conspicuousness.
\end{itemize}
Although common, using initial capital letters isn’t the perfect solution. Initial caps include extra ascenders or “bumps” which can interfere with the recognition of sight words.\(^{36}\) Instead, better-designed documents will avoid the use of caps altogether, except where the rules of grammar or court absolutely require them.

2. *I scream, you scream: A caution on using other cueing devices*

Although using all capital letters is a bad idea, employing some cueing devices is nevertheless important. The same researchers who studied the use of all capital letters also researched the use of cueing emphasis with *italics* and *boldface*. *Italics* also retard reading speed, up to 10% in situations that also included poor lighting and small type size.\(^{37}\) Normally, however, the use of italics slows reading time up to 4.5% in a five-minute reading span.\(^{38}\) Moreover, the same studies revealed that most test participants indicated a dislike for italics as compared to lower case letters.\(^{39}\) At least one writer in the business world claims that people ignore italics and that they should be avoided.\(^{40}\) But a popular professor of educational technology currently researching in the field disagrees, at least when italics are used for only a few words.\(^{41}\) The science really supports either proposition. Based on the hard numbers, using italics is not as bad as using all caps, and italics in a citation probably doesn’t hurt anything. But the wise attorney would do well to avoid italicizing a whole passage.

Underlining has not undergone the same testing rigors as the use of all capital letters or italics. Instead, most of the studies involving underlining have looked at “mixed media,” that is the combination of visual effects such as underlining, italics, and boldface. The purported reason for using mixed media is to “change the pace” or level of emphasis. Drs. Tinker and Paterson studied what they referred to as a medley of typographical arrangements and found results similar to those for all capital letters — a slowdown in reading speed of approximately 8-11%.\(^{42}\) Again, although it is impossible to parse out the exact percentage of speed reduction that underlining caused, it seems likely that underlining does slow reading rates. Underlining skews the visual pattern of letters as does the use of all capital letters.

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\(^{37}\) Tinker, *supra* n. 24, at 65.

\(^{38}\) Tinker & Paterson, *Influence of Type Form, supra* n. 23, at 359; Tinker, *supra* n. 23 at 444.

\(^{39}\) Tinker, *supra* n. 23, at 55. According to the study, 96% of the participants preferred non-italicized print.

\(^{40}\) Lohr, *supra* n. 10, at 100 (citing Claire Raines, *Visual Aids in Business: A Guide for Effective Presentations* (Crisp Pub. 1989)). Dr. Lohr teaches at the University of Northern Colorado. She conducts research emphasizing visual design to support cognitive processes.

\(^{41}\) Id.

\(^{42}\) Miles A. Tinker & Donald G. Paterson, *Readability of Mixed Type Forms, 30* J. Applied Psychol. 631, 634 (Dec. 1946); *we also* Tinker, *supra* n. 24, at 62-63.
Boldface, on the other hand, does not appear to seriously slow reading speed. Boldface letters are perceived at a greater distance than letters in lower case print. Moreover, Drs. Tinker and Paterson discovered no difference in the speed of reading boldface letters. Thirty percent (30%) of the test participants actually preferred boldface. Based on these results, the psychologists recommend boldface as the cueing device of choice when the writer wishes to add emphasis.

3. Que serif serif . . . The great font debate
Why do we seem to gravitate towards Times New Roman or Garamond? What about using Arial? Just how awful a choice is Courier? Should you single or double-space your document? All of these questions have to do with typeface design. Many articles have been written about typeface, more than a reader could possibly hope to digest here. Or more than a reader might even be interested in digesting. Instead, I am going to focus only on distinguishing between broad classes of fonts.

Serif or not to serif? Research reveals flexibility
First: an oversimplified but very fast crash course in font lingo. Fonts are grouped in families according to certain visual attributes. Although there are six families, the most important two for attorneys are those most commonly used in traditional text, serif and sans serif fonts. A “serif” or “wing” is the extra little line dangling on the bottom of letters. Look carefully at the bottoms of the letters in this and the next sentence. You will most easily see these lines on the bottoms of the letters “m” and “n” as well as on the capital “Y.” Serif fonts all have those danglers. Sans serif fonts, on the other hand, have no such extra danglers, hence the “sans,” French for “without.” In other words, sans serif is “without wings.” A common sans serif font is Arial. Tahoma and Univers are other examples of sans serif type.

The popular view among graphic design experts is to use serif fonts, like Times or Garamond, for large blocks of text. Those designers conclude that

44. Tinker, supra n. 24, at 62.
45. Id.; accord Williams, The PC is not a Typewriter, supra n. 34, at 53.
46. Any treatise on typeface will provide this information. See e.g. Lohr, supra n. 10, at 71; Robin Williams, The Non-Designer’s Design Book 131 (2d. ed., Peachpit Press 2003).
47. There are other categories of course, and there are subcategories within the major font families. For example, serif fonts are also sub-grouped according to the shape of the serif and the slant of the thin/thick emphasis of certain letters such the letter “o” (deliberately enlarged so that you can see the thick/thin slant). Fonts like Times New Roman are part of the subgroup “old style serif” because the serifs are slanted and the emphasis of the letters is on a slant. Look at the above “O” to see what I mean.
serif fonts read more easily in blocks of print text.\textsuperscript{48} They reason that reading is easier because the serifs “lead the eye from one letter to the next.”\textsuperscript{49} But there is only minimal science to support the theory. The Tinker and Paterson studies demonstrated a slight 2.2\% difference in reading speed between Roman and “Kabel”\textsuperscript{50}; the latter is a sans serif font but not one typically in use. [This is Kabel.] In a more recent study, researchers found that overall the serif fonts had greater legibility than sans serif.\textsuperscript{51} The percentage differences, however, were still relatively low compared to the dramatic slowdowns caused by all capital letters.\textsuperscript{52}

Because there is little conclusive evidence on the topic, at least one expert has shrugged off the debate and instead recommended that writers choose their fonts holistically based on consideration of the many competing factors.\textsuperscript{53} The most typical serif fonts are \textit{Times New Roman} and Garamond (the body text of this article is 11-point Garamond). Some typical sans serif fonts include (all in 12-point) \textit{Arial}, \textit{Franklin Gothic}, \textit{Avant Garde}, and \textit{Univers}.\textsuperscript{54} I will discuss the use of both serif and sans serif fonts again in Part III and Part IV of this article under the topic of “contrast.”\textsuperscript{55}

Proportional spacing versus monospaced fonts: Rome is nicer than the Valley of Dead Typewriters

A font will have other recognizable attributes besides serifs (or not), for example, its width. Look at these two examples; both are serif fonts:

\begin{itemize}
  \item This is Courier 12 point.
  \item This is Times New Roman 12 point.
\end{itemize}

\textsuperscript{48} Williams, \textit{supra} n. 46, at 132; Williams, \textit{The PC is Not a Typewriter}, \textit{supra} n. 34, at 49 (claiming that “extensive studies” support her proposition that serif fonts are more “readable” as a word units whereas sans serif fonts are more independently legible with respect to independent letters); \textit{contra} Lohr, \textit{supra} n. 10, at 82, 90 (claiming that instructional design research shows no significant difference between serif and sans serif).

\textsuperscript{49} Lohr, \textit{supra} n. 10, at 82 (citing Robin Williams and J. Tollett, \textit{The Non-designer’s Web Book: An Easy Guide to Creating, Designing, and Posting Your Own Web Site} 214 (Peachpit Press 1994). In fact, serifs originated during the days of stonecutting in Rome; the cross strokes that we call serifs were used to keep the stones from chipping at the end of the letters. Lohr, \textit{supra} n. 10, at 73.

\textsuperscript{50} Tinker, \textit{supra} n. 24, at 48; Donald G. Paterson & Miles A. Tinker, \textit{Studies of Typographical Factors Influencing Speed of Reading X. Style of Type Forms}, 16 J. Applied Psychol. 605 (Dec. 1932).


\textsuperscript{52} See \textit{supra} pt. II.A.1.

\textsuperscript{53} Lohr, \textit{supra} n. 10, at 71.

\textsuperscript{54} Id. at 82; Williams, \textit{supra} n. 46, at 135.

\textsuperscript{55} See infra pts. III.A. and IV.A. In case you are impatient, I am going to recommend using serif fonts in the body of the text and sans serif in the headings as a way to contrast the two parts of the document and as an alternative to using all capital letters in the headings. All of the samples were provided in 12-point format so that you could see the variations in overall sizes.
Notice how the Times New Roman takes up less space on the line even though it actually has more characters on the line (29 including spaces versus 25). Why is that?

There are two reasons. The first is that 12-point size can mean different things in different fonts simply because the measurement is taken according to the “x-height” of the font, a variable number based on the height of a lower case “x” rather than an average of all the letters in the font.\(^\text{56}\) The second reason is that Courier font is a “monospaced” font, which means that each letter takes up the same amount of width regardless of the natural letter shape. The letter “i” and “l” use the same width space as the letter “w.” In contrast, Times New Roman is a proportionally spaced font, so the “l” and “w” have different widths.

