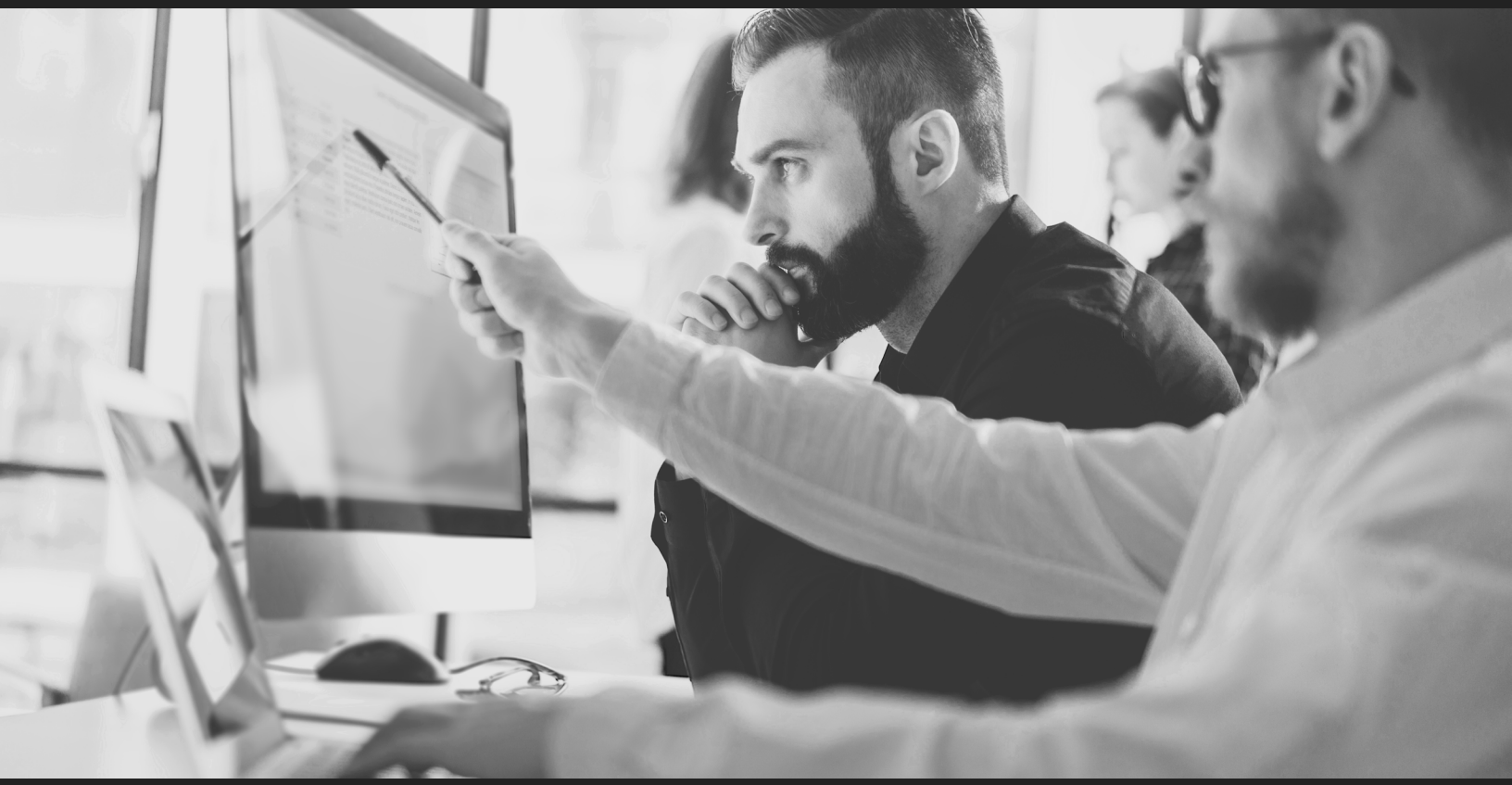
HOW TO WRITE THE PERFECT BRIEF

By Gary Kinder



WORDRAKE®

INTRODUCTION

The brief is like a mini-trial. You may write more than one brief in the course of a case—for example, for pretrial motions, at the conclusion of trial, or for an appellate court[1]—and each helps the court[2] understand why your position is the most meritorious.

This book contains WordRake's checklists and techniques developed by lawyers who have taught tens of thousands of litigators over the past 25 years. WordRake's methods address:

- Summarizing your case
- Presenting relevant facts
- Making effective arguments
- Understanding the judge's viewpoint

Our goal is to make your professional life easier by helping you understand the whole process at a deeper level—what moves a judge to say yes.

PART 1: REASONABLENESS AND ETHICS

No matter how strong your case, there are facts or law working against you. One of the most effective tools in the litigation arsenal is the ability to acknowledge and address them. Many lawyers don't. As a result, the judge may view them with skepticism or outright mistrust, to the detriment of their case—and even future cases.

The more reasonable we make our brief, the more likely we are to prevail.

1 In an appellate brief, you must include all assignments of error so as not to waive an issue on appeal, but how to do so is beyond the scope of this book.

2 You might write a brief for many different fact finders, including trial judges, appellate judges, licensing boards, magistrates, and maybe even arbitrators and mediators. For simplicity's sake, we will refer to the fact finder as a *judge*.

THE UNETHICAL APPROACH

Writing unethical or unreasonable briefs doesn't just lose cases, it may even subject you to discipline by your state bar—especially if you misstate the facts or law. Misstating facts or law is dishonest and prejudicial to the administration of justice.

There are now disciplinary rules that address civility. With brief-writing, this means you must refrain from personal attacks. Instead, even if you are moving for sanctions, stick to the facts and the effect of the other side's behavior on your case or you will lose credibility and may be subject to discipline.

THE WORDRAKE APPROACH

The WordRake method calls for you to either explain why your situation is different or use your opponent's facts against the other side. The benefit of this approach is that addressing law or evidence harmful to your case often reduces its significance. We include an example toward the end of this book.

