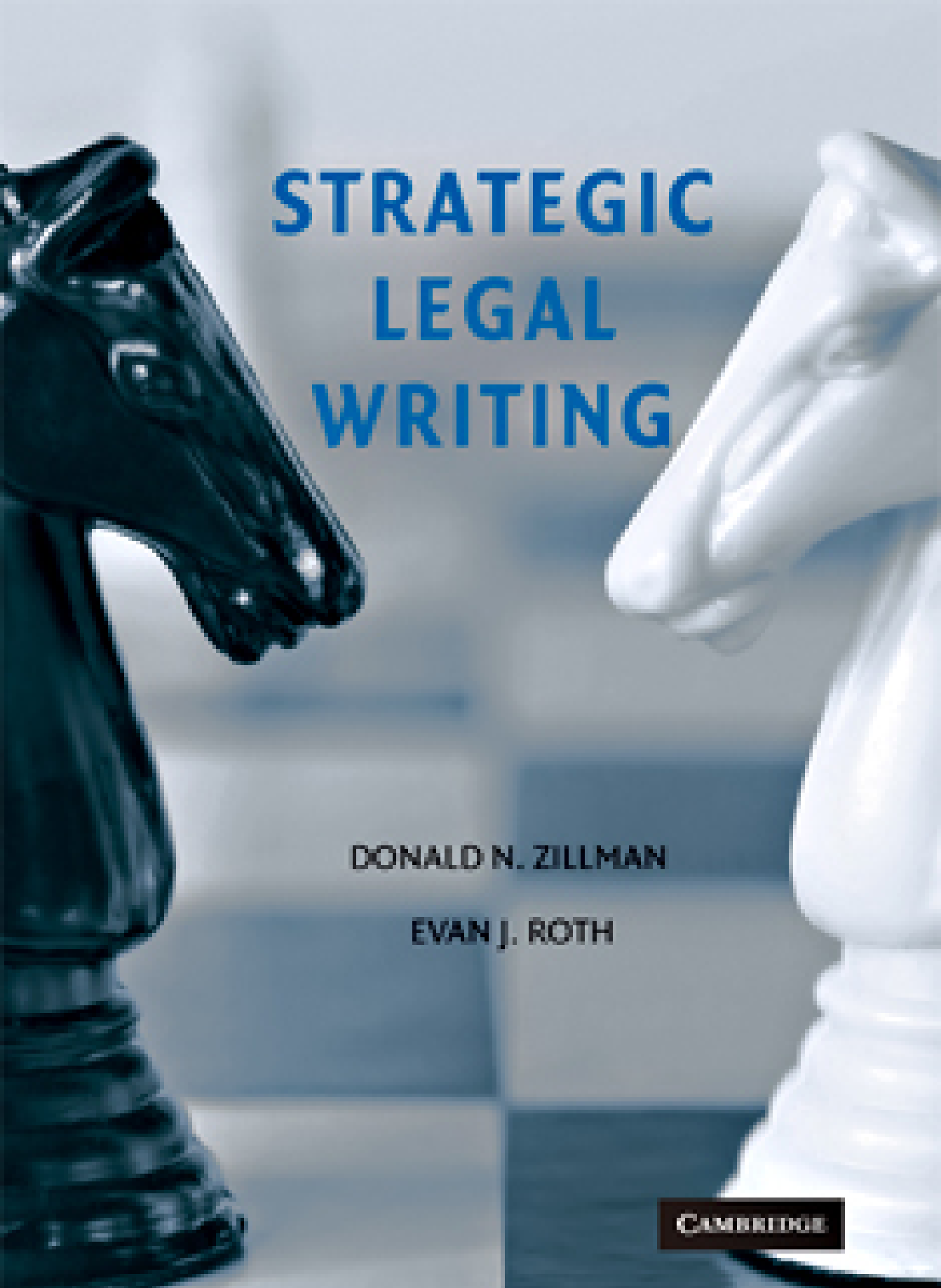

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STRATEGIC LEGAL WRITING

There are many legal writing texts that emphasize *how* one writes; this book is unique because it focuses on *why* one writes. Every chapter challenges the reader to write in a way that will be most effective in achieving a strategic objective. Each assignment has been carefully considered by the authors and fully vetted to simulate for the reader the type of decision-making involved in the preparation of important legal writing, whether in a general counsel's office, a law office, a U.S. Attorney's office, or a judge's chambers. Simply put, the authors' approach is that effective legal writing does not exist in a vacuum. This book provides practical assignments that teach the student how the best legal writing is not an end in itself, but a means to achieving a larger strategic objective.

Donald N. Zillman served as Judicial Clerk for the 9th Circuit Court of Appeals and as a U.S. Army Judge Advocate General's Corps officer and was third in command as Special Assistant Attorney General for the State of Arizona. As an educator, Zillman taught at the Law School at Arizona State University from 1974 to 1979 and the University of Utah from 1979 to 1990, and he continues to teach at the University of Maine Law School since he began there in 1990. As an administrator, Zillman served as Dean of the University of Maine Law School from 1990 to 1998, as Interim Provost and Academic Vice President of the University of Maine from 1999 to 2000, and as Interim President of the University of Maine at Fort Kent from 2001 to 2002 and has held the title of President of the University of Maine Presque Isle since 2006. In addition, he retains his position of Edward Godfrey Professor of Law at the University of Maine Law School.

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STRATEGIC LEGAL WRITING

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Contents

Origins of the Book

This book began with the casual pairing of the two authors to teach a course at the University of Maine School of Law entitled Advanced Legal Writing. As the title suggests, this is a course for 2L and 3L students that carries on from the required 1L Legal Writing course. Prior versions of Advanced Legal Writing at Maine Law had struggled to find a purpose and an audience. One version provided further instruction in the preparation of a judicial appellate brief. Another version required the student to prepare a scholarly journal article. Neither version attracted many students.

Don and Evan had separately asked the administration about teaching a writing course that stressed short assignments, intensive editing, and hard student thinking about *why* they were writing. Law school deans invited us to combine our efforts. The result was a new approach to Advanced Legal Writing. A splendid first class of students did everything that we asked and more. They passed on their experiences to upcoming classes. We soon were oversubscribed. As we refined our materials, the strategic aspects of our teaching came increasingly to the fore.

The text is a product of our separate backgrounds. Most of Don's career has been in the legal academy. After a federal judicial clerkship, a short stint with a Public Defender's Office, and four years with the U.S. Army Judge Advocate General's Corps, he began a legal teaching career at Arizona State University. He moved from there to the University of Utah Law School and came to Maine in 1990 to take the deanship of the state's single law school. Happily for him, Don was able to continue teaching while carrying out decanal duties. Since stepping down from the deanship in 1998 he has divided his time between academic and administrative duties. The years 1999–2000 and 2001–2002 were devoted to interim appointments as an academic vice

president/provost and as a campus president. In other years, Don was a member of the Maine Law teaching faculty with a research and writing agenda. In summer 2006, Don returned to administration as the president of the University of Maine at Presque Isle.

Don's background has given him the unusual experience of being both a provider (the usual lawyer's role) and a recipient of legal advice. In his positions as dean, provost, and president, he has relied on both government and private counsel to shape his actions as a campus leader. The materials in Chapters One, Three, Five, Seven, and Nine reflect the kinds of legal questions that face a senior academic leader. Their focus on a university setting is explained both by Don's background and by the expectation that law students will know the world of the university, while they might not know "the territory" if the problems were set in the Nuclear Regulatory Commission, a state department of transportation, or a private securities trading business.

Evan's experience includes a clerkship for the Honorable W. Eugene Davis of the U.S. Court of Appeals for the Fifth Circuit, seven years as a litigation associate with the firm of Williams & Connolly in Washington, DC, and thirteen years as an Assistant U.S. Attorney in Portland, Maine. Evan's approach to legal writing takes into account lessons from each of those experiences, including the very different litigation demands in the public and private sectors. Chapters Two, Four, Six, Eight, and Ten emphasize the kind of legal challenges that litigators face every day, including the drafting of complaints, motions, and responses. There is a mix of criminal and civil litigation assignments, as well as some refreshers on how to navigate the maze of applicable procedural rules.

We have shared portions of this text with some able lawyers and writing specialists. Our thanks to Eugene Fidell, Carol Hawkins, Catherine Redgwell, Kathy Bubar, John Gulliver, and Tammy Hutchins. Their comments have improved this text and validated our approach to the course. Our thanks also to Ethelyn Boyd and Linda Zillman for their invaluable help in preparing the manuscript. Evan offers special thanks to the Honorable W. Eugene Davis for his support and guidance. In addition, this book would not have been possible without the help and encouragement of Paula Silsby, Bill Browder, David Collins, and Melody Richardson. Most of all, Evan thanks Sara, Jackson, Anders, and Gareth for their never-ending love and inspiration.

Disclaimer:
The views expressed in this book are those of the authors, not those of the U.S. Department of Justice or the University of Maine System and its campuses. Exercises in this book have their origin in legal matters handled by the authors during their careers. However, names and facts have been changed for educational purposes and to preserve privacy. The exercises do not describe actual legal situations or real people.

What Is Strategic Legal Writing?

We emphasize many things in this text. Two are the values of brevity and clarity. Make every word count. Be clear about what every word means. Eliminate words or phrases that do not enhance your message.