Here is another visual comparison:

| will (Courier) | will (Times New Roman) |

The bottom line: proportionally spaced fonts are easier to read. Drs. Tinker and Paterson demonstrated that American Typewriter, another monospaced font, causes a 4.7% reading delay.\(^\text{57}\) That equals almost fifteen (15) words per minute. Dr. Tinker concluded that this slowdown was “significant.”\(^\text{58}\) Moreover, in the last version of the test that Dr. Tinker ran, the test readers ranked the fonts in terms of preference; they rated five proportionally spaced fonts ahead of the monospaced type.\(^\text{59}\)

**Bigger isn’t necessarily better**

The Tinker–Paterson studies are not as helpful with respect to font size questions because the studies focused primarily on sizes smaller than what most court rules require. Most of the 1,500 journals the researchers studied used either 10-point or 11-point size fonts. Textbooks use 10-, 11-, or 12-point font, with 11-point being the most common.\(^\text{60}\) For that reason, the researchers chose to test legibility relative to a 10-point Roman norm (similar to Times New Roman) and relative to a line length slightly longer than 3

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56. A point is 1/72 of an inch so a 12-point “x” determines the size of the font even if all the other letters in that font are much larger, proportionally. Look again at the examples in the serif versus sans serif discussion. They are all 12-point. See the differences?

57. Tinker, supra n. 24, at 47-48.

58. Id. at 48.

59. Miles A. Tinker, *Criteria for Determining the Readability of Type Faces*, 35 J. Educ. Psychol. 385 (Oct. 1944) (results reproduced in Tinker, *supra* n. 24, at 52 tbl 4.4). Proportionally spaced fonts also dispense with the need for two spaces after ending punctuation. The reader can see the end of one sentence and beginning of another without the second space. Historically, writers placed two spaces after ending punctuation because of the problems with monospaced fonts. See also Williams, *The PC is Not a Typewriter*, supra n. 34, at 13-14.

60. Tinker, *supra* n. 24, at 67-68.
inches.61 Although the study included 12-point and 14-point types, 14-point type was considered the outlier, the farthest from the norm. The results showed that readers considered 11-point Roman the most legible for the line length.62 The larger 14-point font was more than 6% slower to read and 12-point was more than 5% slower.

There is no definitive scientific answer, however, to whether court rules should require 12-point or 14-point font, given a page that is 8.5 inches by 11 inches. The studies unfortunately did not test the relative legibility of font sizes using lines of text closer to what normally appears on the standard paper size used for most legal documents. There is some discussion that larger font sizes such as 14-point Roman cause longer fixation pauses, which in turn slows reading.63 Dr. Tinker took care to caution that there was no easy way to draw a final conclusion as to optimal type size because other factors contribute to the equation, such as line length and line spacing.64 Nevertheless, experts in the field recommend reserving 14-point and larger sizes for headings as opposed to blocks of text.65

4. Length doesn’t matter (well, maybe it does, a little)

The length — sometimes also referred to as the width — of the text lines affects legibility because of the way the eye reads a document. When we read, our eyes shift from one set of words to the next. Between each set, our eyes must pause before moving to the next set. These stops are called “fixation pauses.” If a line of text is too short, readers cannot effectively employ their peripheral vision, and that appears to reduce legibility.66 In contrast, if a line of text is too long for the type size, readers must pause for a greater length of time while their head moves and their eyes search for the beginning of the next line.67 When there are fewer fixation pauses, there is greater retention and comprehension.68

The optimal line length depends on the size of the type. Unfortunately, the standard 6.5 inches of 12-point type in common use, that is, one-inch margins on the left and right sides of an 8.5-inch-wide page, decreases legibility by

61. Presumably this size was studied because many journals are printed in two-column format as are cases in West reporters and Westlaw and Lexis case downloads.
62. Tinker, supra n. 24, at 71 tbl. 5.2.
63. Id. at 72 tbl. 5.4
64. Id. at 73.
66. Tinker, supra n. 24, at 83.
more than 3%. Based on those studies, more modern publications claim that the ideal line length for 12-point type should range from 2.75 to 4 inches. Modern examples of text using narrow columns for printing include newspapers and online legal research documents from Lexis/Nexis or Westlaw.

Line length also helps explain why readers dislike the visual impact of a block quote. If the reader becomes used to reading more than six inches of line length, and then must switch to a shorter line length, the reader’s “pleasant reading rhythm has been broken.” Lines that are too short can tire the reader because the eye must find the next line too frequently.

5. One lead or two? Line spacing issues
The United States Supreme Court’s font rule dictates “line leading” in documents. As used in this context, “leading” is synonymous with spacing between lines of text. Pronounce leading to rhyme with “sledding” because it derives from the chemical element lead, the metal that protects Superman from kryptonite. In the days when printers used metal forms for typeset, they placed strips of lead between the lines of type. The lingo survived the practice.

You may have noticed that the common word processing programs permit the user to set spacing to “exactly __ points.” A point is 1/72 of an inch. In other words, the writer may set the spacing between the lines to 1/72 of an inch. Usually the leading is automatically set to be 20% larger than the font size. A 12 point font will have 14.4 point leading. Naturally, the automatic settings derive from the Tinker studies. Dr. Tinker concluded that the optimal line spacing varies with font size and line length. For the typical 8.5- by 11-inch paper with one-inch margins on either side and using 12-point font, the

69. Id. at 83 tbl. The table refers to 36 picas; 36 picas equal 6 inches (one pica = 1/6 inch) and carries a 3.2% reduction in legibility.
71. Carter, Day & Meggs, supra n. 68, at 91.
72. Id.
73. S. Ct. R. of Ct. 33; see infra Appendix (listing the font rules for the state and federal appeals courts).
74. Williams, The PC is Not a Typewriter, supra n. 34, at 41.
75. Lohr, supra n. 34, at 41. accord Williams, The PC is Not a Typewriter, supra n. 34, at 41. To reiterate, a “point” is 1/72 of an inch. A font’s size is determined by the size of its lower case “x” and that is why Times New Roman in 12 point looks a lot smaller than Arial in 12 point. The lower case “x” of each font is the same size.
76. Tinker, supra n. 24, at 88-107; see also Lohr, supra n. 10, at 96.
77. One inch margins on the left and right sides will leave 6.5 inches of line length. That equals 78 picas, each “pica” is 1/6th of an inch.
line leading should be somewhere between 1 to 5 points larger than the type size. This is slightly larger than single spacing but not as large as 1.5 spacing.

6. The 50% rule: Balance the white space
Effective use of white space — the margins and the amount of text on the page — also affects legibility. At the time of the Tinker and Paterson studies, the average book devoted a little more than 50% of the page to print. This is known as the “50%” rule and still holds true today in most graphic design. Drs. Tinker and Paterson experimented with the white space ratio but found that most people overestimated the amount of ink actually on the paper. When more than 900 college students were asked their opinions about the common “50% rule” practiced by most publishers, 89% of students agreed with the rule of thumb for legibility and aesthetic reasons. Those students who disagreed cited concerns about wasted paper costs rather than legibility. According to one expert in adult learning theory, a pleasing amount of white space does not actually affect legibility, “but the reader thinks it does.”

B. Organization, or “bottom line up front”: Why headings and roadmaps work
Educational psychologists have also looked at the visual effectiveness of headings and summary or roadmap paragraphs. In those studies, headings are also called “signaling topic structures” and summaries or roadmaps are called “advance organizers.” Both signals and advance organizers help provide the reader with the hierarchical structure of the material. Ultimately, this contributes to better recall because the reader better understands the relationships among subtopics.

1. Roadmaps lay the groundwork for memory
Advance organizers such as roadmaps or summaries create a learning base that the reader can call upon as pre-learned material when later introduced to the material in more depth. The information is learned the first time in the advance organizer and placed into working (short-term) memory if the related text is read immediately afterwards. Curiously, the educational psychologists have also found that a slight delay between the advance organizer and the

78. Tinker, supra n. 24, at 92.
79. Donald G. Paterson & Miles A. Tinker, The Part-Whole Proportion Illusion in Printing, 22 J. Applied Psychol. 421 (August 1938); see also Tinker, supra n. 24, at 111-12.
80. Tinker, supra n. 24, at 113.
81. Id.
82. Laubach & Koschnick, supra n. 70, at 36.
associated text helps improve the memory performance, in theory because the information has been processed into long-term memory. 85

These studies have practical implications in legal documents including briefs, memos, or disclosure documents such as prospectuses. A “summary of the argument” section or a roadmap paragraph between hierarchical sections of the legal discussion can provide a knowledge base for the later subsection containing more detail.

2. **Headings chunk the information**

Headings help the reader search effectively for answers to questions about the text. They also provide the super-structure of the document, which leads to better concept recall.86 Breaking information up into “chunks” under headings also makes sense from a memory standpoint. Cognitive psychologists have long known that “chunking” information raises recall rates.87

Chunks are groups of related information. Research concludes that human short-term memory can process seven plus or minus two (7±2) chunks at a time without losing information.88 Chunking information can help increase the likelihood of retaining the information in the working memory.89 Without it, the reader is overloaded and may completely stop processing the information.90

Chunks are organized by some sort of hierarchy, such as in sequence or by category. Chunking happens in everyday life. For example, driving directions and recipes are chunked according to sequence. Directories and indexes are organized around topics or alphabetically. Just looking at this very page shows you an example of chunking; the page is divided into paragraphs. Each paragraph is a chunk of text and the paragraphs are arranged in a hierarchical order, one paragraph is dependent on the previous paragraphs.