The more reasonable we make our brief, the more likely we are to prevail. To do that:

- Be honest about the law and the evidence in the case
- Explain why your client deserves to win

That said, it's still our job to discredit and attack the other side's case. That's the oath we have taken. In this book, we'll show you the most successful ways to defeat the other side's case—while remaining ethical.

Model Rule 1.3: Diligence

In 1983, the ABA promulgated the ABA Model Rules of Professional Conduct and a new standard: "Model Rule 1.3: Diligence," which requires a lawyer to "act with reasonable diligence." The accompanying Comment specified that the new standard "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

To be diligent or zealous, many of us still believe that we must shout on paper and belittle opponents. Even the highly principled among us sometimes let digs and jabs enter our briefs—it feels good—but we forget that every slip is noted first by a clerk, and then by the judge, and that with every slip we lose a little credibility.

PART 2: THINKING LIKE A JUDGE

Judges, like the rest of us, can get irritated, especially with lawyers who indulge in hyperbole or personally attack or insult opposing counsel or the court. Courts respond well to the lawyers who try to help them do their job, which is to be fair. Because our job is to provide our client with the best possible chance of winning, we are wise to signal to the judge deciding our client's fate that we are the credible advocate. But how do we do that?

Because our job is to provide our client with the best possible chance of winning, we are wise to signal to the judge deciding our client's fate that we are the credible advocate.

Think of every brief as a mini-trial. The way we frame the law and the evidence can make the difference between winning and losing. While litigating with honesty and calmness may encourage a judge to listen to us more carefully and move her closer to *wanting* to decide for us, that approach alone will not win your case. Its absence will harm it.

Here are five ways that your brief can make your case while maintaining a reasonable and credible tone.

DON'T DEHUMANIZE

Don't dehumanize your opponent's client. If you are a prosecutor, calling the defendant an "animal" or a "rabid dog" is reversible error and can subject you to discipline. Even in a civil case, calling witnesses names or insulting opposing counsel is not only improper, but doing so can make the judge sympathize with your opponent even if your conduct doesn't trigger a bar complaint.

While some attorneys say it's best practice to refer to the client by name (first name if the client is an individual) and the other side as "plaintiff" or "defendant," others say this is a trick that the judge will see through. Since you are telling a story, consider referring to all parties by name, which has the benefit of making your brief look less generic. This works especially well when there are multiple parties.

CHECK THE HYPERBOLE

Judges know that a lawyer has no case when he adopts a shrill tone. In our quest to be a zealous advocate, we sometimes part with common sense and write sentences that look like they belong in an unbalanced manifesto or a parody of legal writing. While writing zingers

might make us feel better, inflammatory statements are improper enough that they look bizarre and undermine our own credibility.

AVOID LITTLE DIGS

Don't use derogatory adverbs to open a sentence. Words like *unfortunately*, *interestingly*, *curiously*, *conveniently*, *surely*, *incredibly*, *amazingly,* or any similar adverb are little digs that diminish our credibility. These phrases are neither colorful nor clever; they're unreasonable, border on the uncivil, and signal to the court that your position is weak. And while no judge will sanction us for using the word *surprisingly* to discuss some action by an opponent's client, it might irritate the judge. We do not want an irritated judge reading our brief, especially if we caused the irritation.

IGNORE THE BAIT

If your opponents write digs and hyperbole, do not respond in kind. Rarely will a judge comment on it, but the judge notices. If we respond to this gamesmanship, we surrender the high ground and find ourselves in a petty war that tries a judge's patience.

WRITE IN PLAIN LANGUAGE

Effective writing does *not* use legalese. It's clear and simple. Bloated writing stuffed with medieval jargon and convoluted sentences that go on forever provokes mistrust. It looks like you're hiding something because you're not just saying it straight out. Legalese can even introduce confusion. Plain language is straightforward, uses terms of art where it should, and says what it means.

DON'T WRITE THIS AT WORK

Often, we write take this approach because we think our clients want us to, but our clients would rather win, and writing like this does not bring success.

1. Hyperbole: "This is a story of a legal system run amuck, a Kafkaesque demonstration of tyranny given free rein."
2. Diminishing Adverbs: unfortunately, interestingly, curiously, conveniently, surely, incredibly, amazingly
3. Inflammatory Language: *approaches the frivolous* or *borders on the laughable*

PART 3: ORGANIZING FOR EFFECTIVENESS

The judge needs the facts, the law, and the argument. Do not make the court muddle through stacks of disorganized or verbose headings. We recommend that your headings be simple, and preferably one clear word: Introduction, Facts, Argument, Conclusion. If we label them with more than one word, we risk sounding insincere and untrustworthy.

Rather than allowing your opponent to define the issues, take control from the first sentence. Set the tone and provide the judge with a reason to favor your client and your case. Add the details later.

DON'T WRITE THIS AT WORK

Our word choice can raise or ease suspicion. Contrast "Facts" with "Overall Background of the Case." The latter sounds like an unreliable mix of fact and opinion.

The subheadings should guide the judge, not confuse them. You might need subheadings in a complex case to help the court follow along. But these should be succinct.

USE THE INTRODUCTIONS SPARINGLY

Most lawyers make preliminary statements in their introductions and the effect is like throat-clearing. There are several situations where including an introduction would be wise; a sampling:

- Our case is one of first impression.
- The judge is new to a complex case with a long procedural history.
- We need to tell the judge that our Motion for Summary Judgment addresses only certain counts.
- So many players are involved, the judge needs a program.

BREAK THE HABIT #1

Unless you have a compelling reason to write an introduction, we would not introduce a brief. We use the opening sentence to get the judge leaning our way immediately and follow that path until we have the judge wanting to decide for us. Check with the partner before skipping introductions.

AVOID REPEATING THE CAPTION

Most lawyers open briefs by repeating the information found in the caption just above the introduction. Most judges skip that paragraph because it contains nothing they need to know. So why do most briefs still open like this?