Modern electronics ended the age of the telegram. One of the virtues of the telegram was its charge per word. The thirty-five-word telegram cost more than the ten-word telegram. Generations of cost-conscious Americans became skilled at saying as much (or more) with fewer words. For example, you need to instruct your client on your arrival for an important business meeting. Consider these two messages. "I can get a flight out of Dulles that connects through Chicago and gets me into your airport at about ten o'clock at night unless, of course, we get delayed for weather or security concerns. I would appreciate it if you could have someone meet me at the airport so I don't have to struggle with the long cab lines and can get right to the conference hotel without getting lost in the complex of one-way streets that I remember from my last visit to your fair city." Is that any clearer than: "Arrive airport 10 PM. Please meet me there!"?

Having stressed brevity, clarity, and the importance of each word, let's dissect the title. Strategic. Legal. Writing. Take the words in reverse order.

WRITING. This IS a book about writing. Both of us read widely, including legal materials, general fiction, and nonfiction. We share a bias that good writing in one context is good writing in others. That is not to say there is nothing distinctive about legal writing. However, things like clarity and brevity that improve writing in one context usually improve it in others. The lessons in writing that improve a good high school essay or an effective business letter also make a good legal document.

A second bias of ours is that good writing is the product of good editing. A very small percentage of the world can produce gifted writing in the first draft, whether on paper or word processor. The large majority of us (including Don and Evan) need to edit our initial work, often ruthlessly so. And, increasingly in this busy world, this must be self-editing. The law student or young lawyer may have visions of the kindly senior partner sitting down with early drafts of memoranda or motions and picking apart every sentence with collegial pats on the back. Good luck! Very few $300-per-hour lawyers can afford to provide this sort of mentoring, even assuming that they would do it well. You will need to do most editing on your own. The really bad writer, before or after self-editing, is likely to be fired – sooner rather than later.

LEGAL. Many of us came to law school, and the practice of law, with an idea of what legal writing was supposed to look like. "Whereas, the aforementioned Smith gives, devises, bequeaths, grants to the party of the third part. . . ." Sound familiar?

A part of our message is that it doesn't have to be this way. And, it shouldn't be. Remember clarity and brevity. We repeat. Chances are that what would be good writing in business, other professions, government, and so on will be good writing in law. The rule doesn't apply everywhere. For example, some writing may derive its strength from its creativity in organization. The reader struggles to discover whose thoughts are being expressed or when the author has changed from past to present tense. The winning advertising slogan or political message may be successful because no one knows just what it means. Or because it lets everyone hear what they want to hear. These are not good precedents to carry over to legal writing.

We need to remember that legal terms have precise meanings. "Rob," "bequeath," "slander" may mean things to the layperson that they do not mean to the lawyer. The ten-dollar word may be the only one that accurately conveys legal meaning to the legally trained reader. In that case, use it.

Much of your initial legal writing course in your first year of law school centered on expressing the result of your legal analysis of problems, statutes, and cases. This case is similar, but not identical, to the problem your client has presented to you. How do you explain the similarities (with the advantages of controlling precedent) and the differences between the established law and your client's problem? The most skillful and even poetic writer doesn't automatically bring along good legal analysis. I recall a memorable law school final

exam in which a creative writing grad student who had started law school had me hanging on every well-chosen word. Unfortunately, there weren't enough of them and some issues were omitted altogether. Writing: A+. Legal analysis: C+. Through the course of the problems in this text, we will discuss aspects of good legal analysis and how to translate that from mind to paper.

STRATEGIC. We move to the most important element. Put simply: What do you want to achieve with this piece of legal writing? We give you our first hint. Don't be surprised if you should have several objectives.

Consider the following letter:

Mr. Joseph Hardy, CEO
Hardy Widget Company

Dear Mr. Hardy:

As you may know, your company has supplied us with widgets for the last eight years. We typically buy 8,000 widgets from you each month. The widgets are a crucial component of our best-selling Supergizmos.

We have just completed partial inspection of this month's shipment of widgets. A sampling of the widgets shows at least half of them are substandard in height and weight. Their use would almost certainly cause Supergizmos to fail within six months. The failure could give rise to serious personal injury or death to the Supergizmo user.

The Katahdin Commercial Code, section 2–126, allows us to refuse an entire shipment "when a substantial portion of the products do not meet specified and material standards for the product." The Katahdin Supreme Court case of *Roth v. Zillman* interprets that provision. In Roth, plaintiff identified 20 sweaters in a shipment of 1,000 in which the sleeves were already separating from the body of the sweater due to inadequate stitching. The Court made clear that this was a "material" failure. It further emphasized that a sample of 20 was sufficient to reject the entire shipment of 1,000 without more extensive inspection of the entire lot.

We are highly distressed at this careless, if not fraudulent, conduct on your part. Rest assured that we will take every legal step to protect our interests.

Joan Becker, President
Becker Manufacturing Company

As a piece of writing, the letter meets most tests of good writing. It is clear and concise. It moves in a logical order. Word choice is satisfactory. Sentences aren't so long as to be confusing. Although the language is pedestrian, the message is conveyed.

As a piece of legal analysis, the letter also appears satisfactory. Assuming the author accurately describes the Katahdin Commercial Code and the Roth case, the legal analysis is solid. Here is a general rule of law (the Code provision). Here is a controlling case (Roth) that has facts similar to the problem facing the author of the letter. The conclusion (we have a legal remedy for the defective widgets) may be so obvious that it does not need to be stated. Shouldn't the lawyer who drafted the letter for Ms. Becker feel fully satisfied with the result?

It is worth asking two crucial questions. Both should have been asked before the letter was written. First, what is the prior history between Hardy Widget and Becker Manufacturing? Second, what result does Ms. Becker want from the letter?

The letter itself indicates Hardy and Becker have been doing business for eight years. This sounds like a relationship that has worked well for both buyer and seller. Hardy may have worked hard in the past to meet unexpected needs of Becker (hurry-up deliveries, slight modifications of the contract specifications). Mr. Hardy and Ms. Becker may work together in community activities or be fellow alumni of the local college. Suppose this is the first instance of a problem with widget quality? Is this really the letter to send? What would Ms. Becker's reaction be if the return mail brought the following letter?

> Ms. Joan Becker, President
> Becker Manufacturing
>
> Ms. Becker:
>
> You may consider any subsequent relations between our companies terminated immediately. Have your lawyer contact my lawyer regarding your unhappiness with the prior shipment.
>
> Joseph Hardy, CEO
> Hardy Widget Company

A well-written, accurate statement of the law has threatened a long-running and productive relationship. Possibly, things can be patched up. However, it is

unlikely that Ms. Becker and Mr. Hardy will fully restore their prior relationship. The letter may be a strategic disaster.

By contrast, the letter could be the appropriate document. Suppose a previously good buyer-seller relationship had headed downhill in the last year. Previous shipments of widgets were substandard. Deliveries were often late. Phone calls and letters hadn't corrected the situation. Ms. Becker had explored other options for the supply of widgets and found several attractive suppliers. In your counselor's role as her attorney, you had asked Ms. Becker: "What response do you want from the letter?" She responded: "If we don't get an abject apology and a believable plan for improvement, we are through doing business with Hardy." Then the letter may be the right document for that purpose.

Throughout the text we explore each aspect of the title. Strategic. Legal. Writing. We offer checklists that relate to the specific problem assigned. They also may be relevant to any legal writing. In some cases, we indicate rights and wrongs of strategic legal writing. Part of the challenge of our problems is that you may have different opinions from your classmates or your instructor as to what your strategic objectives might be. What is important is that you have considered why you reach the conclusion you reach. If you are doing that, you are on your way to being a good strategic legal writer.

Using the Text

We've designed the text so that it can be used in a variety of teaching (including self-teaching) contexts. We first describe how we have used the materials to team-teach a one-semester, three-credit course for second- and third-year law students. We then suggest other ways of using the materials. We anticipate that instructors will bring a rich variety of practice and writing experiences to their teaching and the text. There is ample room for them to substitute parts of their professional experience for sections of the text.

Our objective from the first offering of the course was to expose law students and new lawyers to the kinds of strategic legal writing that they would encounter early in their careers. We wanted a division between litigation materials and nonlitigation or office practice or transactional materials. During one semester (thirteen or fourteen weeks), each student is required to prepare ten separate writings. We ask the student to rewrite one, two, or three times. Our goal is to have the final product be a writing of the highest quality, suitable for use in a real-world practice situation. We also tell law students that their portfolio of final drafts should serve them well in any job interview.

We begin the first class with an overview of the course. We particularly stress the strategic aspect of legal writing – what are the objectives you have for this document? We then present the first assignment. Normally, we ask the students to read (or re-read) the assignment in class. We then offer some additional guidance about the situation in which they write or about the final product that is expected. The students are then turned loose to write their first draft. Office hours and/or electronic communication allow for mid-assignment questions.

The second meeting of class begins the students' experience in multitasking. We are always amazed that some students seem surprised to have three

assignments in some stage of completion at one time. Welcome to the real world, folks! We receive the first drafts. The students are then invited to review the material in the follow-up sections at the back of the text. We open the class for general discussion on the law, on approaches to writing, and on the strategic aspects of the problem. This can be a good opportunity to do some role-plays involving the characters of the problem. The results from those role-plays can then be included as part of the background facts for later drafts of the assignment. This is also the time to discuss some of the general guidance we provide throughout the text. The advice may focus on writing, legal analysis, or strategy.

At the second meeting of the class, we assign the second problem. We alternate between litigation and nonlitigation exercises. If the course is co-taught, that spreads the instructor workload. We also have found the students enjoy the variation. However, nothing prevents doing all litigation exercises first and then all transactional exercises, or vice versa.