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85. *Id.* at 295.
87. George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity For Processing Information*, 63 Psychol. Rev. 81(1956) (also made available online by Stephen Malinowski with the author’s permission at http://www.well.com/user/smalin/miller.html (accessed Mar. 18, 2004)).
88. *Id.; see also Lohr, supra n. 10, at 206.
89. *Id.* Phone numbers are the classic example of the phenomenon; it is much easier to remember a phone number when it is broken down into “chunks” of 3 and then 4 numbers, rather than a list of 7 numbers.
90. For a quick and persuasive self-test that proves memory improves with chunking, visit the At Bristol website, *Your Amazing Brain, Your Memory, Memory Chunks*, http://www.youramazingbrain.org/yourmemory/default.htm; select Memory Chunks (accessed July 1, 2004).
Headings help create those chunks for the reader, thus improving the likelihood of the reader recalling the information. As Dr. Lohr succinctly states, “[c]hunking must work, or we wouldn’t be using it so much.”

There is one caveat to this generality, however. In some studies, headings helped the reader recall the structure of the information package better than documents without headings, but not necessarily more of the details. For that reason, attorneys should take care to make those headings really count. If readers will better recall the headings than the details, the headings should be persuasive and contain the conclusion the attorney wants the reader to reach.

III. How Graphic Designers Apply the Science: the “CRAP” of the Document

Graphic designers have studied legibility factors and have used the science as a basis on which to construct textual design principles. Graphic designers, like attorneys, are paid to create persuasive documents that maximize comprehension and retention of the printed material. In light of the legibility studies discussed earlier, the methodology of large-scale design in a purely textual document becomes relatively easy to comprehend. Graphic designers refer to four major elements in a document’s structure, which you can remember by Robin William’s acronym “CRAP”:

- Contrast
- Repetition
- Alignment
- Proximity

The acronym “CRAP” is wonderfully memorable and even parallels legal writing’s beloved “CRAC,” but it makes little sense to talk about the four elements in that order. Instead, for ease of comprehension, this section is organized as follows:

- Contrast
- Proximity
- Alignment
- Repetition

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91. Lohr, supra n. 10, at 206.
92. Glover, supra n. 84, at 295.
93. Williams, supra n. 46, at 13. With apologies to the sensibilities of the reader. But it grabbed you, didn’t it?
A. **Contrast: Vary fonts, not capitalization within the same font**

To present a hierarchy in the information, design experts use contrasting typefaces.\(^{95}\) This helps chunk the material. Most people implicitly understand this principle. As the science has proven and this article has stressed, however, using all capital letters is the worst thing you can do if you want your headings to be legible and easy to read. Oregon and South Dakota have recognized this research finding and limit the use of all capitals in briefs.\(^{96}\)

Instead, graphic designers teach us to develop contrast by varying the look of the letters. There are two related ways to increase contrast on the black and white printed page: vary heavy/dark/boldface lettering with light lettering, and vary the style of the letters, in other words, the font families.\(^{97}\) The simplest way to do this is to employ both a serif and a sans serif font in the document. Moreover, because at least some designers believe that serif fonts are easier to read when dealing with large amounts of text, it makes sense for attorneys to choose serif fonts for the body of their documents.

Sans serif fonts — the fonts easier to read on computers, overheads, and the like — provide a visual contrast to serif fonts. As most attorneys already implicitly know, headings are supposed to stand out in a legal document. Headings should visually count. Providing visual contrast goes a long way to further that principle. As one designer suggests, “if two items are not exactly the same, then make them different. Really different.”\(^{98}\) Thus, assuming you are using a serif font such as Times New Roman or Garamond for your text, sans serif fonts are a good alternative for headings. To provide more visual contrast, use boldface or a heavier weight sans serif font (such as **Arial Black** or **Futura Md BT**)

This article uses contrast in its design. The headings are written in Univers and I have boldfaced the headings to provide a dark/light contrast. **So my headings look like this.** I have varied the font size to help show the overall hierarchy of the headings. Additionally, I have included some use of italics, taking the slight risk that there will be a decrease in reading speed, but keeping my headings short enough, no more than one line, to minimize the impact. I have certainly avoided any use of all capital letters. Robin Williams believes in an even greater weight to the boldface, something like **Arial**
Black. That looked too radically different for me to use in this article. I acknowledge the better contrast, but followed a personal preference.

Ultimately, contrast helps the reader chunk the information because the writer can control where the reader looks first. The overall arrangement of the chunks influences how the document is initially perceived. The writer thus needs to consider the initial impression.99 In law, particularly in brief writing and long contracts, this leads to a caveat about following the general advice for headings when designing the Table of Contents page. Because the Table of Contents should itself be a well-designed visual document, attorneys may wish to refrain from repeating the heavy fonts of the headings as they appear within the document. A table of contents that repeats the heavy fonts from the interior of the document will disturb the 50% rule of white space to ink and will be less legible. The writer will have unwiselegibly sacrificed legibility for uniformity and the reader may well forego looking at the “big picture” that the Table of Contents normally provides. Court rules and common practices do not require attorneys to duplicate the font and layout specifics of the headings as long as the wording itself is duplicated in the Table of Contents.

B. Proximity: Keep related items related in layout
Because writers want their readers to be able to understand the hierarchy when they look at the document, as well as when they read it, writers must also consider proximity as a design principle. Proximity is important because aligning items on the page “creates a stronger cohesive unit.”100 The science indicates that too many fixation pauses create a more difficult document; thus, the writer should strive for more visual uniformity. For example, a heading that is followed by too many vertical spaces (hard returns) will create too many fixation pauses and a less legible document.101

Proximity, in other words, provides organization.102 Placing things closer together denotes relationship whereas the opposite is true when items are spaced apart. For example, one of these lists shows a definite hierarchical relationship and one of the lists does not:

<table>
<thead>
<tr>
<th>Stressful events</th>
<th>Stressful events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Major illness</td>
<td>Major illness</td>
</tr>
<tr>
<td>Public speaking</td>
<td>Public speaking</td>
</tr>
<tr>
<td>Moving</td>
<td>Moving</td>
</tr>
</tbody>
</table>

100. Williams, supra n. 46, at 31.
101. Id. at 24-25.
102. Id. at 48.
Elements within the hierarchy may be separated to denote that relationship. The writer can easily do this in a textual document by manipulating white space, particularly between paragraphs. Adding one hard return between paragraphs will create the visual break needed to show the simple paragraph organization. In contrast, keeping the headings close to the beginning paragraph of the section will show that the paragraph belongs with the heading. So, rather than adding a space after a heading, the writer should instead consider using no space between the heading and the start of the section. The extra space should be placed between the end of one section and the beginning of another.

Here is a visual of what I just explained as the best option:

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End of subsection

Heading
Start of new subsection
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A legal writer concerned about exceeding maximum page limits can gain back some extra room by using only one space between sentences and by using a space between paragraphs rather than a space plus an indented first line of the new paragraph. The practice of using two spaces between sentences and indented first lines to begin the new paragraph are merely remnants of days when attorneys had only typewriters at their disposal and were forced to use a monospaced font. Using a monospaced font requires two spaces between sentences in order to provide enough visual cueing through width, but using two spaces with proportionally spaced fonts will create extra gaps, which will cause the reader to experience a greater fixation pause between sentences as her eye searches for the next phrase.

Indenting can lessen legibility if the reader experiences an added delay while searching for the beginning of the new line. Moreover, if the paragraph already has a hard return between the end of the last paragraph and the beginning of the next, there is no need to add an additional break of indenting unless line spacing requirements suggest otherwise.

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103. Carter, Day & Meggs, supra n. 68, at 97 (“An important goal for a designer is to distinguish typographically one thought from another, clarify content, and increase reader comprehension. Clear separation of paragraphs in a body of text is one way to accomplish this goal.”) The authors caution against using a hard return if the writing is all short choppy paragraphs because the extra space could be “very disturbing.” Id.

104. Obviously, if the court rules require a monospaced font such as Courier, then the attorney should weigh the relative visual advantages of the suggestions made in this paragraph. Williams, The PC is Not a Typewriter, supra n. 34, at 13-14; Williams, The Non-Designer’s Type Book, supra n. 34, at 191-92.

105. The general advice to use an extra space between paragraphs rather than an extra space plus an indented first line is premised on optimal line leading. For 12-point Times New Roman, the optimal line leading is something slightly less than 1.5 spacing. See supra pt. IIA.5.
C. Alignment

1. The body of the text

Popular design author Robin Williams complains that “[d]esign beginners tend to put text and graphics on the page wherever there happens to be space, often without regard to any other item on the page.” Alignment concerns lining the text up with a vertical line somewhere on the page. With text, the three common alignments are “right aligned,” “centered,” and “left aligned.”

This line is right aligned.

This line is centered.

This line is left aligned.

Left aligned is most commonly used in text and according to experts is considered the “easiest to read.”107 For that reason, attorneys should probably stick to that option.

2. There isn’t much justification for justified text

Design experts have some disagreements when it comes to justifying text, but the majority seems to favor leaving the text left aligned rather than fully justified. Text that is “fully justified” is lined up at both the left and right sides. This is common practice in professional printing. The legibility danger is the odd spacing that can result between letters or words. And, even with the correcting mechanisms available in word processing programs,108 some experts claim that “justified text blocks often suffer from poor spacing and excessive hyphenation and require manual refinement.”109 The problems are compounded when the paragraph contains a legal citation. By the way, I fully justified this paragraph so that you could see the difference. Notice the extra spacing between some of the words?