DON'T WRITE THIS AT WORK

COMES NOW Montezuma Chemical Company, Defendant, in the above entitled and numbered cause, and responds to Plaintiff Ballard Chemical Company, Inc.'s Motion for Leave to File First Amended Complaint, and in support thereof would respectfully show the court the following:

. . . when one inch above that sits a caption that reads:

MONTEZUMA CHEMICAL COMPANY'S

RESPONSE TO BALLARD CHEMICAL COMPANY, INC.'S

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

BEGIN YOUR BRIEF BY FRAMING THE ISSUES

By framing the issues at the outset, you take control of the case—both in open court and in your brief. You can usually do this in three sentences (although the second sentence—explaining the *why* of your position—might run to two or three sentences):

Sentence One: Your position

Sentence Two: Why you think this way

Sentence Three: What you want the judge to do about it

By giving this overview up front, you provide the judge and the clerk with the context for understanding everything that follows. For instance:

EXAMPLE

Summary

Sentence One: The Tlingit Tribe's unprecedented demand for site restoration distinguishes all law on ejectment proceedings and requires this court to consider two issues never addressed by another court.

Sentence Two: Many tribes have tried to eject landowners, but no tribe has ever demanded that a landowner first restore the land to its natural state of over half a century earlier.

Sentence Three: Because the Tribe's demand comes 60 years after the first dike was built and poses a huge expense for Defendant Stockard, and because the Tribe's demand cannot be met without first determining the rights and duties of the United States under the Environmental Protection Agency, Stockard asks this court to allow him to do discovery into laches and to join the United States as an indispensable party.

Rather than allowing your opponent to define the issues, take control from the first sentence. Set the tone and provide the judge with a reason to favor your client and your case. Add the details later.

DON'T CLUTTER YOUR OPENING PARAGRAPH WITH DEFINED TERMS

For many years, the trend has been away from defining terms. We advise lawyers not to define terms for three reasons:

- defining terms clutters our writing, making it difficult to read
- the reader must bear the burden of keeping track of our definitions
- definitions serve no purpose

Using a shorter version of a long name is fine, but you need not tell the judge you're going to do that; just do it. If you mention *Hamilton Regional Medical Center*, and in the next sentence or paragraph you write *Hamilton* or *Hamilton Regional* or even *the medical center*, every reader will know what you mean; you need not define it even at the first mentioning.

BREAK THE HABIT #2

If you're an associate, always check with the partner before dropping definitions, but we advise against using them because we rarely need to.

PART 4: DEVELOPING YOUR FACTS

The perfect brief requires keen investigation and shrewd fact-gathering. The better the facts we gather, the better the story we can tell the judge and the more persuasive our brief. No brief can exceed the quality of its facts—so invest in finding the right facts. While we may have learned to present facts like a news reporter, few are trained to find them like an investigative journalist.

No brief can exceed the quality of its facts—so invest in finding the right facts.

HOW TO DEVELOP FACTS

We must find the facts before we can develop the case and write the brief. The better our fact-finding and analysis, the greater our odds of winning. Developing facts requires us to be curious and strategic. We have three ways to develop our facts:

- search the Internet
- visit the site
- listen carefully during interviews and depositions

Search the Internet

The first thing we should do when we become involved in a case is analyze the website of the other party. Often, information helpful to our case will appear on that website.

EXAMPLE

Our client used to work for Mega Gym, but he quit and opened Small Gym across the street. Mega Gym has sued him for violating a non-compete clause. Their lawyer wants a temporary restraining order or Mega Gym will suffer "irreparable harm." On the Mega Gym website, we discover that Mega Gym has 1,300 gyms and claims to have brought good health to "millions worldwide." These facts support our position that Mega Gym will not suffer "irreparable harm" while the issues work their way through the court system.

TIP #1

After we annotate our opponent's website, we should check it a few weeks later to see if anything has changed. If they have added, removed, or rewritten the content, it suggests that our opponent considers the original information damaging. And if they later pretend that the original never existed, we have already preserved it. Make sure you take a screenshot of the website as you find it to prove the before-and-after. By the same logic, we should analyze our own client's website and be prepared to counter any weaknesses, but advise the client to leave it as it is.

Go to the Scene

Getting out of the office seems to be the hardest part of gathering facts for most lawyers, but this is often where we find the best facts —where it all started.

We visit the scene because we never know what we will find. It will never look and feel like what we imagine. And it will reveal facts not found in the police report, pictures or videos taken at the scene, or eyewitness accounts. The physical attributes of the scene will suggest clues we can get nowhere else, no matter how uninteresting the scene might seem.

EXAMPLE

Our client was hit by a driver running a red light. Liability is not an issue, but the impact broke our client's back, sending him to the hospital for six days and landing him in a full back-brace for three months. The driver has no insurance, and our client's Underinsured Motorist coverage is for the minimum $25,000—leaving a $145,000 gap for medical bills alone. Who will pay for the damages?

Though visiting the scene might not change the outcome with the uninsured motorist, it might reveal other helpful facts. If we visit the scene soon and at the same time of day the crash occurred—6:30 a.m.—we notice things like the sun glaring into the intersection. A passerby tells us the light is new and that many local residents protested its installation because they thought it was unnecessary and difficult to see with the sun. The city put it up anyway. We also notice that the city had not installed retro-reflective borders on the traffic signal's backplates, which would have made the light more visible. Now we have a bigger defendant. One with insurance. But none of this is in the police report or witness statements.

Listen Carefully During Interviews and Depositions

When you interview a client or depose a witness, listen for two categories of words; they are the key to the most persuasive facts:

- conclusions
- abstractions

Conclusions are merely opinions, so they count for little unless the witness is an expert. *Cold* is a typical conclusion. When the deposed says it was *cold*, we ask, "How cold?" because we can't picture *cold*. *Fifty-two below zero* is a fact, and we can picture it. When we put it in our fact statement, so can the judge.