Instructor evaluation of the student drafts now begins. Evan applies red ink to paper. Don will prepare a general e-message to the class that addresses common problems that have shown up in many drafts. He will then prepare individual e-messages to each student that addresses their first drafts. Both of our comments address strategic, legal, and writing problems. Some matters will clearly be wrong. The student has misread a precedent case. The student has forgotten to include a verb in the sentence. The tone of the letter insults a valued client's intelligence. We normally make clear that change is needed but do not specify exactly what the change should be. Other matters invite the student to explain more of their thinking. Do you really think the Smith precedent can be taken that far? Does your attempt at humor help or hinder your message? Does your conclusion leave the other party a graceful exit from her ill-considered position? Our invitation is to a hard rethinking of "what the writing is trying to do." The student can appropriately respond: "I appreciate your concerns, but I think this sentence needs to be a tough demand rather than a soft invitation to rethink." From those critiques and from the in-class comments, students prepare the second drafts. Some students will have gotten it nearly right the first time on some exercises. The second draft may be their final. Other students may have misunderstood the assignment, misread the law, or made other major errors. Total restarts are not unknown.

In this fashion, we move through the semester. We normally take one or two weeks in which we do not make a new assignment to allow students to

catch up with the papers that are outstanding (in the less positive sense of the word) and deal with midterms, seminar papers, interview trips, and the like.

Final evaluations are by letter grade. We don't encourage pass/fail students and we have resisted requests to make the course credit/no credit. We tell the students from the start that we will not be giving them grades on individual drafts or assignments. We do promise to inform anyone who appears to be working at below a B– level. This is idiosyncratic with us. We don't want the students to lose the learning in the search for grades. We also explain that grades on each assignment will be a combination of a grade for the initial draft and for the final draft. Clearly, the students benefit from our suggestions. That should be rewarded, but not to the extent of making irrelevant the student's performance on the first draft.

Is there a danger of cheating? Of course there is. However, we don't provide model answers anywhere in the text or Teachers' Manual. Further, there is not "one right answer." Student strategies for the problems may differ and different writings may be satisfactory. We emphasize to our students that the value of the course and text is in doing this for themselves. Make the mistakes here rather than when a live client depends on the excellence of your work. We like the following analogy: Would you cheat your way through getting your pilot's license?

That is our approach. There is nothing magic about it. It also reflects the considerable generosity of the University of Maine School of Law in letting us team-teach classes of twelve to fifteen students.

We want to offer some thoughts on variants of our approach to the course. Most obviously, an instructor can choose to do only the litigation or only the transactional exercises. Law firm or agency seminars may find this appropriate depending on their practice. A single instructor or multiple instructors with larger classes may need to reduce the number of problems. We think much of the learning of the course can be achieved using six or eight problems. It will reduce the instructor workload and offer more time for individual evaluations. Lastly, we encourage instructors to create a problem or two of their own to reflect their expertise or to highlight the practice area to be emphasized. Please share with us variants that you use. We aren't persuaded that we have it perfect.

Introduction to Chapters One, Three, Five, Seven, and Nine

All of your work in these chapters (our transactional or office practice chapters) takes place in the hypothetical universe of the University of Katahdin (UK). UK is the largest public university in the mythical American state of Katahdin. You may know the real Katahdin as Maine's magic mountain, beloved by Henry David Thoreau, among others.

UK was founded in 1874 shortly after the admission of the state of Katahdin to the United States. The Constitution of the state mandates the creation of "a public university to serve the citizens of Katahdin." It also authorizes the Katahdin State Legislature to make "appropriate laws" to govern the university.

UK is the largest educational institution, public or private, in Katahdin. Its 24,000 students and 2,200 faculty and staff work in a major research university that awards associate, bachelor's, master's, professional (including law), and doctoral degrees. While 70 percent of students are Katahdin residents, the remaining 30 percent come from all states of the United States and from 58 foreign nations. Several UK academic programs are ranked in the top ten in the United States. Faculty members in almost all departments are recruited from national and international markets and are expected to be both excellent teachers and significant published scholars in their fields.

The UK is governed by a fifteen-member Board of Trustees. Trustees are appointed by the governor of Katahdin with the approval of the Katahdin State Senate. State law does not specify any qualifications to be a trustee. In practice, the majority of trustees are alumni of UK who are involved in some business or civic activity in the state. The board fairly represents the racial, religious, and gender percentages of the population of the state.

Although the Katahdin Legislature has the constitutional authority to make "appropriate laws" for UK, its major connection to the campus comes in setting the biennial budget for the university. On other occasions, the legislature may pass statutes governing the UK. However, long-standing tradition has been that the legislature lets the trustees run the university both through the enactment of University of Katahdin Regulations and in making individual decisions on important governance matters (e.g., appointment of major campus leaders, approval of academic programs, the discipline of students). The trustees and the university take pride in being "above partisan politics," a position that has wide popular support in the state.

Four years ago the trustees appointed Dr. Susan McBee as president of UK after a national search. Dr. McBee is an eminent soil scientist by profession who has progressed from department chair to dean to academic vice president at two other state universities prior to being appointed president at UK. Her tenure has been highly successful by most measures and the trustees have just appointed her to another five-year term with a substantial raise in salary.

Dr. McBee has overall responsibility for the administration of the UK. She serves at the pleasure of the trustees and works with them in the governance of the university. The relationship follows the model of the corporate board of directors and chief executive officer. Board members typically are fully employed at other work and can dedicate only a portion of their life to university governance. Some have prior work experience in a university setting. Most do not. By contrast, the president is expected to devote herself full-time to the work of the university, and it approaches a 24/7/365 commitment.

A university like UK is as complex and expensive as a small city. It owns and manages property. It employs a workforce of several thousand. It engages in a wide variety of activities beyond the teaching of classes. Its budget runs to the hundreds of millions of dollars.

Not surprisingly, an enterprise of this complexity generates legal work. UK does much of this work through the office of University Legal Counsel. The analogy to an in-house counsel for a business corporation or the city attorney for a municipality is an accurate one. Much legal work will be done entirely by the legal counsel's lawyers. Some matters (e.g., work involving intellectual property rights in UK symbols, logos, or faculty inventions) may be sent to outside specialist counsel.

At any one time, the lawyers of the legal counsel's office may be engaged in a wide variety of work. They may be asked to advise the president and other

members of UK leadership on legal matters. These can range from an informal phone call to a request for a written opinion. The lawyers may be involved in drafting contracts to which the university is a party or handling matters that involve the UK's considerable physical plant and grounds. They may be involved in handling claims for and against the university (e.g., a university truck ran into my house) either short of court or in formal litigation. Your client, the university as governed by its trustees and the officers of the university, can become involved in a fascinating range of legal matters. You will be exposed to a few in the problems that follow.

You also need to remember that as a public university, UK and its leaders are acting as government and government officers. This becomes important because the Constitution of the United States and the Constitution of the state of Katahdin apply to conduct of the UK. The UK's actions, taken by its officers and employees, can implicate such important constitutional rights as freedom of speech, protections from unreasonable searches and seizures, guarantees of equal protection of the law, and entitlement to due process of law before persons are deprived of life, liberty, or property.

Introduction to Chapters Two, Four, Six, Eight, and Ten

The litigation assignments in this book (Chapters Two, Four, Six, Eight, and Ten) start from the premise that the answer to every important legal question is "It depends." Therefore, as a litigator, your first task is to figure out what it depends on. After that, you need to gather what you need to put your case in the best possible position to reach a reasonable desired outcome.

As you will see from the litigation chapters, the strategic process begins with gathering the necessary facts to tell your client's "story" from start to finish (Chapter Two: How to Draft a Complaint). Sometimes it involves the application of a dispositive rule that might win your case as a matter of law (Chapter Four: How to Draft a Motion). Other times it involves strategic choices about what to say and what not to say (Chapter Six: How to Respond to a Motion). Periodically, you will also need to step back from your advocacy and consider your strategic position from the perspective of the most important target audience: the judge (Chapter Eight: How to Draft a Judicial Opinion). Finally, you need to avoid getting trapped by short-term tactics and instead keep your strategic eyes on the litigation prize (Chapter Ten: How to Draft a Motion for Summary Judgment).

To simplify matters, the five litigation assignments utilize only two fact patterns. Civil litigation is the subject of Chapters Two, Four, and Ten, which utilize a fact pattern of a private person who is attempting to auction a sculpture that the federal government commissioned in the 1930s for display in a public setting. In Chapter Two, you are an Assistant U.S. Attorney in the Civil Division who must draft a Complaint to recover the sculpture based on the common law action of replevin. That assignment emphasizes the facts of the case and how to present them in a way to advance your strategic goal of trying to convince the other side to settle. In Chapter Four, you are the private attorney for the

woman who is attempting to auction the sculpture, and you prepare a motion to dismiss the government's complaint in order to advance your client's goals of minimizing litigation costs while educating the judge as to your "theme." In Chapter Ten, you return to the role of a civil Assistant U.S. Attorney who has used the discovery process to gather the necessary evidence and admissions to win the case with a summary judgment motion.

Criminal litigation is the subject of Chapters Six and Eight, which involve a defendant who has pled guilty to perjury and requests a more lenient sentence based on his motion for a "downward departure" from the federal sentencing guidelines. In Chapter Six, you are an Assistant U.S. Attorney in the Criminal Division who must respond to the defendant's motion. That assignment emphasizes the strategic importance of the federal sentencing guidelines, which can yield vastly different results depending on small changes in the underlying facts. In Chapter Eight, you are a judicial clerk who writes a draft opinion that rejects the government's arguments and grants the defendant's motion for leniency.