For desktop publishing, then, the choice should be different. According to some experts, keeping the text left-aligned affords the greatest legibility because there is no adjustment needed to word spacing and because “the resulting ‘ragged’ right margin adds variety and interest to the page without interfering with legibility.”110

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If, however, the writer is not able to choose the leading, the advice may change. For example, if a court rule requires a document to be double spaced, then indenting may be a better visual option than inserting an extra space between paragraphs.

107. Lohr, supra n. 10, at 163; accord Williams, The Non-Designer’s Type Book, supra n. 34, at 116. Obviously the authors are talking about reading in languages that move from left to right. Hebrew, on the other hand, might not be as readable in a left-aligned format.

108. The technical term is “kerning.” Most word processing programs have this capability. See also infra n. 114 and accompanying text.


110. Id.
Robin Williams gives conflicting advice with respect to “fully justified” text. In one book, she advises the writer to keep the right side as “smooth as possible.” In another book, she cautions that fully justified text can create odd spacing between letters and words. Additionally, she claims that professional publishers are moving towards leaving the right margin unjustified. The concept of “kerning,” not discussed in this article, theoretically could help with that problem but is most often used to adjust spacing between letters of large fonts thirty (30) points and larger.

3. Centered and left-aligned text don’t match
Finally, design experts also warn writers away from using more than one text alignment on the page. The contrast and visual cueing a heading demands does not also require a centered alignment to alert the reader. In fact, it might be less legible that way, especially if the writer mixes indents with centered headings; the result is a “messy page” with lines in too many places. Last, mixing alignments can also make it difficult for the reader to determine where in the outline hierarchy a centered heading belongs.

D. Repetition
Attorneys should easily understand this concept as it applies to legal documents: uniformity throughout the document’s overall design. If a heading that is numbered I. (Roman numeral) appears in a certain size and type, then the next Roman numeral should appear in the same size and type. Spacing between headings should remain consistent throughout. Chunking styles should also repeat. Readers crave consistency because it helps organize the information and unify the hierarchy. Thus, attorneys should carefully edit to guarantee that the style of each outline level is consistent throughout the document.

IV. What am I Supposed to do About It?
Translation into Legal Document Design
One easy answer would be to use a font specifically designed for lawyering documents. Other disciplines have developed fonts specific to their discipline. Times Roman derives its name from the London Times, which commissioned the font in 1931 for its newspaper. Web designers have also introduced a font named “Georgia,” which is a serif font that is easier to read on a screen than the

111. Williams, The Non-Designer’s Type Book, supra n. 34, at 116.
112. Williams, The PC is Not a Typewriter, supra n. 34, at 45-46; see Lohr, supra n. 10, at 95.
113. Williams, The PC is Not a Typewriter, supra n. 34, at 45-46.
114. Lohr, supra n. 10, at 94.
115. Williams, supra n. 46, at 38-48.
116. Id. at 40-41.
117. Id. at 55.
common print serif fonts.¹¹⁹ Perhaps the most interesting of the specific fonts comes from the European Committee for Uniformity of Type Design and Type Safety, which conducted an international design contest in order to obtain a font legible at high speeds in order to best serve and protect European drivers.¹²⁰ The winning entry combined the interdisciplinary skills of psychologists, engineers and graphic designers and introduced the world to “Euroface.”

According to the press release, Euroface is 42% more legible at the speed of 80 km/h (about 48 mph) than standing still, and at 120 km/h (about 72 mph) legibility reaches a legibility factor “that is not far below... the absolute legibility world record measured in 1982 in simulated conditions in a research and test centre in Nizhniy Olenek near the Arctic Circle by a team of Russian typographers.”¹²¹

We need something like that in law to streamline the fonts rules of the various courts in the country. Perhaps someday, a group interested in furthering legal writing will commission such a font.

In the meantime, by incorporating all of the concepts of Parts I and II, the science and graphic design concepts, I have generated an example format for a well-designed textual document. This is only one potential formula; there are certainly other options and there may even be better options.¹²² I would be negligent if I did not point out that a few courts’ rules will not permit following this suggested format. The Appendix following the article charts the font rules of state and federal courts; it includes an entry that answers the question of whether the sample formatting may be used in that court. Also worthy of note is the Seventh Circuit’s impressive website discussion of graphic layout concepts.¹²³
Here is the suggested formatting. As you search for a sample document, keep in mind that this article was written using the sample format style.

A. Contrast

Headings
► Incorporate them to help chunk the material for the reader.
► Use sans serif and in a dark/heavy weight such as Arial (bolded) or Arial Black.
► Vary the size of the headings to show hierarchy, moving from larger to smaller.
► Avoid using all capital letters as a way to show contrast or hierarchy or anything else.
  • This is the #1 recommendation this article gives.
  • The research is so conclusive: words set in all caps are the least legible of all.124
► Use italics minimally but as needed to show hierarchy or cueing.
► Indent lightly to help connote hierarchy, but don’t center the headings.
► You do not need to use the same contrasting dark sans serif font in your Table of Contents as you did in the headings contained in the document’s body if it would be too hard to read.
  • The principle behind document design is always to maximize legibility.
  • Don’t feel obligated to compromise the “50% rule” for uniformity’s sake.
  • No court rules require font uniformity between the Table of Contents and the body of the document.

Text
► Contrast the typeface (font) with that used in the headings.
► Although there is some debate, serif fonts are the norm for large blocks of text.
  • Unless the court rules require otherwise.
  • Given the choice, use a proportionally spaced font such as Times New Roman or Garamond.
  • Corollary: avoid monospaced fonts such as Courier.
► If allowed, use the optimal line leading for a 12-point font document of something slightly less than 1.5 spacing (14.4 point spacing is optimal).

B. Proximity
► Keep the text related to the headings to show the interrelationship.
► Add a space between paragraphs to allow white space to help create visual chunking.

124. Williams, The Non-Designer’s Type Book, supra n. 34, at 47; see also Carter, Day & Meggs, supra n. 68, at 91; supra pt. II.A.1.
Think about eliminating indentations to cue the beginning of new paragraphs; at the very least, minimize any indentation.

C. **Alignment**

The standard computer paper size, 8.5 by 11 inches, actually does not provide for maximum legibility at the font sizes required by most courts. In fact, the better thing for courts to do would be to move to the dual column printing that is already a feature of computer-assisted legal research sources such as Westlaw and Lexis. Nevertheless, this is what we can do with the current limitations:

- **Left-justified**
  - This reads more easily than fully justified, at least according to some graphic designers.
- **Slightly wider than one inch margins on the left and right sides (8.5- by 11-inch paper).**
  - The best line length for the font size commonly used is slightly less than 6 inches.
  - To achieve this, slightly increase your left and right margins beyond the one-inch standard.
- **Avoid using centering or wide indents in order to minimize fixation pauses, which make the reader’s eye do more work finding the next line.**

D. **Repetition**

- Be very careful to make all hierarchies consistent throughout.

V. **Conclusion**

If we accept the acknowledged science about legibility and the related concept of information retention, then we must also accept as true the conclusion that a lawyer who is able to effectively manipulate textual design will create a more credible and a more persuasive document. A visually well-designed document will enhance that document’s readability, and the author/designer will reap the benefits of a more easily comprehensible document. Thus, attorneys should keep the visual design arrow handy in their quiver of persuasive techniques.
Appendix
This section includes all federal appellate and state court rules affecting typography used in briefs.
For court rules that set a maximum character/inch number, you should know that there are about 15 characters per inch in 12-point Times New Roman. Remember that a pica is 1/6 of an inch.

Federal Courts
General Rule
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
Font Rules: (5) Typeface. Either a proportionally spaced or a monospaced face may be used. (A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger. (B) A monospaced face may not contain more than 102 characters per inch. (6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

Supreme Court
Rule: Sup. Ct. R. 33
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
Font Rules: The text of every booklet-format document, including any appendix thereto, shall be typeset in Roman 11-point or larger type with 2-point or more leading between lines. The typeface should be similar to that used in current volumes of the United States Reports. Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited. Type size and face shall be consistent throughout. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 9-point or larger with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

1st Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
2d Circuit
Rule: Uses Fed. R. App. P. 32(a) with a proviso
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced or 12 points or larger for printed pamphlets
May Use Optimal Layout? Yes
Font Rules: (a) Form of Brief. Briefs must conform to FRAP Rule 32(a), with the proviso that, if a litigant prefers to file a printed brief in pamphlet format, it must conform to the following specifications: ...Font size: 12-point type or larger, for text and footnotes.

3d Circuit
Rule: Uses Fed. R. App. P. 32(a) and also Local App. R. 32.1
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
Font Rules: (c) Typeface. Briefs shall comply with the provisions of F.R.A.P. 32(a)(5) and (6).

4th Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

5th Circuit
Rule: Uses Fed. R. App. P. 32(a) and also Local App. R. 32.1
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced (footnotes 12 point proportionally spaced typeface, or 122 characters per inch or larger in monospaced typeface)
May Use Optimal Layout? Yes
Font Rules: 32.1 Typeface. Must comply with F. R. App. P. 32(a)(5), except that footnotes may be 12 point or larger in proportionally spaced typeface, or 122 characters per inch or larger in monospaced typeface.