An abstraction is not an opinion, but we still can't picture it, like *password coding systems* or *space-age materials*. We don't know what the deposed means, so again, we must ask.

TIP #2

Opponents will usually answer with conclusions and abstractions because they want to answer our questions without telling us anything. Our client and anyone who supports our client will answer with conclusions and abstractions because they don't know what we need to support the case we imagine. So listen closely to everyone for words like *difficult*, and be ready to develop that conclusion into a fact.

A true story: Lead counsel at a defendant insurance company deposed the head of his client's IT Department. During the deposition, the engineer answered one question with "It was a *difficult* transition." *Difficult* is a conclusion, the engineer's opinion. The lawyer asked what the engineer meant by *difficult*. The engineer said that while shifting all insurance policies onto a new system, they had to continue processing 2.4 million claims. That's a great fact.

TIP #3

Ask the deposed to compare their conclusion to something else. When the lawyer asked the engineer what he would compare the difficult transition to, the engineer said, "It was like trying to change the tires on a car going 60 miles an hour." That sentence went in the lawyer's brief.

BE CURIOUS

Over the years, we've learned three *curiosity* questions to keep in the back of our litigator's mind and bring out when necessary; they will jumpstart any conversation with most clients:

- What is this?
- What does it do?
- How does it work?

Your client is suing a company because they delivered her a rare book for which she paid $500,000, and it was badly damaged. The seller warranted that the book was in As New condition. But when she got the book out of the packing, it contained a deep slash in the cover. Your client says that the defendant misrepresented the condition of the book. The defendant claims that your client slashed the book with a box cutter when she opened the box. This case is now a swearing contest.

You ask your client if she kept the packing material and she said that she had, because she initially wanted to send it back and then thought better of it. You ask her to bring all the packing material. When she brings it to your office, you see that the book was packaged top and bottom in a thick casing of Styrofoam. You ask her if she had ordered other books from the company and she said that she had, but she was so upset by the condition of the expensive book that she was afraid to open them.

You have her bring the books to your office. On video (while holding your breath), you have her open one of the books. It, too, is sandwiched between two thick pieces of solid Styrofoam. A box cutter could not have cut through the layer of Styrofoam.

PART 5: PRESENTING YOUR FACTS

"The Law Will Be What It Ought to Be"

A federal judge once told us, "Facts are everything. The law will be what it ought to be." That's because all laws are based on:

- equity – is it fair?
- logic – does it make sense?

Keep the facts interesting, relevant, and favorable. Where the facts aren't favorable, we acknowledge them. When we do that, we establish credibility with the judge and create empathy for our position.

A judge knows the law, how it works, the difference between a tort and a contract. But she knows nothing about our case. The fact statement is our opportunity to educate her.

NEVER ARGUE IN THE FACTS SECTION

If we want a judge to look favorably upon us and our case, we must distinguish between fact and argument and leave out all opinion—even simple words like *hot* and *cold*. Doing this buries important facts and wastes space: You have an Argument section for a reason.

DON'T WRITE THIS AT WORK

Opinions are self-serving and make judges suspicious, ready to double the burden on us. Yet many lawyers write sentences like this in their fact statements:

Simply put, allegations of troubled labor relations at Ypsilanti are a post facto creation of the Charging Parties in a desperate attempt to justify this meritless litigation.

Often, we write these sentences because we're so used to seeing and writing similar sentences, we don't realize how they work against us:

Any allegation that the loan was "fraudulent," however, is baseless.

The remedy sought is plainly inconsistent with the facts.

Opinion sounds like we're posturing and being disingenuous. When we write our facts without opinion, we tell the judge that the facts matter most.

A GOOD FACT STATEMENT ARGUES FOR US

Imagine reading the following as the opening sentence of a brief:

> On October 6, 2018, Plaintiff Antonio DiMarco smashed the glass of a vending machine with a tire jack to retrieve a bag of chips stuck in the dispenser.

After reading one sentence—with no conclusory words—the judge is already leaning in our favor. The judge may be thinking, *If that were my employee, I would have fired him*—which is what our client did.

OPEN WITH A FACT THAT IS INTERESTING, RELEVANT, AND FAVORABLE

When drafting our fact statement, we should focus on facts that are *interesting*, *relevant*, and *favorable.* And we open with those.

EXAMPLE

In December 2018, Plaintiff James Holman asked a co-worker if he knew how to convert an unalterable PDF document into an alterable Word document. The co-worker did and explained the process to Holman. The document was the 2018 Simmons Commission Plan, a contract for Holman to sign. Before signing, Holman modified it to his benefit, then returned it to the Senior Vice President of Sales. When the Vice President reviewed the signed Commission Plans from his regional sales managers, he noticed that Holman's was different than the others.

From the very beginning, we are showing the judge the plaintiff's lack of integrity. But we never make that accusation; we let the facts speak for themselves.

AVOID NAMES, DATES, AND NUMBERS, UNLESS THEY ARE IMPORTANT

Names, dates, and numbers carry an aura of importance, so a judge will try to keep track of them. if they're not important, the judge will still try to keep track of them, because the judge doesn't know.

DON'T WRITE THIS

"On January 21, 2019, Gonzales violated company policy when he . . . . As required under company policy, he was provisionally discharged on January 26, 2019. On January 30, 2019, after a provisional discharge meeting, Gonzales's employment was formally terminated. On February 2, 2019, the Union filed a grievance."

DO TRY THIS

"On January 21, 2019, Gonzales violated company policy when he . . . . As required under company policy, he was provisionally discharged, and, after a provisional discharge meeting, formally terminated at the *end of January*. *Three days later*, the Union filed a grievance."

Instead, give numbers and dates only when relevant. Otherwise, say things like "It only took a month" or "by the end of the school day." By doing it this way, we give our judge a timeline and still let her know that the process continued fairly and expeditiously without confusing her with insignificant dates.