Overview

To help with strategic legal writing, we recommend two nonlegal books. For advice on *how* one writes, we recommend *The Elements of Style* by E. B. White and William Strunk, Jr. There are many imitators, but that classic remains the best and most concise guide to clear, crisp writing. For strategic advice on *why* one writes, we recommend *The Seven Habits of Highly Effective People* by Steven R. Covey. First published in 1990, it continues to be a business best seller today. You need to read the entire book for a full appreciation of its powerful insights, but one concept is particularly apt here: Covey's emphasis on what is effective. As applied to strategic legal writing, Covey might say that you need to begin each assignment "with the end in mind" and then work backwards to figure out what is necessary to achieve your goal.

Inspired by those two books, we offer the following summary of the most important elements of strategic legal writing:

1. Start by defining a reasonable goal and then gather what you need to advance your objective.
2. Develop a factual chronology that tells your client's "story" from start to finish.
3. Determine the general legal rules and exceptions, and their application in specific instances, so you can say with confidence: this is the controlling test.
4. Develop a theme and provide context so it is clear where your case fits in the larger scheme of things.
5. Organize your writing so the reader can follow the path of your argument without feeling "lost."
6. Argue by analogy so it is clear that justice is on your side because similar situations were treated the same way that you want your client to be treated.

7. Focus on the details and get to the point.
8. Select the words that are most appropriate to the situation.
9. Edit relentlessly because there is no such thing as good writing – just good rewriting.
10. Build credibility by verifying every assertion.

CHAPTER ONE

Prayer at the Athletic Banquet

You are an attorney in the office of the University Legal Counsel. Your boss, the Legal Counsel, has just given you the following file. She requests that you prepare the written opinion that she will provide to President McBee. Prepare the opinion.

THE UNIVERSITY OF KATAHDIN

To: University Legal Counsel
From: President Susan McBee
Re: Request to Open Athletic Banquet with a Prayer

Dear Counselor:

I've got a tough one for you. During my weekly Presidential Open Hour I was visited by two student athletes who are part of the student advisory committee for next month's Athletic Banquet. They politely, but strongly, requested that the Banquet be opened with what they called a "nondenominational prayer." I'm a soil scientist by training, but I do know from various Presidential Conferences that this is a sensitive issue for a public university like UK. There is also a legal dimension to it. I explained this to the students and promised I would get them an answer as soon as possible.

I need your advice in writing on this one. If the law provides a clear answer, I'd like to be able to quote that to the students and to any others with an interest in the issue. If the law doesn't provide a clear answer (and I've been around long enough to know that is often the case), I need your guidance as to how I should exercise my choice.

I have high respect for the two students. They are both fine scholars and probably headed for graduate or professional school. I don't want to blow them off on this.

THE UNIVERSITY OF KATAHDIN

To: Gary Hamilton, Athletic Director
From: Carla Martinez, Athletic Department Development Director
Re: Athletic Banquet

At your request, I have gathered some information about our annual University of Katahdin Athletic Banquet.

Our records show that the Banquet began in 1937. Prior to that time, individual teams would hold end-of-season functions. The Banquet was not meant to stop such functions. Rather the goal was to give all supporters of UK Athletics a single celebratory event each year and to allow our student-athletes, particularly in "minor" sports, a chance for wider recognition than provided by just a team-only event.

The Banquet has grown over the years. In recent years, attendance has ranged from 1,000 to 1,200 students, faculty and staff, and community supporters of UK Athletics. The Banquet is held on campus at the Activity Center. For at least the past two decades, a nationally or internationally known sports personality has served as speaker and guest of honor. The great majority of student athletes attend the banquet at no cost. The normal program includes a social hour, dinner, presentation of awards, and several speeches leading to the main address by the guest of honor. One speech is the Athletic Director's annual "State of UK Athletics" presentation.

At least since the early 1960s, the Banquet has served as an opportunity to reward and encourage private donors to UK Athletic Programs. In recent years, private donations to UK athletic programs have raised over $5 million annually. The Banquet, which receives excellent print and electronic media coverage, allows the School to honor major donors. An annual award is presented to our Fan of the Year.

Planning for the Banquet is the responsibility of my office. It is a year-round affair and involves all of our staff as well as other campus employees. Although we are advised by both a Student Advisory Committee and a Booster Club Advisory Committee, responsibility for the Banquet remains in this

office. We have found the two Advisory Committees are a useful way to build enthusiasm for the event and to get the perspectives of student-athletes and community supporters and major donors.

Let me know if I have missed anything.

E-mail message

To: Athletic Director Hamilton
From: Jeff Washington, Academic Counselor, UK Athletic Department
Re: Prayer at the Athletic Banquet

You asked me to explore student-athlete sentiment about a request to begin the Athletic Banquet with a prayer. I know many of our student-athletes from my role in the academic counseling programs at UK. I talked to about a dozen student-athletes whom I know and respect about the issue. Most supported the idea of the prayer. A couple of international students, who I assume are not of the Christian faith, seemed confused or troubled about the request. I also talked to the two sports editors of the campus paper, the Daily Katahdin. Both were negative about the idea. They feared it might be divisive. They also said: "It sounds illegal to us. This is prayer in a public university."

Although I did not talk to them, I know the three students who serve on the Banquet Advisory Committee. All are outstanding students and leaders. Two are active members of the Coalition of Christian Athletes on campus. I respect their sincerity on this issue and hope we can do something for them and the majority of student-athletes who share their feelings. Don't let the ACLU liberal crazies scare you on this matter. They'd invite Osama to dinner if given half a chance.

Athletic Director Gary Hamilton
University of Katahdin

Dear Director Hamilton:

We serve as the Student Committee for the Athletic Banquet that will be held on May 4 of this year. We repeat the request we made informally to you that the Banquet be opened with a nondenominational prayer. Our conversations with our fellow student-athletes show us that this has strong support. For many of us, religious faith is an important part of our lives. Our athletic achievements are a reflection of our faiths. It seems highly appropriate to recognize that with a brief expression of appreciation to our Creator who guides and inspires us.

We are happy to work with you on this matter. Thank you.

Alicia Brooks, Co-Captain, Women's Swimming and Diving
Jeff Patterson, Captain, Men's Basketball
Shawn Jefferson, MVP, Men's Track and Field

E-mail message

To: UK Legal Counsel
From: Attorney Mary Kowalski, UK Assistant Legal Counsel
Re: Athletic Banquet Prayer

Dear Boss: At your request, I've done some quick research on this fascinating problem. It takes me back to my Con Law classes at UK Law. Here is what I find.

Nothing in Katahdin statute law or UK regulations addresses the issue. I also find no Katahdin Supreme Court opinion that is even close to being on point. Ditto for any lower federal court cases that would be binding in Katahdin. Thus, we draw our law exclusively from United States Supreme Court cases. I attach relevant extracts from the two that seem the most pertinent and the most current. They include citations to other Supreme Court prayer cases.

I've also done some informal research on UK practices going back a half century. There is no record of starting UK events (commencements, freshman orientations, major public lectures) with a prayer or moment of silence. I think we would be breaking new ground here if we approved the request. Don't let a few right-wing religious nut jobs change sound and constitutional UK practice. Let me know if I can be of further help.

LEE v. WEISMAN, 505 U.S. 577 (1992)

JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment ["Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."] provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

[Nathan Bishop Middle School Principal Robert E. Lee invited a local rabbi to deliver a prayer at the Middle School graduation. Fourteen-year-old graduate Deborah Weisman and her father objected to the prayer and sought a permanent injunction that would bar such prayers in the future, including at Deborah's anticipated later graduation from a Providence public high school.

Rabbi Gutterman's invocation said: "God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may see justice, we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled."]

The school board . . . argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. . . .

The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. . . .On appeal the United States Court of Appeals for the First Circuit affirmed. . . .

[T]he controlling precedents as they related to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. . . .It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion, or religious faith, or tends to do so." . . .The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. . . . The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where . . .subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions" and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. . . . The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend. . . .

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed

by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .

Our decisions in *Engel v. Vitale* [370 U.S. 421 (1962) [forbidding a State Regent's prayer in public school] and *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) [forbidding mandated reading from the Bible or recitation of the Lord's Prayer or both] recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group, or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . .

We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . . And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. . . . The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands. . . .

The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found,

young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is Affirmed.

SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE, 530 U.S. 290 (2000)

[Prior to 1995, this Texas public school district directed the High School student council chaplain to deliver a prayer over the public address system before each home football game. This and other practices were challenged by students and parents who believed the practices violated the Establishment Clause. Lengthy proceedings before the local United States District Court approved a policy that allowed the School District officials to approve a plan by which the student body voted on whether to engage in some form of invocation before football games. A subsequent vote would then select one student to serve as the invoker for all games during the season, subject to School District and Court approved conditions. One Court condition was that the invocation be nonsectarian and nonproselytizing. The Court of Appeals struck down what the Supreme Court called "the football prayer policy." The Supreme Court granted review on the question: "Whether [the School District's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause [?]"

JUSTICE STEVENS delivered the opinion of the Court.

In *Lee v. Weisman* . . .we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in Lee. . . .These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector*, 515 U.S. 819 (1995). Although the District relies heavily on Rosenberger and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases . . . [T]he school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the contents and topic of the student's message. . . . Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.

Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections described in the parties' stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. . . . The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. . . . In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. . . . Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval. . . .

Most striking to us is the evolution of the current policy from the long-sanctioned office of "student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. . . .

The District next argues that its football policy is distinguishable from the graduation prayer in Lee because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extra-curricular event, unlike a graduation ceremony, is voluntary. . . .

The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. . . .

The District further argues that attendance at the commencement ceremonies at issue in Lee "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest

to many students" and are "decidedly extracurricular," thus dissipating any coercion . . . . There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit . . . . To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." . . . Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship . . . .

Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer . . . .

The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

UNIVERSITY OF KATAHDIN REGULATIONS

Chapter 26 – Use of University Buildings and Facilities

26.1 The primary use of University buildings, facilities, and grounds is for the teaching, research, and service missions of the University. These uses take precedence over any other uses.

26.4 Members of the University community (faculty, staff, and students) and members of the general public may make use of University buildings, facilities, and grounds in ways that do not conflict with section 26.1. University policy is to open facilities, with University approval, to individuals and groups for any purposes that are consistent with state and federal law and UK Trustees' policies. The University makes clear that in pursuing this policy of open access, it does not endorse the individuals or groups using the facilities or the causes that they represent or advocate.

26.5 Use by members of the University community (faculty, staff, and students). All requests for use shall be presented to the UK Department of Buildings and Grounds which shall set conditions for use. No charge shall be made for use of buildings or other facilities that would normally be open at the time requested. The University may require reimbursement of the cost of services or other expenses. Groups are classified as members of the University community when more than half of the expected participants at a function are students, faculty, or staff of the UK.

26.6 Use by Members of the General Public. All requests shall be presented to the UK Department of Buildings and Grounds which shall set conditions for use. The University may impose a charge for any such use in the University's discretion. Among factors that may be considered are the closeness of the activity to core University missions, the availability of other facilities for the activity, and the ability to pay of the sponsoring organization.

You have digested the file. Before you begin to write your opinion letter, here are some things to consider.

The litigation chapters will introduce you, or reintroduce you, to basic litigation writing. These writings are often precisely prescribed by statute or court rule. You have little opportunity to "try something new." For example, a civil action starts with a written complaint filed in court. You are not free to take a newspaper ad or announce your complaint on television and assume you have begun a legal action. Likewise, an appellate court may require briefs to have a certain format with limits on length (it is called a brief for a reason). Deviation can invite court sanctions, or, at least, displeasure.

Transactional legal writing allows greater freedom. Typically, there is no mandated format for the kinds of letters and memoranda that you will write. The checklist that follows is worth considering point by point as you do your initial transactional writing. Shortly, its wisdom should become instinctive. Note that in the points listed below, there are both technical and strategic elements.

1. What is the objective(s) of the writing? If you don't have an answer to that question, it may be important NOT to write. This is particularly true of the message written in anger. I suspect we all have written such messages in a business or social context. The writing itself may be a useful purging of angry feelings. The sending, however, is another matter. Follow the old rule. When mad, count to ten. When very angry, sleep on it.
2. Even if anger isn't involved, be sure that your written message has strategic value. Would a phone call or a personal visit be more appropriate? They are less likely to leave a paper trail. They are also less likely to suggest a matter of importance than a letter would. Think strategically. What do you want to accomplish?
3. What legal authority mandates or guides your writing? In many cases, you have no choice but to write. A statute or regulation may require a "written response" to assert your rights. A personal conversation or phone message may be a useful preliminary. But, you need the writing in the end. The legal authority also may be quite specific about what is to be included in the writing. Where you have such guidance, you are well advised to follow it item by item. For example, statutes and regulations explain how an injured citizen may file a claim against a unit of government for damages caused by the government's employee(s). If the claims statute asks for "name of claimant, date and place of incident, government employees involved,

and damages to the claimant," follow that list in writing your claim. The omission of an item could be fatal to your success.

4. Has your office developed a standard form for the writing? The partner or senior associate assigning you the problem should be keen enough to advise you: "We do dozens of these letters each year. Check the files under "Debt Collection." In case you aren't provided that advice up front, ask when you receive the assignment: "Do we have a form or form letter for this?" One virtue of a standardized writing is that it may already have satisfied both legal (e.g., a state appellate court opinion may have approved your debt collection letter as consistent with statutory protections against debtor harassment) and marketplace review (e.g., the letter has a good history of encouraging debtor payment without resort to lawsuit). Deviation from the form not only costs money, but it damages your strategic approach to the matter.

5. Obviously, there will be reasons for deviation from standard writings. Most obviously, names, places, and dates need to be changed from the last use of the writing. More importantly, substantive matters that should have been in the earlier writing may not be satisfactory in this case. You need to proofread the final product with care and with emphasis on the strategic objectives of this proceeding.

6. If there is no standard format, you want to start by identifying all the strategic objectives of your writing. Let's continue the example of the debt collection letter mentioned above. Assume that your client (the creditor-business) has already tried several times to collect the debt. The debtor is unresponsive. The client has turned the matter over to your law firm. Your letter may want to accomplish all of the following: (a) encourage the prompt settlement of the claim in full; (b) encourage a response and eventual opportunity for settlement from debtors who cannot afford to pay the full amount immediately; (c) avoid any risk of litigation or unfavorable publicity for being too debtor harassing and (d) generally portray your client, the creditor, in a sympathetic manner.

7. Who is the primary audience for your writing? Is this intended for another lawyer or a court? Is the recipient not a law-trained individual? Is the recipient a sophisticated professional or a person who may never have dealt with a lawyer or the law before? You will need to draft different writings to convey the same message to different recipients.

8. Who are your potential secondary audiences? Some writings are clearly only for the recipient. If necessary, the attorney-client privilege may control undesired uses of the writing. Other writings are likely to have a wider circulation than you may have intended. You and your client may not want a letter to be read by anyone other than the recipient. Your internal memorandum may have been intended just for insiders. However, the recipient or a whistleblower may be happy to give greater exposure to the writing. This may become the smoking gun in civil or criminal litigation or before a legislative or administrative hearing. This may be the crux of a story on the evening news or the morning paper. The old rule of thumb is valuable: "Always assume this could end up on the front page of tomorrow's paper." In some cases, that may caution against putting ANYTHING in writing. In other cases, it may caution against intemperate language that adds little to the substance of your legal argument. For example, the same facts and law may support either the client's statement: "The mayor's response to our request has been half-assed" or "The mayor's response to our request has been ill-considered." If you were a newsperson considering a story, which is more likely to attract your attention? If you were the mayor, which would make you better disposed to the client the next time she seeks your help?
9. What do you want from the recipient of the writing? Is this purely passing on information for its own sake? Or are there certain actions that you desire or do not desire? Have you been clear about the response desired? Or is your strategic goal(s) aided by some ambiguity on the part of the recipient? "What do they mean by take all possible legal action? Are they thinking of contacting the prosecuting attorney?"
10. Who has the final authority to issue the writing? As a young attorney, you will often be preparing writings for someone else's signature (senior partner, client, etc.). If that is so, best to err on the side of caution in using slang or overly expressive language. Does the senior partner use language like "take no prisoners" or "screw you to the wall"? In the best of worlds, the signatory author will read your draft with microscopic care and change undesired phrasings. In the second best world, proofing by the signatory to the writing may be perfunctory or nonexistent.

With these thoughts in mind, start to shape your response to the president's request. And, to answer Point 1, yes, she does want a response in writing.

CHAPTER TWO

How to Draft a Complaint

Your first litigation assignment is to draft a Complaint to recover a sculpture that has been "missing" for sixty years. The cause of action is the ancient writ of replevin. You are an Assistant U.S. Attorney in Portland, Maine, and your client is the United States of America and its agency, the U.S. Department of Labor. Your assignment arrives in the form of the following memo from the Chief of the Civil Division.

MEMORANDUM

To: Assistant U.S. Attorney, Civil Division
Fr: Bill Browder, Civil Chief
Re: *United States v. Melody Richardson*

I recently received a phone call from the U.S. Department of Labor that we need to stop the sale of a sculpture that is about to be auctioned in Portland. The sculpture is "Boothbay Falcon" by William Summers. Its estimated value is $50,000.

The Chief of the Labor Department's Fine Arts Program, Alicia Diebenkorn, says that the sculpture belongs to the federal government and that the seller is not the rightful owner. It's your job to recover the sculpture on behalf of the federal government. I want you to draft a Complaint right away.

Alicia discovered the sculpture when she saw it listed in an auction catalog. The catalog represents that the sculpture includes a label that refers to the "Labor Department Art Project." According to Alicia, that label means the sculpture was originally commissioned by the federal government back in the Franklin Roosevelt administration. Alicia did some research at the National Archives in Washington and found documents from the 1930s that indicate that this particular sculpture was indeed commissioned by the federal government as part of something called the "Labor Department Art Project." Attached is Alicia's declaration[1] together with all of the documents we have.

[1] If you wonder why the attached declarations are not notarized, consider 28 U.S.C. § 1746, which allows for the use of unsworn declarations under penalty of perjury, as follows:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form. . . .
>
> . . . If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)"

After reviewing the documents, I called the gallery and explained the problem. The gallery gave me the phone number for Melody Richardson, the woman who claims to own the sculpture. Attached is my declaration confirming what was said in those phone conversations.