6th Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

7th Circuit
Rule: Circuit rule 32(b)
Specific Fonts: 12 point proportionally spaced (footnotes 11 point)
May Use Optimal Layout? Yes
Font Rules: (b) A brief need not comply with the 14-point-type requirement in Fed. R. App. P. 32(a)(5)(A). A brief is acceptable if proportionally spaced type is 12 points or larger in the body of the brief, and 11 points or larger in footnotes.

8th Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

9th Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

10th Circuit
Rule: 10th Cir. R. 32.1
Specific Fonts: 13 or 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
Font Rules: The court prefers 14-point type as required by Fed. R. App. P. 32(a)(5)(A), but 13-point type is acceptable.

11th Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

D.C. Circuit
Rule: Circuit rule 32(a)(1)
Specific Fonts: 11 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes
Font Rules: (1) Typeface. If a brief uses a proportionally spaced face as allowed by FRAP 32(a)(5), the court will accept a proportionally spaced face of 11-point or larger.
Federal Circuit
Specific Fonts: 14 point proportionally spaced, 102 characters/inch monospaced
May Use Optimal Layout? Yes

State Courts
Alabama
Rule: Ala. R. App. P. 32 (a)(5)
Specific Fonts: Courier New 13 point font
May Use Optimal Layout? No
Font Rules: A brief must be set in Courier New 13. . . . The type style must be plain, Roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

Alaska
Rule: Alaska R. App. P. 513.5 (c)(1), (2)
Specific Fonts: 12 point monospaced, 12.5 or 13 point proportionally spaced
May Use Optimal Layout? Yes
Font Rules: (1) The text of documents, including headings and footnotes, must be at least (A) 12 point (10 monospaced characters per inch) Courier, or substantially similar monospaced text style; (B) 13 point (proportionally spaced) Times New Roman, Garamond, CG Times, New Century Schoolbook, or substantially similar serifed, roman text style; or (C) 12.5 point (proportionally spaced) Arial, Helvetica, Univers, or substantially similar non-serifed text style. (2) When a typeface other than 12 point Courier is used, the party filing the document must also file a certificate that identifies the typeface and point size used in the document.

Arizona
Rule: Ariz. R. App. P. 14 (a)(1), (b)(i), (ii)
Specific Fonts: 14 point
May Use Optimal Layout? Yes
Font Rules: (a)(1) A brief shall comply with Rule 6(c), except that the brief’s covers and the components of the brief excluded from the word count computation are exempt from the 14 point or 10 1/2 characters per inch typeface requirement. (b)(i) a principal brief prepared in a proportionately spaced typeface may not exceed 14,000 words, and a reply brief may not exceed 7,000 words, and neither may have an average of more than 280 words per page, including footnotes and quotations; and (ii) a principal brief prepared in a monospaced typeface may not exceed 40 pages, and a reply brief may not exceed 20 pages. (Rule 6 deals with Motions requirements, stating
that “Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10 1/2 characters per inch, shall be used for text, quotations, and footnotes.”

Arkansas
Rule: Ark. R. Sup. Ct. & Ct. App. 4-1 (a)
Specific Fonts: 10 point monospaced, 12 point proportionally spaced
May Use Optimal Layout? Yes
Font Rules: The style of print shall be either monospaced, measured in characters per inch, not to exceed 10 characters per inch, or produced in a proportional serif font, measured in point sizes, not to be less than 12 points.

California
Rule: Cal. R. Ct. 14 (b)(2), (3), (4), (11)(c)
Specific Fonts: 13 point computer, standard pica typewriter
May Use Optimal Layout? Yes
Font Rules: Computer briefs: (b)(2) Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced. (3) The type style must be roman; but for emphasis, italics or boldface may be used, or the text may be underscored. (4) Except as provided in (11), the type size, including footnotes, must not be smaller than 13-point. . . . Typewriter briefs: (11)(c) The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters.

Colorado
Rule: Colo. R. App. P. 32(a), (a)(3)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: Typewriter: (a) Briefs and other appellate papers produced through the use of a typewriter shall be in pica type at no more than 10 characters per inch, and the type shall be no smaller than 12 points. Computer: (a)(3) The typeface of text and footnotes shall be no smaller than 12 points. Script and condensed typefaces are not permitted.

Connecticut
Specific Fonts: 12 point or larger, Arial, Univers
May Use Optimal Layout? Yes except that cannot vary typeface of text and headings because only two sans serif fonts are acceptable
Font Rules: Only the following two typefaces, of 12 point or larger size, are approved for use in briefs: Arial and Univers.
Delaware
   Rule: Del. R. Sup. Ct. 13 (a)(i)
   Specific Fonts: 11 point
   May Use Optimal Layout? Yes
   Font Rules: All printed matter must appear in at least 11 point type on opaque, unglazed paper. All typed matter must be of a size type permitting not more than 11 characters or spaces per linear inch.

District Of Columbia
   Rule: D.C. R. App. Ct. 32(a)
   Specific Fonts: 11 point
   May Use Optimal Layout? Yes
   Font Rules: If printed records or briefs produced by the standard typographic process are filed, they shall be in not less than 11 point type.

Florida
   Specific Fonts: 14 point Times New Roman, 12 point Courier New
   May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
   Font Rules: Computer-generated briefs shall be submitted in either Times New Roman 14-point font or Courier New 12-point font.

Georgia
   Rule: Ga. R. App. Ct. 1(c)
   Specific Fonts: 10 point Courier, 14 point Times New Roman
   May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
   Font Rules: Letter spacing and type or font size shall be no smaller than Courier 10 cpi, 12 point (or equivalent). Notwithstanding the ten (10) characters per inch requirement, the Court will accept in lieu thereof Times New Roman Regular 14 pt (Western).

Hawaii
   Rule: Haw. R. App. P. 32(b)
   Specific Fonts: 12 point
   May Use Optimal Layout? Yes
   Font Rules: The print must be standard 12 point pica or equivalent and yield no more than ten characters to the inch. In footnotes, pica type at no more than 12 characters per inch may be used.

Idaho
   Rule: Idaho R. App. P. 36(c)
   Specific Fonts: 12 point Times New Roman
May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
Font Rules: The type shall be no smaller than 12 point Times New Roman.

**Illinois**

Rule: Ill. R. Sup. Ct. 344(b)
Specific Fonts: 11 point
May Use Optimal Layout? Yes
Font Rules: If printed, the brief shall be on paper 6 3/4 by 10 inches in type not smaller than 11 point. If not printed, the brief shall be legibly and neatly produced on paper 8 1/2 by 11 inches, securely bound on the left side, double spaced, with the text in type not smaller than standard elite typewriting.

**Indiana**

Rule: Ind. R. App. P. 43(d)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: The typeface shall be 12-point or larger in both body text and footnotes.

**Iowa**

Rule: Iowa R. App. P. 16(a)
Specific Fonts: 12 point Arrus BT, Arial, Courier New; 13 point Times New Roman
May Use Optimal Layout? Yes
Font Rules: Such matter must appear in no smaller than pica type (averaging no more than ten characters per inch) or in a 12 point Arrus BT, 12 point Arial, 12 point Courier New, 13 point Times New Roman, or substantially equivalent typeface.

**Kansas**

Rule: Kan. R. Sup. and App. Ct. 6.07(a)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: Text shall be printed in a conventional style typeface no smaller than 12 point with no more than 12 characters per inch. If typewritten, the type shall be no smaller than pica (10 characters per inch).

**Kentucky**

Rule: Ky. R. Civ. P. 76.12(4)(a)(i), (ii)
Specific Fonts: 11 point computer, 12 point typewritten
May Use Optimal Layout? Yes
Font Rules: (i) If printed, briefs shall be in black ink on unglazed opaque white paper 6 1/8 by 9 1/4 inches in dimension, in type no smaller than 11-point, and enclosed in covers colored as specified in this rule. (ii) If typewritten, briefs shall be on unglazed white paper 8 1/2 by 11 inches in dimension in black type no smaller than 12 point set at standard width.

**Louisiana**

Rule: La. R. Sup. Ct. VII(2)  
Specific Fonts: 11 or 12 point  
May Use Optimal Layout? Yes  
Font Rules: No less than 11 point typeface, but no more than 12 point typeface, shall be used.  
Specific Fonts: 14 point Roman or Times New Roman  
May Use Optimal Layout? Maybe  
Font Rules: The size type in all briefs will be: (a) Roman or Times New Roman 14 point or larger computer font, normal spacing; or (b) no more than 10 characters per inch typewriter print.

**Maine**

Rule: Me. R. App. P. 9(f)  
Specific Fonts: 12 point  
May Use Optimal Layout? Yes  
Font Rules: All printed matter must appear in at least 12 point font not smaller than 12 point Bookman on opaque, unglazed paper except that footnotes and quotations may appear in 11 point type.

**Maryland**

Rule: Md. R. App. Ct. and Spec. App. 8-112 (b), (c)  
Specific Fonts:  
May Use Optimal Layout? Yes, unless the official list indicates otherwise  
Font Rules: (b) Typewritten Papers — Uniformly Spaced Type. (1) Type Size. Uniformly spaced type (such as produced by typewriters) in the text and footnotes shall not be smaller than 11 point and shall not exceed 10 characters per inch. (2) Spacing. Papers prepared with uniformly spaced type shall be double- spaced, except that headings, indented quotations, and footnotes may be single- spaced. (c) Printed and Computer-Generated Papers — Proportionally Spaced Type. (1) Type Size and Font. Proportionally spaced type (such as produced by commercial printers and many computer printers) in the text and footnotes shall not be smaller than 13 point. The Court of Appeals shall approve, from time to time, a list of fonts that comply with the requirements of this Rule. Upon the docketing of an appeal, the clerk of the appellate court shall send the approved list to all parties or their attorneys. The horizontal scaling ordinarily produced by the computer program may not be
altered in order to decrease the width of the characters or increase the number of characters on a line.