CHOOSING FACTS TO HIGHLIGHT

The facts you highlight frame the case your way. No matter how complex, there are only a handful of facts that decide the outcome. Discussing more than you need clutters your brief. Further, discussing irrelevant facts might confuse the court.

DON'T WRITE THIS

"In July 2017, the Alhadefs arranged to sell their house for $659,500 to the Mulvaneys on a real estate contract. The principal balance owing on the loan at that time was $426,000."

DO TRY THIS

"When the Alhadefs sold their house for $659,500, the balance on the loan was $426,000."

DON'T GIVE UNNEEDED BACKGROUND INFORMATION

Background information on a party is rarely helpful. If we start with the action, we establish a reason for the judge to want to know more about the party. We open with what they've done or what's happened to them; then we tell the judge who they are. We set our story in motion from the first sentence, then come back to introduce the characters.

DON'T WRITE THIS

Tideco manufactures a wide variety of kitchen equipment and is one of the world's leading kitchen appliance companies. Tideco has 46,000 employees worldwide, with approximately 17,000 located inside the United States and 29,000 based internatonally.

DO TRY THIS

In spring 2018, Tideco's business performance had exceeded expectations, and management wanted to reward all 46,000 of its employees worldwide with a paid day off: Appreciation Day.

Beware of Irrelevant Facts

Facts suggest issues; irrelevant facts also suggest issues. Irrelevant facts confuse the judge and might divert the judge's attention to irrelevant issues. While the judge is considering irrelevant issues, they are ignoring the real ones. If a fact does not help give rise to our issues, it is irrelevant and should not appear in our Facts.

REWRITING TO LEAD WITH THE MOST TELLING FACT

We understand the tug toward setting the stage with background and details, but if you were a judge, would you rather read about the plaintiff's duties and the defendant's procedures or a paragraph more like this?

EXAMPLE

Over a two-year period, the plaintiff arrived at work late almost 200 times. During the same two years, while at work and using hospital computers, he "day-traded" in the stock market. The report from the hospital's IT Department—showing his daily visits to stock and financial websites—was too voluminous to e-mail and had to be burned to a CD.

These are facts the lawyer could have used to set the tone of his brief up front. But he buried them.

TIP #4

To find the most telling fact, ask yourself:

"What is the one fact in my case that—were it not true—would cause me to lose?"

Open with that fact. Do not leave the judge wondering: "Why do I need this information?" "What does it have to do with the case?" "When will they get to the point?"

Real Case #1 – Medical Assistant Sues Hospital for Wrongful Termination

After a short, formal paragraph in the Mediation Statement, the lawyer representing the hospital opened by describing the parties:

Plaintiff is a former Medical Assistant . . . Detox Unit . . . Regional Medical Center . . . hired on or about . . . terminated for cause on

Defendant is a hospital and licensed nursing home . . . one of the largest resources . . . long term care . . . substance abuse expertise

After describing the parties, the lawyer followed with "The Relevant Facts," which explained the "Detox Unit" and how patients are admitted and screened and treated. Then he discussed the plaintiff's "Job Responsibilities" as a medical assistant, like drawing blood and taking urine samples. These descriptions filled the first 1,000 words of the Statement. Not till then do we see a candidate for most telling fact.

After reading these three sentences, a mediator will likely lean toward the hospital. By the time the mediator gets to the plaintiff's allegations two or three pages later, they sound like weak excuses from a subpar, insensitive employee whom the hospital has every right, even a duty, to terminate. Now the lawyer can explain the plaintiff's duties and why his chronic tardiness frustrated the timed responsibilities of other hospital personnel, put patients at risk, and exposed the hospital to malpractice lawsuits.

TAKE CONTROL OF YOUR CASE AND SET THE TONE AT THE OUTSET

Instead, set the tone for the case with a few sentences that read more like this:

EXAMPLE

On November 16, 2017, Plaintiff violated Commonwealth's drug and alcohol policy when he tested positive for cocaine. After being given a "last chance," the plaintiff promised to complete drug rehabilitation and remain alcohol and drug free. One month later, he again tested positive for cocaine.

You now have the judge's attention, and he's already leaning toward your client. Opening like this establishes the case as an Employer Had No Choice But To Terminate Employee Under the Influence of Drugs and Dangerous to Himself and Others case, which makes the judge wonder how the plaintiff ever had the gall to sue your client. Same case, different perspective, different ordering of facts.

Real Case #2 – Employee Sues Employer for Discrimination, Harassment, and Unfair Treatment

If we represent the defendant-employer sued by an employee and open with a list of the bad things the employee has claimed about our client, we establish the case in the judge's mind as An Employer Discriminates, Harasses, and Treats Employees Unfairly case, which we then spend the rest of our brief denying. The first sentence in this brief:

Plaintiff filed an amended Title VII Complaint under the Civil Rights Act of 1964, alleging three claims for relief: (1) "discrimination based on race"; (2) "harassment and unfair treatment on the job"; and (3) "unfair labor practices."

Our client and our case look especially weak when we follow our presentation of the other side's case with denials like "Complainant's claims are totally without merit." And "Neither his national origin nor his race played any role whatsoever in the decision to end his employment." That is our opinion, and judges don't care what we think; they want to know how we got there.

TIP #5

Don't overwhelm the judge with minutiae or present the other side's case. If we open with mundane detail, we confuse our judge about what is important. If we open by listing the other party's accusations against our client, we establish a "guilty" tone. Neither is a good first impression, and we will spend the rest of our brief trying to make another, better, first impression.

A Brief Is Not a Law Review Article

The biggest criticism partners level at litigation associates is that they write a brief the way they would write a law review article, presenting both sides instead of advocating for one side. Present your facts, then in your Argument cite authority and explain why those facts and authority support your position.

Keep the facts interesting, relevant, and favorable. Where the facts aren't favorable, we acknowledge them. When we do that, we establish credibility with the judge and create empathy for our position.