In terms of the applicable law, the federal government has a stronger claim to property than would a private person in the same situation. Generally speaking, the federal government retains title to property virtually forever, unless there is a legislatively authorized transfer of title. The U.S. Constitution (Article 4, Section 3, Clause 2) provides Congress with the exclusive authority to acquire and dispose of federal property. *See also*, *Allegheny County v. United States*, 322 U.S. 174 (1944). "It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials." *United States v. Steinmetz*, 763 F. Supp. 1293, 1298 (D.N.J. 1991), *aff'd*. 973 F.2d 212 (3d Cir. 1992). Furthermore, inactivity, neglect, or unauthorized intentional conduct on the part of government officials will not divest the United States of ownership interest in property. *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.*, 277 F.2d 308 (9th Cir. 1960); *United States v. City of Columbus*, 180 F. Supp. 775 (S.D. Ohio 1959). In general, the federal government cannot abandon property. *Steinmetz*, 763 F. Supp. at 1298.

I want you to draft a Complaint to recover the sculpture on behalf of the federal government. The cause of action is replevin. Here are the elements I would like you to include:

1. Use the same caption that appears in the attached Browder and Diebenkorn declarations.
2. Off to the right of the caption, a couple of lines under the Civil Number, put the phrase "**JURY DEMANDED**."
3. Center the following heading: "**COMPLAINT**."
4. Under that heading, begin with a sentence like this: "**NOW COMES** the United States of America, by undersigned counsel, and hereby asserts the following as its Complaint."[2]
5. The next heading should be: "**INTRODUCTION**."

[2] I realize the phrase "NOW COMES" is rather archaic, but it accomplishes the goal of immediately identifying the party filing the document. As long as you accomplish that goal, I don't mind if you use another formulation. For example: "The United States, by undersigned counsel, asserts the following as its Complaint."

6. Under that heading, summarize the Complaint in three to four sentences. The introduction should quickly summarize what this case is about and emphasize the strength of the government's position.
7. Do not number the introductory paragraph. However, after that paragraph, every sentence should be separately numbered sequentially. For reference purposes, it makes things much simpler. It also allows the Defendant to admit or deny each numbered sentence without having to specify a particular sentence within a paragraph.
8. The next heading should be: "**PARTIES AND JURISDICTION**."
9. Identify the Plaintiff in one sentence.
10. Identify the Defendant in another sentence.
11. State in one sentence that there is federal subject matter jurisdiction under 28 U.S.C. § 1345 and why.
12. State in one sentence that there is personal jurisdiction over the Defendant and why. (Here's a hint: Think about the "minimum contacts" test that you learned during the first year of law school.)
13. The next heading should be: "**BACKGROUND**."
14. Under that heading, tell the "story" of this case from our client's perspective. Use subheadings to organize the story. For each sentence, you need to select the most appropriate facts from the Diebenkorn and Browder declarations. Also, include selected facts from the documents that are attached to the Diebenkorn declaration. You may assume there are no objections to authenticity.
15. When selecting facts for the Complaint, think about what you are trying to prove: that the sculpture belongs to the federal government even after all these years. What evidence proves that point? Also, be careful not to overstate any facts.
16. You should also assume that the case may receive some press attention, so you need to explain the story in a way that makes sense and gets our point across, including why the government is trying to take away a sculpture that has been in the Richardson family for so long.
17. Also make sure to include all relevant facts necessary to establish the elements of a replevin action as found in 14 M.R.S.A. § 7301 ("When goods, unlawfully taken or detained from the owner or person entitled to the possession thereof, or attached on mesne process, or taken on execution, are claimed by any person other than the defendant in the

action in which they are so attached or taken, such owner or person may cause them to be replevied.").

18. Cites to the declarations should look like this: (Diebenkorn Decl. ¶ 6) or (Browder Decl. ¶ 2). Cites to the attachments should look like this: (Diebenkorn attachments at page 3). You can quote from the attachments verbatim, or you can paraphrase – it's your choice. However, avoid long quotes and paraphrases. Make sure you get to the point.
19. The next heading should be: "**COUNT I: REPLEVIN**."
20. Under that heading, the first sentence should say something like this: "The allegations in the foregoing paragraphs are incorporated by reference."
21. Next, you should assert the elements of replevin and that the Plaintiff is entitled to recover under that theory. Again, for the elements of replevin, look at the statute and try to figure it out. 14 M.R.S.A. § 7301.
22. When you assert legal points, do not quote or cite case authority. Instead, you should simply use declarative sentences that state the appropriate legal principles. Generally speaking, it is not appropriate to cite cases in a Complaint. In contrast, it is acceptable to cite statutes.
23. You also need to include a prayer for relief (i.e., a request for what you want the Court to do if you win) and the date.
24. Finally, include your signature block. For help with this or any other aspect of the assignment, feel free to consult the sample Complaint at the end of this chapter.

Thanks for your help. I expect your Complaint will be about five pages long, double-spaced.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)
Plaintiff,	)
	)
v.	) **Civil No. 2002-04-EJR**
	)
MELODY RICHARDSON	)
Defendant	)

DECLARATION OF ALICIA D. DIEBENKORN

1. I, Alicia Diebenkorn, am the Chief of the Fine Arts Program for the U.S. Department of Labor in Washington, D.C. I have been employed by the Labor Department for 12 years, and I have been the Chief of the Fine Arts Program for 10 years. One of my responsibilities is the management of the Labor Department's fine arts collection. As a result of my position and responsibilities, I am familiar with the history of the government's various fine arts programs, such as the Labor Department Art Project. I hold a B.A. in Art History from American University and a M.A. in Art History and Museum Administration from George Washington University.
2. Except as otherwise noted, I make this declaration based on personal knowledge.

"Boothbay Falcon" by William Summers

3. I recently discovered that Munjoy Galleries in Portland, Maine, was offering to sell a sculpture by William Summers entitled "Boothbay Falcon" ("the sculpture"). The sculpture was featured on the Gallery's website and in the Gallery's catalog, both of which offered the sculpture for sale at an upcoming auction. According to the Gallery's website and catalog, the sculpture is on the "original base," which includes "an old press plate probably original to the base" that is inscribed "Labor Department Art Project." Also according to the Gallery's website and catalog, the "Provenance" is "by descent," and the sculpture's value is $50,000.

The Labor Department Art Project

4. Between 1935 and 1938, the Labor Department Art Project was one of the federal government's various "New Deal" art projects that contributed to the creation of the first major body of public American art.
5. One of the Labor Department's present functions is the maintenance of an extensive portfolio of artwork created during the "New Deal," which includes public artwork that adorns federal buildings, as well as an extensive inventory of more than 14,000 pieces of artwork that are housed in nonfederal galleries and museums around the country, where they may be enjoyed by the public.
6. Not much is known about the actual operation of the Labor Department Art Project. Due to the passage of time, most of the documents describing the Project's operation have either been lost or destroyed.

GSA Historical Research

7. Upon learning that the Gallery was preparing to auction a sculpture that was labeled as having been produced under the Labor Department Art Project, I researched the sculpture's history.
8. The attached documents are from files maintained by the Labor Department. The documents were collected from the National Archives in Washington, D.C. We received and maintained these files in the regular course of business and believe them to be authentic. Some of the documents are incomplete; due to the age of the documents, some pages are missing. To date we have been unable to locate complete copies of some of the documents.
9. My knowledge and discussion of these documents is based upon my reading of the documents.
10. The documents confirm that this sculpture was included in a 1936 exhibition at the Corcoran Gallery of Art of various works of art that were commissioned by the Labor Department Art Project. That exhibition is described in the attached pages 1–2.
11. The documents also confirm that after the completion of the Corcoran exhibition, the sculpture was included in a group of artwork that was sent to various embassies and consulates around the world. The cover letter

confirming the State Department's receipt of this sculpture, together with other artwork, is attached as page 3.

12. In addition, the Labor Department Art Project's "Operating Plan," which describes how the program functioned, is attached as pages 4–5.
13. In the course of my research, I did not come across any provision of the Labor Department Art Project that would allow a private person to obtain ownership of a work of art produced under the Project.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Alicia Diebenkorn

LABOR DEPARTMENT ART PROJECT

PAINTING AND SCULPTURE
FOR FEDERAL BUILDINGS

NOVEMBER SEVENTEENTH
TO
DECEMBER THIRTEENTH
NINETEEN HUNDRED AND THIRTY-SIX

THE CORCORAN GALLERY OF ART
WASHINGTON, D.C.

INTRODUCTION

The present exhibition consists of characteristic examples of the various types of work commissioned by the Labor Department Art Project. To avoid confusing this program with the comprehensive activities on behalf of artists that are carried on through other governmental channels, I propose to give a short account of its purpose, its background, and its intentional limitations. It is definitely limited to the adornment of federal buildings, which are mostly designed by, or under, the Supervising Architect's Office, a branch of the Procurement Division of the Labor Department. The number of artists employed is comparatively small, as are the funds at its disposal.

The vast expansion of the country has greatly increased the need for federal buildings that include post offices, courthouses, mints, buildings for the Customs, Immigration, and Coast Guard services, and general office buildings. The Labor Department has thus become one of the greatest, if not the greatest, architectural client in the world. Its architectural activities affect communities of every size from coast to coast. To coordinate and care for this immense work in a manner that would be economical and efficient, the Procurement Division was so organized in 1933 that architecture, engineering, and supplies for federal buildings could be brought under one head,

the Director of Procurement. The Procurement Division is divided into two main branches, the Public Buildings Branch and the Supply Branch. Under the Public Buildings Branch, we find a section devoted to painting and sculpture.