**Massachusetts**
- Specific Fonts: 12 point monospaced (Courier)
- May Use Optimal Layout? No
- Font Rules: The typeface shall be a monospaced font (such as pica type produced by a typewriter or a Courier font produced by a computer word processor) of 12 point or larger size and not exceeding 10.5 characters per inch.

**Michigan**
- Rule: Mich. R. Ct. 7.212(b)
- Specific Fonts: 12 point
- May Use Optimal Layout? Yes
- Font Rules: At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

**Minnesota**
- Rule: Minn. R. Civ. App. P. 132.01(1)
- Specific Fonts: 11 point monospaced or 13 point proportionally spaced
- May Use Optimal Layout? Yes
- Font Rules: If a monospaced font is used, printed or typed material (including headings and footnotes) must appear in a font that produces a maximum of 10 1/2 characters per inch; if a proportional font is used, printed or typed material (including headings and footnotes) must appear in at least 13-point font.

**Mississippi**
- Rule: Miss. R. App. P. 32(a)
- Specific Fonts: 11 point
- May Use Optimal Layout? Yes
- Font Rules: All printed matter must appear in at least 11 point type on opaque, unglazed paper. . . Type shall not be smaller than pica.

**Missouri**
- Rule: Mo. R. Civ. P. 81.18(a)
- Specific Fonts: 11 point monospaced, 13 point proportionally spaced
- May Use Optimal Layout? Yes
- Font Rules: The type used shall be not less than a ten pitch and ten characters to the inch in a fixed space type. If a proportionally spaced type is used, it shall be not smaller than 13 font, Times New Roman on Microsoft Word.
Montana
Rule: Mont. R. App. P. 27(b)
Specific Fonts: 11 point monospaced, 14 point proportionally spaced
May Use Optimal Layout? Yes
Font Rules: Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10.5 characters per inch may be used in a brief, appendix, petition, motion or other paper. A proportionately spaced typeface has characters with different widths. A monospaced typeface has characters with the same advanced width. The brief’s covers and the components of the brief excluded from the word count computation are exempt from the 14 point typeface requirement. Text shall be in roman, non-script text. Case names, headings and signals may be underlined or in italics or in bold.

Nebraska
Rule: Neb. R. Sup. and App. Ct. 9(B)(2)(a), (b)
Specific Fonts: 12 point Courier, Arial, Helvetica, Times, Times New Roman
May Use Optimal Layout? Yes
Font Rules: Type may be underscored, italicized, or boldfaced for emphasis. a. Computer-generated briefs shall be in not less than 12-point Courier, Arial or Helvetica, or Times or Times New Roman font, double spaced, with not less than 12 points of leading. b. Typewritten briefs shall be in nothing smaller than 10-inch pica type and double spaced.

Nevada
Rule: Nev. R. App. P. 32(a)
Specific Fonts: 11 point
May Use Optimal Layout? Yes
Font Rules: The type must be black in color, no smaller than 10 characters per inch, and be equally legible to printing.

New Hampshire
Rule: N.H. R. Sup. Ct. 16(11)
Specific Fonts: Unclear
May Use Optimal Layout? Maybe. There are no further indications whether “standard typewriter” means something monospaced such as Courier.
Font Rules: Each brief shall consist of standard sized typewriter characters produced on one side of each leaf only.

New Jersey
Rule: N.J. R. Ct. 2:6-10
Specific Fonts: (A monospaced font such as 12 point Courier New meets the requirements; no proportionally spaced font will meet it)
May Use Optimal Layout? No

Font Rules: Papers shall be approximately 8.5 inches by 11 inches and, unless a compressed transcript format is used, shall contain no more than 26 double-spaced lines of no more than 65 characters including spaces, each of no less than 10-pitch or 12-point type. Footnotes and indented quotations may, however, be single-spaced. When a compressed transcript format is used, two transcript pages may be reproduced on a single page, provided that no compressed page contains more than 25 lines of no more than 55 characters including spaces, each of no less than 9-pitch type.

New Mexico
Rule: N.M. R. App. P. 12-305(b)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: Briefs shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface.

New York
Rule: N.Y. Civ. Pract. L. & R. 105(t), 2101(a)
Specific Fonts:
May Use Optimal Layout?
Font Rules:
105(t): Type size requirement. Whenever a requirement relating to size of type is stated in point size, the type size requirement shall be deemed met if the x-height of the type is a minimum of forty-five percent of the specified point size. Each point shall be measured as .351 millimeter. The x-height size shall be measured as it appears on the page. The x-height is the height of the lower case letters, exclusive of ascenders or descenders.
2101(a): Quality, size and legibility. Each paper served or filed shall be durable, white and, except for summonses, subpoenas, notices of appearance, notes of issue, orders of protection, temporary orders of protection and exhibits, shall be eleven by eight and one-half inches in size. The writing shall be legible and in black ink. Beneath each signature shall be printed the name signed. The letters in the summons shall be in clear type of no less than twelve-point in size. Each other printed or typed paper served or filed, except an exhibit, shall be in clear type of no less than ten-point in size.

North Carolina
Rule: N.C. R. App. P. 26(g)(1) and 28(j)
Specific Fonts: 12 point Courier or 14 point Times New Roman and maybe others
May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
Font Rules:
26(g)(1): All printed matter must appear in at least 12-point type.... No more than 27 lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6 1/2 inches.

28(j)(1) Type. (A) Type style. Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or non-proportionally spaced (monospaced) type. (B) Type size. 1. Non-proportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point). 2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger. 3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

North Dakota
Rule: N.D. R. App. P. 32 (a)(5)(A), (B), (6)
Specific Fonts: 12 point
May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
Font Rules: (5) Typeface. Either a proportionally spaced or a monospaced face may be used. (A). If proportional spacing is used, the typeface must be no smaller than a 12 point font with no more than 16 characters per inch. The text must be double spaced, except quotations may be single spaced and indented. Footnotes may be single spaced and must be in the same typeface as the text of the brief. (B). If monospaced typeface is used, the typeface must be a 12 point font having 10 characters per inch. The text, including quotations, and footnotes must be double-spaced with no more than 27 lines of type per page. (6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

Ohio
Rule: Ohio R. App. P. 19
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: All printed matter must appear in at least a twelve point type on opaque, unglazed paper.

Oklahoma
Rule: Okla. R. Sup. Ct. 1.11(a)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: All briefs shall be printed or typed in clear type not less than 12-point.
Oregon
Rule: Or. R. Sup. Ct. 5.05(4)(f)
Specific Fonts: 11 point monospaced, 12 point proportionally spaced
May Use Optimal Layout? Yes
Font Rules: Uniformly spaced type shall not exceed 10 characters per inch (10 cpi). If proportionally spaced type is used for the text of the brief, it shall not be smaller than 12 point . . . Reducing or condensing the typeface in a manner that would increase the number of words in a brief is not permitted. Briefs printed entirely or substantially in uppercase are not acceptable.

Pennsylvania
Specific Fonts: 11 point
May Use Optimal Layout? Yes
Font Rules: The lettering shall be clear and legible and no smaller than point 11.

Rhode Island
Rule: R.I. R. Sup. Ct. 16(d)
Specific Fonts:
May Use Optimal Layout? Unclear, it depends on what font the Rhode Island Reporter uses
Font Rules: The size of type to be used in printing briefs shall be that used in the text of Rhode Island Reports, as near as may be.

South Carolina
Rule: S.C. App. Ct. R. 238(c)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: Type size shall be standard 12-point or larger.

South Dakota
Rule: S.D. R. Civ. App. P. 15-26a-66(a), (b)
Specific Fonts: 11 point monospaced, 12 point proportionally spaced
May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)
Font Rules: (a) Monospaced type shall be no more or no less than ten characters per inch (10 cpi). (b) A proportionally spaced typeface must be 12-point or larger, in both body text and footnotes. (1) Type Style. Briefs must be set in a plain, roman style, although italics may be used for emphasis. Case names must be italicized or underlined. Boldface can only be used for case captions, section names, and argument headings. The use of all-capitals text may be applied only for case captions and section names. Nevertheless, quoted passages may use the original type styles and capitalization. (2) Type Volume Limitation. Appellant and appellee briefs are acceptable if they
contain no more than the greater of 10,000 words or 50,000 characters. . . . (3)
Headings, footnotes, and quotations count toward the word and character
limitations. The table of contents, table of cases, jurisdictional statement,
statement of legal issues, any addendum materials, and any certificates of
counsel do not count toward the limitations.

**Tennessee**

Rule: Tenn. R. App. P. 30(a)
Specific Fonts: 11 point
May Use Optimal Layout? Yes
Font Rules: All printed matters should be on paper 6 1/8 by 9 1/4 inches in
type not smaller than 11 point and type matter 4 1/4 by 7 1/4 inches. If not
printed, copies should be on paper 8 1/2 by 11 inches, double spaced, except
for quoted matter, which may be single spaced, with the text not smaller than
standard elite typewriting.