PART 6: TELLING THE JUDGE A STORY

Stories take a judge to the heart of our dispute. They let the judge see our client's plight, empathize with our client, and want to decide for our client. By telling a story, we say to the judge, "Your Honor, here is what this case is really all about."

Litigators sometimes resist telling stories because of some notion that "stories" are frivolous. But think of it this way: No story, no issues; no issues, no case.

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WHAT IS A STORY?

A story provides context for applying the law. It is about people doing things or having things done to them. *Interpreting a statute* is not a story. *Alleging a wrongdoing* is not a story. *Describing a principle* is not a story. *People generating and pumping raw sewage* into a lake and *spilling wastewater into a sound* are stories.

In the condemnation case below, the judge need not read a metes-and-bounds description of the property before they hear the story of what happened there. Nobody acts in a metes-and-bounds description. Instead of opening with the description, we could engage the judge with a simple story:

EXAMPLE

In July of 2015, Kensington Investments purchased 27 acres west of Ft. Lauderdale for $2,000,000. In August of 2017, Broward County condemned the property and offered to compensate Kensington with $5,000,000. Although Kensington had done nothing to improve the site, the company claimed that in two years the property had appreciated 650% to $13,000,000.

In three sentences of story, the judge already wonders how any plot of land could increase in value 650% in just two years, which immediately shifts the burden to Kensington.

HOW DOES STORYTELLING DIFFER FROM EXPLAINING?

An explanation contains no events. Nothing happens. At its deepest level, a story has a beginning, a middle, and an end. Telling a story can be as simple as this:

> In August, Proud Rhodie contracted with LMK to purchase silicon for $130,137.30. Ten days later, LMK delivered the silicon.

Contracting and *delivering* are events, so we're telling a story. If we open our brief by explaining, nothing happens.

A SAMPLE STORY

Consider this Position Statement, not only does the lawyer open with an unnecessary formal sentence—then present the *other side's* case—but also nothing's happened. A better way to open the Pericles brief would be by telling a story that helps the judge appreciate our client's position.

DON'T WRITE THIS

Dear Ms. Horowitz:

This firm represents Respondent Pericles Packaging in the above referenced matter. Kindly accept this Position Statement as Pericles's explanatory response to the Verified Complaint filed with the New York Division on Civil Rights by Adeola Okafor.

Complainant Adeola Okafor alleges that she was discriminated against by Pericles based on her race (African American) and her national origin (Nigerian) in violation of the New York Law Against Discrimination ("NYLAD") (N.Y.S.A. 10:5-12a) and in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Complainant's claims are totally without merit.

DO TRY THIS

In July 2018, Complainant Adeola Okafor, a shipping clerk for Respondent Pericles Packaging, shipped a customer's 10-case order "Overnight."

With each order Okafor shipped, she first had to check the customer's master shipping instructions. That customer's instructions authorized "Overnight" shipping only if the order was for five or fewer cases; Okafor had failed to check the instructions, and the customer refused to pay for the overnight shipping.

Because of Okafor's mistake, Pericles had to absorb a loss of $2,322.47. Pericles has a list of 14 similar examples of Okafor's carelessness resulting in losses for the company.

BEGIN WITH THE FACT THAT BROUGHT YOU TO COURT

Open with a story and a sentence like this to establish a tone advantageous to our client:

> In July 2018, Complainant Adeola Okafor, a shipping clerk for Respondent Pericles Packaging, shipped a customer's 10-case order "Overnight."

Keep telling your story exclusively with facts—no editorializing—letting the story build, until the judge wonders about the veracity of the Complainant's accusations. The next two sentences of *Pericles* might be something like:

> With each order Okafor shipped, she first had to check the customer's master shipping instructions. That customer's instructions authorized "Overnight" shipping *only if the order was for five or fewer cases*; Okafor had failed to check the instructions, and the customer refused to pay for the overnight shipping.

Now the judge knows that the Complainant's carelessness has cost Pericles money, and the judge reads on because he wants to know the degree of her carelessness.

FEEL FREE TO BEGIN IN THE MIDDLE

We need not tell a story in chronological order. We can pick the crucial moment that supports our client's case and begin there, then go back and fill in details. This technique works in fine literature, good film, and well-written briefs: Rather than open with the day the employee was hired, open with the day that they created loss for their employer and come back to the day they were hired.

In Pericles, we've opened with one example of the Complainant's carelessness; later in the brief, we can tell the judge what the company does and how long the Complainant has worked there. But in the last two sentences of our opening paragraph, we finish the point with:

> Because of Okafor's mistake, Pericles had to absorb a loss of $2,322.47. Pericles has a list of 14 similar examples of Okafor's carelessness resulting in losses for the company.

In one paragraph of storytelling, the judge now knows that the Complainant has been consistently careless and cost Pericles thousands of dollars to cover her mistakes. How can the Complainant now deny her own role in her dismissal?

By telling the judge a story at the beginning, we engage them in our client's case, provide them the context to apply the law, and take command of the case from the first sentence. At the outset, we point the judge immediately toward the conclusion we want them to reach.

PART 7: CAPTURING THE JUDGE'S IMAGINATION

To immerse a judge in our story, we must capture the judge's imagination. By using descriptive language that engages the senses, we invite a judge to see the events through our client's eyes.

- Begin with the moment the judge needs to hear about first.
- Give facts, not conclusions.
- Give the facts that lead to your conclusions; don't bore the judge to death.

By using descriptive language that engages the senses, we invite a judge to see the events through our client's eyes. Descriptions that do not hit at least one of our five senses disorient us, because we have nothing to grasp.

If we are to capture a judge's imagination, we must follow Rule 16 from Strunk & White's *The Elements of Style*: "Use definite, specific, concrete language. Prefer the specific to the general, the definite to the vague, the concrete to the abstract." The classic example from Strunk and White pits two sentences against each other, the one on the left conclusory and abstract, the one on the right specific and concrete.

CONCLUSORY AND ABSTRACT

"A ***period*** of unfavorable weather set in."