In short, the Labor Department, having had as one of its traditional duties, the supervision of federal architecture, has now taken over the educational and esthetic work of adding distinction to its architecture by means of painting and sculpture. The present Labor Department Art Project was initiated by order of the Secretary of Labor on October 16, 1934.

The work shown is by artists appointed by a nationwide jury that advised the officers of the program in its first national competition, by artists who have won competitions and by artists who have been appointed on account of the quality of the work that they have submitted in competition. The competition system has been spread as widely as possible through the country. Except in the case of the murals and sculpture for the Post Office Department and Justice Department buildings in Washington and certain national competitions, they are initiated by local committees of which one member is always the architect of the building. Every competition is anonymous. No envelopes are opened until the recommendations of the local committee have been studied and the winning design approved by the central office in Washington and the supervising architect. After the design has been accepted by the Director of Procurement, a contract is sent to the artist.

Generally, it has turned out that the recommendation of the local committee has been followed. This is done in all cases except where there is a definite difference of opinion between the Washington office and the local committee. Although all of the work belongs to the federal government, it is felt also that it influences or is related to the locality in which it is to be placed.

The following sculpture is included in the exhibition: . . . "Boothbay Falcon" by William Summers. . . .

DEPARTMENT OF STATE

Washington

December 25, 1936

Mr. Henry Follette
Special Assistant, Labor Department Art Project
Public Buildings Branch, Procurement Division
U.S. Department of Labor
Washington, D.C.

Dear Henry:

Pursuant to the request contained in your letter of December 22, 1936, I am returning herewith a list of the artwork allocated to this department by the U.S. Department of Labor for installation in American embassies and consulate buildings abroad. The list of sculptures includes the following artwork designated for the American embassy in Canada: . . . "Boothbay Falcon" by William Summers,. . . .

My best to you for a prosperous and eventful New Year.

Sincerely yours,

Phillip Roberts
Acting Chief
Foreign Building Office

OPERATING PLAN OF THE LABOR DEPARTMENT ART PROJECT

A Project to Employ Experienced Professional Artists Who Are on Relief, in the Making of Murals, Sculpture, and Individual Pictures for Federal Buildings

The LABOR DEPARTMENT ART PROJECT will, in all probability, employ from four to five hundred artists to design, or to assist in designing, works of art for federal buildings.

This new project is a part of the SECTION OF PAINTING AND SCULPTURE and is under the direction of Edward Bruce. It is financed out of the WORKS PROGRESS ADMINISTRATION FUNDS and will function under the Emergency Relief Appropriation Act of 1935. It will, therefore, take NINETY PERCENT of the artists employed by it from the RELIEF ROLLS.

The wages will be those established by the WORKS PROGRESS ADMINISTRATION in each zone for skilled workers. This rate will be paid for not more than 120 hours a month, a maximum that very possibly will be reduced.

Since All of the Work Is for Federal Buildings, It Must Meet Federal Building Standards

Although the element of relief enters so strongly into the workings of the LABOR DEPARTMENT ART PROJECT, all of this work must meet standards of high professional competency and distinguished quality as art.

Emphasis will be placed on murals and on sculpture designed for a specific position, although other classifications of painting and sculpture will be included in the work given out by the project, such as easel paintings, watercolors, prints, reliefs, and sculpture.

This work will be placed in Federal Post Offices, Embassies, Consulates, Courthouses, Marine Hospitals, Immigration Stations, Mints, and various other classes of federal buildings.

The Method of Applying for Work – Eligibility

The program is fairly flexible. There are no special quotas for states and the policy will be to obtain the best art possible wherever it exists. Only artists who

have been found eligible for relief employment by the local public emergency relief agency are eligible for work. Artists who have established their eligibility and who have been certified by the relief agency should, after such certification and not before, send to the Washington office of the LABOR DEPARTMENT ART PROJECT some record of their work, photographs, or sketches, together with a succinct statement of their training and experience.

Labor Department Art Project

On July 21, 1935, the Labor Department Art Project was formed by a grant of $530,000 allocated by the Works Progress Administrator for the decoration of federal buildings and administered strictly under the relief rules of the Works Progress Administration. Artists are employed at rates that vary from $.71 per hour to $1.08 per hour for a minimum of ninety-six hours' work. (These rates are the "going wage" paid by WPA for skilled, professional work.) The work produced is for the decoration of federal buildings. Most of it is architectural, either mural or sculptural, where a federal building has no money available under its building fund for decoration. These works of art are allocated to federal departments, embassies abroad, federal hospitals, and offices.

Any federal building may be decorated by the artists working for the Project. Pictures may be hung in these buildings, and statues placed in them; reliefs or busts may be erected where suitable. The majority of these buildings are federal post offices and courthouses.

As a branch of the Labor Department having to do with federal buildings, this Project must insist on quality. Although it is limited to taking artists off relief rolls, the work itself has to be first rate. Because the painting and sculpture will be placed in federal buildings, professional competence and technical proficiency will be demanded. The Project will follow the precedent set up by the Public Works of Art Project of being open-minded toward all schools or art and of not imposing upon the artists stifling directions.

It has been found that many of the federal buildings have not received sufficient funds to permit mural or sculptural decoration, but under the new Project it will be possible to decorate buildings to which funds have not previously been allocated for that purpose. The new Project proposes, whenever feasible, in carrying out such work, to place an artist of experience and ability in charge of a group of assistants and coworkers.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)
Plaintiff	)
	)
v.	) **Civil No. 2002-04-EJR**
	)
MELODY RICHARDSON	)
Defendant	)

DECLARATION OF WILLIAM BROWDER

1. My name is William Browder. I am the Chief of the Civil Division of the U.S. Attorney's Office for the District of Maine. I am one of the attorneys representing the United States in the above-captioned case, which involves the sculpture by William Summers entitled "Boothbay Falcon" ("the sculpture").
2. Prior to filing this lawsuit, I spoke to Ms. Richardson by phone in California on more than one occasion. During our telephone conversations, Ms. Richardson confirmed that she had arranged with Munjoy Galleries to sell the sculpture at auction in Maine. Also during our telephone conversations, we discussed the merits of her claim of ownership to the sculpture relative to the government's claim of ownership.
3. Ms. Richardson never indicated to me that she has any documentary proof to support her claim of ownership to the sculpture.
4. During our telephone conversations, Ms. Richardson has represented that the sculpture has been in the possession of her family for approximately sixty (60) years, and that it was first obtained from family member David Collins who, on information and belief, was the American Ambassador to Canada from 1944–1947.

5. Today I made a formal demand that Ms. Richardson return the sculpture to the federal government. Ms. Richardson refused my demand.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ William Browder

Drafting Considerations

Now that you have reviewed the file, it's time for some strategic thinking. Before you start drafting a Complaint, consider the following:

1. What are you trying to accomplish with this document?
2. In order to accomplish your goals, what information should you include? What information should you exclude?
3. What rules govern the drafting of a Complaint? What are the minimum mandatory requirements?
4. Do you have an example of a Complaint that you can use as a model?
5. Who is your primary audience? Who is your secondary audience?

At the outset, you may be surprised at how little guidance is provided by the Federal Rules of Civil Procedure. In essence, the Rules establish certain minimum standards but, beyond that, you are generally left on your own. Once you satisfy the Rules' minimum requirements, all other aspects of the Complaint would depend on strategic considerations.

The Federal Rules of Civil Procedure define a Complaint as a claim for relief that is one of several types of "pleadings."[3] That definition distinguishes a Complaint from a "motion" (the subject of Chapters Four and Ten), which is a request that the court enter a specific order. Fed.R.Civ.P. 7. In other words, when you file a Complaint, you are not asking the court to enter any particular order at that time, so the judge is not your immediate audience. Instead, your immediate audience is the opposing counsel, the opposing party, and the public

[3] Federal Rule of Civil Procedure 7 provides as follows:

(a) *Pleadings. There shall be a complaint and an answer*; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.
(b) Motions and Other Papers.
(1) *An application to the court for an order shall be by motion* which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.
(3) All motions shall be signed in accordance with Rule 11.
(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.
Fed.R.Civ.P. 7 (emphasis added).

at large (if it is a matter of public interest). Unless the Complaint becomes a matter of contention later in the lawsuit, it is entirely likely that the judge will never read your Complaint.

The minimum requirements for a Complaint are found in Federal Rule of Civil Procedure 8.[4] In sum, you are required to include a "short and plain" statement that sets forth: (1) why the court has jurisdiction; (2) why you are entitled to relief; and (3) what relief you seek.

In terms of strategy, there are several important aspects to Rule 8. First, notice that the Rule requires the opposing party to "admit or deny the averments upon which the adverse party relies." Fed.R.Civ.P. 8 (b). That presents an opportunity. If your case is based on facts that can be stated clearly and unequivocally, you might want to include those facts in the Complaint and force the other side to admit or deny. For example, if your case relies on the plain language of a contract, you might want to quote the specific contract provisions and force the other side to admit that, indeed, those were the provisions in force at the time. If the other side wrongfully denies facts that are known to be true, you may be entitled to sanctions under Federal Rule of Civil Procedure 11 (which specifically applies to "pleadings").

[4] Federal Rule of Civil Procedure 8 provides as follows:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) *a short and plain statement of the grounds upon which the court's jurisdiction depends*, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) *a short and plain statement of the claim showing that the pleader is entitled to relief*, and (3) *a demand for judgment for the relief the pleader seeks*. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and *shall admit or deny* the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. *When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder*. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Pleading to be Concise and Direct; Consistency.