**Texas**

Rule: Tex. R. App. P. 9.4(e)
Specific Fonts: 11 point monospaced (Courier), 13 point proportionally
spaced
May Use Optimal Layout? Yes
Font Rules: A document must be printed in standard 10-character-per-
inch (cpi) non-proportionally spaced Courier typeface or in 13-point or larger
proportionally spaced typeface.

**Utah**

Rule: Utah R. App. P. 27(b)
Specific Fonts: 13 point
May Use Optimal Layout? Yes (but headings might not be accepted in
sans serif)
Font Rules: Either a proportionally spaced or monospaced typeface in a
plain, roman style may be used. A proportionally spaced typeface must be 13-
point or larger for both text and footnotes. Examples are CG Times, Times
New Roman, New Century, Bookman and Garamond. A monospaced
typeface may not contain more than ten characters per inch for both text and
footnotes. Examples are Pica and Courier.

**Vermont**

Rule: Vt. R. App. P. 32(a)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: All typewritten and printed matter must appear in at least 12-
point type.
Virginia
Rule: Va. R. Sup. Ct. 5:6(a) (Supreme Court)
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: All printed matter must be in at least 12 point type.
Rule: Va. R. Sup. Ct. 5A:4(a) (Court of Appeals)
Specific Fonts: 11 point
May Use Optimal Layout? Yes
Font Rules: All printed matter must be in at least 11 point type.

Washington
Specific Fonts: 12 point
May Use Optimal Layout? Yes
Font Rules: The text of any brief typed or printed must appear double spaced and in print as 12 point or larger type in the following fonts or their equivalent: Times New Roman, Courier, CG Times, Arial, or in typewriter fonts, pica or elite. The same typeface and print size should be standard throughout the brief, except that footnotes may appear in print as 10 point or larger type and be the equivalent of single spaced.

West Virginia
Rule: W. Va. R. App. P. 28(a)
Specific Fonts: 11 point monospaced, 12 point proportionally spaced
May Use Optimal Layout? Yes
Font Rules: The text shall be double-spaced and be no smaller than twelve point proportionally spaced or eleven point non-proportionally spaced type. Footnotes and indented quotations may be single-spaced and footnote text shall be no smaller than eleven point proportionally spaced or ten point non-proportionally spaced type.

Wisconsin
Rule: Wis. R. Ct. 809.19(8)(b)(3)(b), (c)
Specific Fonts: 11 point monospaced, 13 point proportionally spaced
May Use Optimal Layout? Maybe
Font Rules: (b). If a monospaced font is used: 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and a one-inch margin on all other sides. (c). If a proportional font is used: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. Italic may not be used for normal body text but may be used for citations, headings, emphasis and foreign words.
Wyoming

Rule: Wyo. R. App. P. 7.05(b)(3)

Specific Fonts:

May Use Optimal Layout? Yes (but headings might not be accepted in sans serif)

Font Rules: Briefs must be in no smaller type or font than 10 characters per inch. Fonts for word processors that will appear as no smaller than 10 characters per inch are Times New Roman 13, CG Times 13, or Courier 12.
BIBLIOGRAPHY

Appellate Brief Writing Resources


   NB: The must-read segments are pp. 1-38, “General Principles of Argumentation,” setting out 21 principles of good argument, and pp. 107-136, on principles of good writing.


Ross Guberman, Point Made (Oxford University Press 2011)


Geller, Shapiro, Bishop, Hartnett & Himmelfarb, Supreme Court Practice (10th ed. BNA 2013),

   NB: Chapter 13.11, pp. 732-746

Steven Stark, Writing to Win: The Legal Writer (Three Rivers Press 1999)

BNA’s Federal Appellate Practice (2d ed. 2013).


Business and Commercial Litigation in Federal Courts, Chapter 55, Appeals to the Courts of Appeals (Haig, 3d ed., ABA Section of Litigation, West 2011)

Appellate Practice in Federal and State Courts, Chapter 10, Writing Appellate Briefs (Law Journal Press 2011)

Matthew Butterick, Typography for Lawyers (Jones McClure Publishing 2010)
Timothy Bishop

JUDGE CATHARINA HAYNES
United States Circuit Judge
1100 Commerce Street, Rm. 1452
Dallas, TX 75242

Judge Catharina Haynes was sworn in as a Circuit Judge of the United States Court of Appeals for the Fifth Circuit on April 22, 2008, having been nominated by President George W. Bush on July 17, 2007. Prior to taking the federal bench, she served eight years as a Texas state district judge. In addition to her judicial service, Judge Haynes spent thirteen years in private practice, including more than five years as a partner and six years as an associate in the trial section of Baker Botts, L.L.P.’s Dallas office. Judge Haynes is board certified in Consumer and Commercial Law by the Texas Board of Legal Specialization.

Judge Haynes received a B.S. in Psychology with highest honors from the Florida Institute of Technology in 1983. In 1986, she received a J.D. with distinction from the Emory University School of Law, where she was a Notes and Comments Editor of the Emory Law Journal and a member of Order of the Coif. She was honored as an Outstanding Woman Law Graduate by the National Association of Women Lawyers.

Judge Haynes has been actively involved in the legal community for many years. From 2003 through 2006, she served as Chair of the Texas Court Reporters Certification Board. She currently serves on the Alumni Advisory Board of the Emory University School of Law and as Secretary of the Appellate Judges Conference of the American Bar Association’s Judicial Division. She previously served eleven years as a member of the Council of the State Bar of Texas Insurance Section and one year as an At-Large Director of the Dallas Bar Association. She is a Fellow in the Dallas Bar Foundation, a Founding Fellow of the DAYL Foundation, and a Life Fellow in the American Bar Foundation.

Judge Haynes is a two-time recipient of the Dallas Bar Association’s Jo Anna Moreland Outstanding Committee Chair Award. She has also received the Outstanding Board Member Award and the Louise B. Raggio Award from the Dallas Women Lawyers Association, the Award of Excellence from the DAYL Foundation, and the Outstanding Achievement Award from the Florida Tech Alumni Association. During her time at Baker Botts, she was awarded its Thomas Gibbs Gee Award which recognizes pro bono efforts.

From 2003 through 2011, Judge Haynes volunteered as a teacher in a program to teach pre-GED classes to adults for whom English is a second language at the Vickery Meadow Learning Center; she also served on the board of that organization for six years. As a lawyer, she chaired the Vickery Meadow Subcommittee of the Dallas Bar Pro Bono Committee which founded a pro bono legal clinic in the Vickery Meadow area of Dallas. Judge Haynes and her husband, Craig, recently celebrated their silver anniversary.
In November 2010, Barbara Jackson was elected to serve on the Supreme Court of North Carolina--twenty years after beginning her career there as a law clerk for (then Associate) Justice Burley B. Mitchell, Jr. Previously, she served as Associate Judge on the North Carolina Court of Appeals for six years. Prior to taking office, she practiced law for fifteen years, most recently serving as General Counsel to the North Carolina Department of Labor. She also worked in Governor James G. Martin’s office, for an advocacy agency for persons with disabilities, and in private practice concentrating in the area of land use and local government law prior to returning to public service at the Labor Department. Justice Jackson received both her undergraduate and law degrees from the University of North Carolina at Chapel Hill. Currently, she is pursuing a Master of Laws in Judicial Studies from Duke University School of Law.

Justice Jackson is a member of the Appellate Judges Conference of the ABA, serving as Chair of the Technology Committee. She is a past member of the Board of Governors and Section Chair of the North Carolina Bar Association, and remains active in other sections and committees. Justice Jackson also previously served as a member of the Board of Directors of the Wake County Bar Association. Currently, she serves on the North Carolina Courts Commission and is a past member of the Dispute Resolution Commission.
Michael A. Scodro is a partner in the Appellate and Supreme Court Practice of Jenner & Block in Chicago. He recently completed more than six years of service as the Illinois Solicitor General, in which capacity he oversaw the civil and criminal appeals divisions of the Attorney General’s Office and argued on behalf of the State in the U.S. Supreme Court, Illinois Supreme Court, U.S. Court of Appeals for the Seventh Circuit, and Illinois Appellate Court. Michael teaches a seminar on the U.S. Supreme Court as a Lecturer in Law at the University of Chicago Law School, serves as the Secretary of the Appellate Lawyers Association, was elected to membership in the American Law Institute, and is a member of the ABA’s Council of Appellate Lawyers and the Seventh Circuit Bar Association, where he chairs the Committee on Administration of Justice. Michael also served on the Special Supreme Court Committee on Illinois Evidence, which drafted the newly adopted Illinois Rules of Evidence, and in 2010 was listed among the Chicago Daily Law Bulletin’s 2010 “40 Illinois Attorneys under Forty to Watch.”

After graduating from Yale Law School, Michael served as a law clerk to the Honorable José A. Cabranes of the U.S. Court of Appeals for the Second Circuit and the Honorable Sandra Day O’Connor of the U.S. Supreme Court. Following several years in the appellate group at Mayer Brown LLP, he became an Associate Professor of Law at Chicago-Kent College of Law. In 2007, the Illinois Attorney General named him Solicitor General, and he joined Jenner & Block as a partner in 2014.
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Practice
Appellate; Indian Law; Commercial Litigation; Products Liability; Insurance

Experience
David Tennant practices in the fields of Indian law litigation and appeals, complex commercial litigation, products liability, and insurance. He leads the firm’s prominent Appellate Litigation Team (Benchmark Appellate 2011-2012) and co-chairs the firm’s nationally ranked (Chambers USA: Leading Lawyers for Business 2011) Indian Law and Gaming Team. David has argued appeals in the New York Court of Appeals and in all four Appellate Division Departments in New York, and in the United States Court of Appeals for the Third Circuit, Ninth Circuit, and Federal Circuit. His appellate work includes trial consulting in high-exposure cases, and “mooting” briefs prepared by other appellate counsel.