SPECIFIC AND CONCRETE

"It rained every day for a week."

We can't comprehend a *period*: It could be a minute, a month, or an epoch. We can't picture *unfavorable weather*: It could be a gale, snowstorm, or dust storm. But we can see and feel *rain every day for a week*; we can hear it and taste it, even smell it. Descriptions that do not hit at least one of our five senses disorient us, because we have nothing to grasp.

CONCLUSORY AND ABSTRACT

"St. Olaf's records ***reflect a concern*** that the bony metastases of cancer to her back was the cause of the compression fracture, which was later confirmed by a bone scan."

SPECIFIC AND CONCRETE

"Doctor Doe opined that the bony metastases of cancer to Susan's back was the cause of the compression fracture, which was later confirmed by a bone scan. The delay in diagnosis reduced Susan's five-year survival rate from 85% to just 10%."

The language in those records is the heart of the case. What does this mean? Is it a big concern or a little concern? How conclusive? *Reflection* and *concern* are not facts, we can't picture or appreciate them; but the words in the records that *reflect a concern* are facts, and unless we have an overriding reason not to use them, we should quote that language.

CONCLUSORY AND ABSTRACT

Both the contractor and the supplier recognized the *difficulties inherent* in *supplying* and *installing equipment* for a *construction project* on a *remote island* in the Aleutians. It takes so much *longer to deliver materials* and *to perform necessary work* in a *remote* and *inhospitable* location.

SPECIFIC AND CONCRETE

Four miles long, two miles wide, Shemya Island lies at the extreme western tip of the Aleutians, 1,500 miles from Anchorage and only a few miles from Siberia. In January 2017, the year King delivered the engines, the US Navy selected Shemya to stage a simulated amphibious assault because the site provided 50-foot seas and gale force winds, what the commander of the Navy Third Fleet described as "the most difficult conditions imaginable." Even in August, the air is so cold and the wind so strong they create "horizontal icicles."

The opposite of *concrete* is *conclusory and abstract*. Judges can't picture conclusions like *remote* and *expensive*; they can't picture abstractions like *defective merchandise* and *operative entities*. If we want the judge to understand the necessity of a limited liability clause, we must allow the judge to envision—maybe feel and hear—the construction site.

Using concrete words and images, this paragraph captures the judge's imagination and persuades by conveying subliminally: Your Honor, we don't know what the weather's going to be like six minutes from now, let alone six months from now. That's why the limited liability clause is not "unconscionable."

CONCLUSORY AND ABSTRACT

The defendant got out of his car and he was acting erratic. He appeared intoxicated. Everyone witnessed how under the influence he was when he walked up to my client's mother in the street.

SPECIFIC AND CONCRETE

When the defendant got out of his car, he had to hold on to the door for support. He staggered over to where Jamie lay crumpled by the curb. Even though he was standing in one place, he was constantly having to adjust his stance to prevent himself from falling over. His eyes were bloodshot and glassy. His speech was slurred. He had alcohol on his breath. From the moment he got out of the car, he talked a mile a minute, but nothing he said was about the crash.

Conclusory language like *acting erratic* or *appeared intoxicated* is counterproductive because it doesn't give the listener any facts to go on. If the evidence is in your favor and the judge would probably rule your way if given all the relevant facts, then they may be even more frustrated with you. The judge needs to know what happened, not what you think.

The judge (or jury) will be deciding whether the defendant in your wrongful death case was driving under the influence of alcohol, but they can't decide for your client if they have no facts.

You must be reasonable and acknowledge a potential defense. But if you present it properly, it will look like the other party is lying.

EXAMPLE

The defendant told the police at the station that he was acting that way because he had hit his head. He agreed that he had been drinking, but he said that he had only had two beers and wasn't drunk. He blamed his behavior on a head injury that he must have had from the crash. But there was an empty bottle of vodka on the floor and he refused to take the blood test. And then he refused medical attention.

When you communicate in concrete and specific terms, the judge will form the conclusions you want. They imagine horizontal icicles. They conclude that the conditions are unpredictable and perilous. They imagine the defendant staggering and swaying over the woman he just struck with his SUV, looking down at her crumpled body in a gutter and not even acknowledging her. They conclude that the defendant had a total disregard for the impact of his actions on a human life.

PART 8: TIGHTENING & PROOFREADING YOUR BRIEF

A polished document encourages a generous reading, so correct mistakes and cut superfluous language. Assuming you've followed the earlier advice from this book, here are ten more ideas to ensure that what we send to the court is our best work and enhances our reputation with the judge.

TWO UNIVERSAL RULES

Proofread for Typos and Grammatical Slips

Fair or not, typos, grammatical slips, and incorrect usage make judges wonder, "If they can't get the simple things right, how can I trust what they say about the more complicated aspects of this case?" These errors chip away at our credibility and send a message to the judge that we don't care about this case.

Never Use Tricks to Squeeze a Brief into a Word or Page Limit

Judges have seen every trick we can imagine and some we can't. If we slightly adjust the margins or the spacing or the font, the judge will notice. Many judges will then strike the entire brief for not following the rules. Instead of using tricks, let WordRake help you meet word and page limits at the push of a button.

THREE EASY EDITING WINS

Avoid Abbreviations

If the judge has to pause to remember what your abbreviation stands for, they can't pay attention to your argument. Use abbreviations and acronyms only (1) when the judge will recognize the acronym but not the written-out term or (2) when everyone uses the acronym and not the term spelled out: IBM, ATT, IRS, NPR, NRA, NOW. But rather than call the "United States Coast Guard" the "USCG," call it the "Coast Guard." Instead of reducing "Sauk-Suiattle Indian Tribe" to "SSIT," call them the "Tribe."

Remove "Transition Words"

Occasionally, a transitional word at the beginning of a sentence serves a purpose, but only if the word means more than, "Yeah, and this, too." Examples of transition words that add nothing to our sentences: *therefore*, *consequently*, *accordingly*, *further*, *in summary*, *in fact*, *moreover*, *furthermore*, *indeed*. Skip the cheap transitions and rely on the simple tools: *also*, *and*, *but*, *or*, *however*, *nevertheless*.

Search for the Word Indicate

This goes back to the problem of conclusory language. *Indicate* means to communicate in an indirect manner, yet many lawyers use it as though it means the more direct *said*, *promised*, *stated*, *claimed*, *declared*. If people say something, and they're not speaking in euphemisms, waving signs, or using body language, they're not *indicating*:

> Bauer indicated that he was not aware of the cost overruns and would further review the budget.

This means that Bauer said something or did something in a way that led the lawyer (or the client) to believe Bauer was not aware of the overruns. Someone else, like a judge, might interpret Bauer's "indication" differently. We often weaken our position by using *indicated* rather than the strong, direct word we mean—"told Jameson."

FIVE THOUGHTFUL CHANGES TO INCREASE IMPACT

Check the End of Each Sentence

At the end of our sentences, we often go beyond the point at which our reader already understands. Examine the last few words before each period to see if you can delete them. If those words form a prepositional phrase, the odds increase they are unnecessary.

DON'T WRITE THIS

But the facts of *Armstrong* are not analogous to the present matter.

DO TRY THIS

But the facts of *Armstrong* are not analogous.

Pare Quotations

We never pull words out of context to change their meaning, but we make life as easy as we can for a judge by quoting only the relevant part.

DON'T WRITE THIS

Hamilton is entitled to its attorneys' fees and costs as a matter of right: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."

DO TRY THIS

As the prevailing party, Hamilton "is entitled as a matter of right to recover costs in any action or proceeding."

Cut Topic Sentences

Topic sentences are good for sixth graders learning how to organize and express their thoughts. Once we learn how to do this, however, topic sentences only clog our paragraphs. A judge can follow our thinking without our placing a bald topic sentence at the beginning of each paragraph. Leave out the topic sentences. It's a much faster way to communicate with our judge.

DON'T WRITE THIS

Mr. Gonzales's time and attendance were very poor throughout his entire period of employment. In approximately two years, he was late for work almost 200 times.

DO TRY THIS

Over two years, Mr. Gonzales arrived late for work almost 200 times.

In Each Sentence, Put the Important Point at the End

When we have two pieces of information in the same sentence, always put the main point at the end. Open with the supporting point, then follow with the main point.

DON'T WRITE THIS

He never returned her money despite her repeated requests.

DO TRY THIS

Despite her repeated requests, he never returned her money.

Change Gendered Language to Gender-Neutral Equivalents

Obviously, you'll want to change things like *manned* to *crewed*, *fireman* to *firefighter*, but you already knew that. It's also important to write without assuming gender, and until about 150 years ago, everyone just used the singular *they*. Then some Victorians decided that the default human was male and it was all downhill.

But more and more authorities recognize that what's good enough for Shakespeare is good enough for us; consequently, more and more style guides recommend the singular *they*. Everyone in the courtroom probably uses it on the record without knowing it—even the partner who lectures you against it. Using the singular *they* is the most natural solution and it's quite possible that no one will even notice you're using it.

If the singular they still makes you uncomfortable, try:

- Substituting the gendered pronouns with the second person pronouns *you* and *your.*
- Replacing *a gendered pronoun* with the article *the*.
- Writing in the passive voice.
- Repeating the actor.
- Making the noun and all related pronouns plural.
- As we frequently do when referring to judges or lawyers, try alternating between *she* and *he*.

BREAK THE HABIT #3

Submitting a brief shorter than what the court will allow signals the judge we have a strong case and we know it well. It is the surest way to create a good impression with a judge. Like the rest of us, most judges will turn immediately to the last page of anything they have to read to see how long it is. If a page limit is 20, over 95% of briefs will run 19 ¾ pages. If a judge sees 16 or 17 on that last page—based on her experience of having read thousands of briefs—she automatically will assume this brief will be better than most. So she turns back to p. 1 with a good feeling about the lawyer who wrote it even though she has yet to read one word.

PART 9: FINAL SUBSTANTIVE REVIEW

For most lawyers, our desire for perfection makes it difficult to recognize when our work is done. If that describes you, then this list is an effective way to determine whether the brief is ready for the court. Ask these 20 questions. Have I:

1. titled each section of my brief with a single word?
2. dropped the formal opening, “Defendant respectfully submits”?
3. started with my own case?
4. addressed both sides reasonably?
5. spelled out acronyms?
6. stated my position, why the law and evidence support it, and what I want the judge to do?
7. opened my fact statement with a fact that is interesting, relevant, and favorable?
8. told the judge a story?
9. discarded conclusory words and arguments in my fact statement?
10. removed extraneous facts?
11. written in the concrete?
12. checked my facts for “opinion” words, like *difficult, confusing, lengthy*?

13. deleted unnecessary words, nominalizations, and passive voice?
14. removed unimportant names, dates, and numbers?
15. avoided self-serving words like clearly, obviously, well-settled?
16. dumped the fightin' words, like outrageously, incredibly, amazingly?
17. pared quotations?
18. asked "Why?" or "So what?" after each sentence of argument?
19. proofread for typos, redundancies, clichés, and legalese?
20. made my brief 15% shorter than the page or word limit?

The above questions themselves are simple, but a "no" answer effectively reveals a weakness that your readers will quickly see. It's your last chance to get your brief right and make it the best it can be. When you can answer "yes" to each of the 20 questions above, you're ready to submit your brief to your supervisor or the court.

CONCLUSION

Using WordRake's approach to brief-writing will strengthen your case and increase your chances of winning. The WordRake method will also enhance your reputation with the judge. Using our method, you will have taken control of the case by establishing the issues, found and communicated facts in a way that the judge can envision, used your facts to lead the judge to the right conclusions, and increased your chances of the judge's ruling in your favor.