Prior to joining the firm in 1992, David served as an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney’s Office for the Central District of California (Los Angeles). He clerked in federal district court in Los Angeles before entering the U.S. Attorney’s Office.

Admissions

Education
UCLA Law School, J.D. (Order of the Coif)
University of Michigan, B.A. (Honors in English)
Selected Publications

- Second Circuit reporter for Certworthy newsletter published by DRI Appellate Advocacy Committee (May 2011 – to present)
- Project Director/Editor For the Defense Appellate Specialty Edition (DRI November 2010)

Selected Presentations

- Program Chair and Panelist, NYSBA, “Federal Civil Practice: A Primer,” Rochester, NY (December 4, 2013)
- Panelist, “Advice from the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts” (panel on appellate practice) (Erie Institute, Buffalo, NY (October 26, 2012) and Monroe County Bar Association (April 25, 2013).


• Program Chair, NYSBA Commercial and Federal Litigation Section, “Where The Action Is: Commercial Litigation in State Court / Views from the Bench” (first regional CLE program and reception involving Commercial Division judges from Syracuse, Rochester and Buffalo) (November 8, 2007).

• Program Chair NYSBA, Commercial and Federal Litigation Section Spring Meeting, Newport R.I. (May 20-22, 2011); CLE Panelist, “Everything You Wanted to Know About the Standard of Review But Were Afraid to Ask” (May 22, 2011)

• Panelist, Aboriginal Economic Development CLE Program, Ontario (Canada) Bar Association, speaking on U.S. experience with Indian gaming, Toronto, Canada (November 15, 2012)

• Panelist, NYSBA, Commercial and Federal Litigation Section Spring Meeting, Ethics Game Show Program (May 23, 2010).


• Panelist, New York State Judicial Institute, Legal Update (ethics program), Rochester, NY (October 28, 2009).

• Panelist, New York State Judicial Institute, Commercial Division Update; state-wide program at NYSJI, White Plains NY (June 18, 2009).

• Panelist, “Do’s and Don’ts in Court,” CLE program at Appellate Division, Fourth Department for newly admitted lawyers (June 18, 2012).


• Guest presenter on legal ethics, SUNY Brockport Honor Ethics class (2006 to 2013).

• Guest Lecturer, Hofstra University Law School, “The Top Ten Secrets For Writing the Most Persuasive Briefs” (2005).

Media Appearances

• Capitol Tonight (YNN Time Warner Cable August 21, 2012) speaking about New York State Bar Association amicus brief in Fisher v. University of Texas

• Guest Commentator, Legal Affairs, WXXII Radio: 1370 Connection (2007) speaking about U.S. Department of Justice controversy

• Appellate Law360 Q&A With Nixon Peabody's David Tennant (March 13, 2013)
Affiliations

David is a member of the New York State Bar Association’s Committee on Courts of Appellate Jurisdiction; is past Chair of the Commercial and Federal Litigation Section (CFLS) and co-chairs the CFLS Appellate Practice Committee. He serves as Vice Chair of the NYSBA Section Delegates Caucus. He served on the CFLS Task Force on State Court Appeals and the President’s Task Force on the Condition of the State Courthouses.

David is a member of the Executive Board of the ABA Council of Appellate Lawyers (ABA Judicial Division) for which he serves as Chair of the Rules Committee. He also holds leadership positions within the Defense Research Institute Appellate Advocacy Committee (Vice Chair for Publications and Second Circuit Reporter for Certworthy, a publication of the committee).

Founding member, Federal Bar Association Western District of New York Chapter (2012); member FBA Indian Law Committee.

New York Bar Foundation, Fellow.

Appointments

David was appointed by Chief Judge Jonathan Lippman to the Advisory Council to the Commercial Division (2013), having previously served on the Chief Judge’s Task Force on Commercial Litigation for the 21st Century (2012).

David served a three-year term on the New York State Continuing Legal Education Board (2009-2012) having been appointed by Presiding Justice Henry Scudder of the Appellate Division, Fourth Department.

David was appointed by NYSBA President Seymour James to co-chair the President’s Task Force on Gun Violence (2013).

Pro Bono

Board of Directors, Volunteer Legal Services Project (2006 to present).

Cabinet co-Chair, Campaign for Justice Annual Fundraising Campaign for Civil Legal Services (2013)

Pro bono intake partner for Rochester Office (2004 to present); Firm Pro Bono Committee (Rochester Office) (2011 to present).

Pro bono indigent panel, Second Circuit (2006-2009).
NYSBA Committee on Mass Disaster Response (member 1997 to present; Vice-Chair 1997-1999; Chair 1999-2002). On behalf of Committee received Governor’s Award for Excellence in Emergency Management (2003).

Awards and Recognition


Recognized as a “Leader in the Law” (Nathaniel Award nominee) The Daily Record (November 4, 2010).

Co-recipient of “Outstanding Pro Bono Contribution Award” from the Law Center to Prevent Gun Violence (LCPGV) for pro bono amicus briefs.

Recipient, New York State Bar Association President’s Pro Bono Service Award for the Seventh Judicial District (May 3, 2010).


NYSBA Empire State Counsel (2008-2013).

Subject of “Pro Bono Spotlight: Responding to a Generation at Risk” The Daily Record (October 9, 2008).


Pending Appeals

Madison County and Oneida County, New York v. Oneida Indian Nation of New York, Supreme Court of the United States, Case No. 10-72 (January 10, 2011 (per curiam). Supreme Court vacated circuit decision and remanded for further proceedings. After obtaining substantially all relief requested on remand (reported at 665 F.3d 408 2d Cir. 2011), the Counties filed a petition for writ of certiorari (Case No. 12-604) challenging the continued recognition of a “not disestablished” Oneida reservation in central NY. The Court called for the views of the Solicitor General on February 19, 2013.


**Completed Appeals**

• **In Jackson v. General Motors Corp.,** 770 F. Supp. 2d 570 (S.D.N.Y. 2011), aff’d sub nom. Butnick v. General Motors Corp., No. 11-1068 (2d Cir. July 11, 2012) (affirming holding that Clean Air Act preempted state law tort claims alleging defective design and failure to warn, and dismissing aggregated claims of bus drivers, mechanics and other works claiming injury illness or death from exposure to diesel exhaust in municipal garages).

• **Fisher v. University of Texas,** United States Supreme Court, Case No. 11-345. On behalf of the New York State Bar Association, pro bono, submitted an amicus brief supporting the continued recognition of diversity in the legal profession. The Supreme Court’s June 24, 2013 decision did not disturb its prior holding in *Grutter* that diversity in law school education serves important governmental interests.


• **Taylor v. The American Chemistry Council et al.,** 2009 U.S. App. LEXIS 17321 (1st Cir., August 3, 2009) (affirming dismissal of all claims asserted by survivor of chemical plant worker occupationally exposed to vinyl chloride (VC), holding that manufacturers of VC have no duty to warn knowledgeable industrial purchasers or their employees).
• **Cummins, Inc. v. Atlantic Mutual Ins. Co.,** 56 A.D.3d 288 (1st Dept. 2008) (reversing summary judgment entered for insurer, finding question of fact as to meaning of contract terms, and remanding for trial on claim that insurer overcharged client by $1 million under large deductible insurance program).

• **Candela v. Byron Chemical Co.,** 54 A.D.3d 306 (2d Dept. 2008) (affirming $6+ million judgment for client in contract dispute following 6-week trial).

• **N.J. Transit Corp. v. Harsco Corp.,** 497 F.3d 323 (3d Cir. 2007) (affirming summary judgment dismissing UCC-based breach of implied warranty claims where plaintiff issued bid package with non-negotiable terms and specified comprehensive bumper-to-bumper express warranty, in effect displacing implied warranties).

• **Town of Massena v. Healthcare Underwriters Mutual Ins. Company,** 40 A.D.3d 1177, 834 N.Y.S.2d 736 (3d Dept. 2007) (reversing trial court and holding defendant-insurer was required to provide a defense to hospital and certain doctors who served on its peer review committees, even if public policy might preclude indemnification in the event of an adverse verdict).


• **Campbell v. Int’l Truck & Engine Corp.,** 32 A.D.3d 1184 (4th Dept. 2006) (affirming summary judgment for client dismissing failure to warn claim in wrongful death but finding triable issue of fact as to alleged design defect).

• **Brisbin v. Superior Valve Company,** 398 F.3d 279 (3d Cir. 2005) (reversing award of $750,000 in lost profit damages in breach of contract action governed by Pennsylvania UCC despite finding of bad faith breach; on remand award was reduced to $20,733.80).

• **GMAC v. Nationwide Ins. Co.,** 796 N.Y.S.2d 2 (N.Y. 2005) (reversing Appellate Division and creating new law regarding the obligations of excess and primary carriers to pay defense costs and reversing lower courts ruling that required our client to bear 100% of the defense costs).