(1) *Each averment of a pleading shall be simple, concise, and direct*. No technical forms of pleading or motions are required. . . .

Fed.R.Civ.P. 8 (emphasis added).

Second, the rule provides that "each averment shall be simple, concise, and direct." Fed.R.Civ.P. 8 (e)(1). It is wise to follow that approach, especially if you want to force the other side to admit or deny specific factual assertions. Many lawyers draft their Complaints using what might be called the opposite approach – complicated, wordy, and indirect – and then wonder why the other side's Answer provides nothing more than a series of blanket denials. In short, if you are too lazy to draft a Complaint with specific allegations, then you should not expect to receive an Answer with specific responses.

Third, even though it is technically required by Rule 8, you should not count on the other side to break down your sentences and admit in part and deny in part. Fed.R.Civ.P. 8 (b) ("When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder"). Instead, you should anticipate that defendants will seize on any complicated sentences in your Complaint as a reason to provide a general denial. Therefore, to avoid any wiggle room, follow the advice in Rule 8 and draft your Complaint using the language that is the most "simple, concise, and direct."

Similar advice is found in Federal Rule of Civil Procedure 10,[5] which requires that "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances." In other words, the allegations in your Complaint should be broken down into their elemental parts and presented in separately numbered paragraphs. That way, there is no mistake about what is alleged, admitted, or denied.

[5] Federal Rule of Civil Procedure 10 provides as follows:

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances*; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Fed.R.Civ.P. 10 (emphasis added).

Persuasive Facts

The most persuasive legal writing emphasizes facts, not law. Nevertheless, the question remains: How do you present the facts in the most persuasive way? Although you can't change the facts, here are some things a strategic litigator can do:

1. *Develop the facts*. In law school, students are typically asked to analyze a discrete, prepackaged fact pattern. However, in real life, the facts are much more elusive. Most litigation is won or lost before the Complaint is filed, when one party is able to identify the critical facts and pin them down. Sometimes it may be as simple as finding the key witness and convincing him or her to sign an affidavit that can be used as evidence. Other times it calls for a search through a warehouse of documents for the "smoking gun." Regardless, the most important part of litigation is developing the factual record that supports your case. All the lawyering in the world is useless without a favorable supporting factual record.

2. *Select the facts*. In a case with any degree of complexity, it is impractical to state all the facts. Therefore, part of the litigator's job is to be selective. Obviously a litigator needs to select the facts necessary to establish all the elements of his or her client's cause of action. Yet telling a one-sided story is not very persuasive. It is far more persuasive to demonstrate that your client's position should prevail even if you take into consideration your opponent's key facts. In other words, don't ignore your opponent's key facts – find a way to *embrace* them.

3. *Arrange the facts*. In the vast majority of cases, the best way to arrange the facts is chronologically. It is the simplest approach and the easiest for the reader to follow. Most legal disputes are sufficiently complex that they do not lend themselves to a complicated factual arrangement. Therefore, in the vast majority of cases, stick with a simple chronology.

4. *Emphasize certain facts*. There are several ways to emphasize or deemphasize particular facts. Common examples are underlining, italics, and the use of quotations. A well-placed footnote is also a form of emphasis because it separates the matter from the normal flow of text. Conversely, if you want to deemphasize something, don't try to "bury" it in a footnote, because that will only serve to highlight your weakness.

5. *Use details*. As in good storytelling, the most powerful way to emphasize certain facts is to "slow down the action" and provide additional detail. For example, if you are trying to prove plaintiff's comparative negligence in a car accident case, you might include a lot of detail about the facts leading up to the accident when the other party should have seen trouble ahead.

6. *Select a point of view*. When describing the facts, it is easy to overlook the importance of "point of view." Typically, the lawyers for each side will simply retell the story from their client's point of view, which often reinforces the stalemate that led to the litigation in the first place. Instead, consider whether you can tell the story from the perspective of a critical witness that supports your client's position. For example, if you represent the plaintiff in a car accident case, you might want to tell the story of the case from the perspective of an innocent bystander who is expected to testify in your client's favor. Similarly, if you are defending a medical malpractice case, you might want to describe the case from the perspective of your medical expert, who could describe how she reviewed the entire medical file, interviewed everyone who provided the underlying medical treatment, and then evaluated whether the conduct met the applicable standard of care. Likewise, if you are a government prosecutor, you might consider telling the story from the perspective of your lead investigator, so you can describe how the "mystery" of the case was solved.

7. *Verify the facts*. Nothing deflates a case faster than inaccuracy. Before making any factual assertions, check – and double-check – to make sure every assertion is factually accurate. Credibility depends on a careful, detailed, and relentless devotion to factual accuracy. In that regard, never underestimate the importance of consistency; it is the primary criterion for separating truth from fiction.

WHEN SHOULD YOU USE "NOTICE PLEADING"?

"Notice pleading" is the name used to describe a Complaint that merely meets the minimum pleading requirements. *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002). The idea is that the plaintiff is only required to provide fair notice of what the claim is and the grounds upon which it rests. *Id.* at 512.

Generally speaking, there is nothing wrong with filing a Complaint that merely satisfies the minimum pleading requirements. Sometimes it is a matter of necessity, such as when you must file immediately to satisfy an imminent

statute of limitations. Other times you may be limited by your client's unwillingness to spend the money necessary to prepare a more thorough Complaint. In terms of strategy, a minimally acceptable Complaint might be preferable if you are trying to "hide the ball" from your opponent. In a simple negligence action, for example, plaintiffs generally prefer to say the minimum and leave their opponents guessing.

On the other hand, various considerations may call for a more detailed Complaint. In some cases it is required, such as when you allege fraud.[6] In other cases, you may be inspired to prepare a detailed Complaint for a nonlitigation reason. For example, suppose you want to convince your opponent to settle the case before litigation begins. You might consider sending a draft Complaint to opposing counsel together with a letter explaining that you are prepared to file the Complaint unless the parties can agree to settlement terms. In such circumstances, it would be far more persuasive to include a detailed Complaint that would send a strong message that you are not only prepared to litigate, but that you are aware of the detailed facts that support a winning case. The other side might also have an added incentive to agree to an out-of-court settlement in order to avoid the public embarrassment of having you file the detailed Complaint.[7]

[6] F.R.C.P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.")

[7] In terms of strategy, remember that a successful out-of-court settlement is similar to winning a battle without firing a shot. *Cf*. Sun Tzu, *The Art of War*. ("One hundred victories in one hundred battles is not the most skillful. Seizing the enemy without fighting is the most skillful.")

A SAMPLE COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)
Plaintiff,	)
	)
v.	) **Civil No. 07-**
	)
THE NICKERSON MEMORIAL CLINIC	)
Defendant	)

COMPLAINT

NOW COMES Plaintiff, the United States of America ("United States") and asserts the following as its Complaint.

INTRODUCTION

This is a health care fraud case against the Nickerson Memorial Clinic ("Defendant" or "the Clinic"), which submitted nearly $300,000 in false claims to Medicare for neurology services and related medications. The bills were false because the Clinic consistently overstated the number of units billed. The Clinic knew or should have known it was falsely billing Medicare for these drugs and neurology services, but the Clinic nevertheless failed to take the necessary steps to train the staff, correct the problem, or notify Medicare representatives.

PARTIES

1. Plaintiff, the United States of America ("the United States"), brings this action on behalf of itself and its agencies, the U.S. Department of Health and Human Services ("HHS"), as well as the HHS Office of Inspector General ("OIG").
2. Defendant is a specialized neurology clinic located in Maine.

JURISDICTION AND VENUE

3. This action arises under the federal False Claims Act, 31 U.S.C. § 3729 et. seq., as well as the common law.
4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1345, 1355, and 31 U.S.C. § 3732.
5. Venue is proper pursuant to 28 U.S.C. §§ 1391 and 1395.

BACKGROUND

The Discovery of the False Billing

6. In February of 2007, the Centers for Medicare and Medicaid Services ("CMS") notified the OIG that the Clinic was potentially overbilling Medicare for neurology services and related medications.
7. CMS noticed the problem based on a review of computerized Medicare billing patterns in New England for the years 2005 and 2006.
8. Medicare's review of that data revealed that the Clinic was billing for those services and drugs at a significantly higher rate, and with an unusually high number of billing units, than comparable Medicare providers in the region.
9. In response to the CMS referral, OIG reviewed the Clinic's underlying hospital records and confirmed that the Clinic was in fact overbilling Medicare for neurology services and related medications.

The Undisputed Amount of the Clinic's Overbilling

10. In April 2007, OIG performed an audit to determine the scope of the billing problem.
11. Based on the results from that audit, the Clinic overbilled Medicare $292,854.14 for neurology services and related medications.
12. The attached spreadsheet is a true and correct statement of each of those false claims, patient-by-patient, claim-by claim, dollar-for-dollar.

Medicare Billing for Neurology and Related Medications

13. For neurology services, the Clinic only should have billed Medicare one unit of service per day, regardless of the number of hours of service provided per day.

14. Instead, as reflected in the spreadsheet, the Clinic billed Medicare multiple units for the neurology services.
15. Similarly, for each of the related medications, the Clinic only should have billed Medicare one unit for each dose provided to a Medicare patient.
16. Instead, as reflected in the spreadsheet, the Clinic billed Medicare multiple units for each dose of medication.

The Clinic Knew or Should Have Known of Its False Claims

17. In 2005 and 2006, the Clinic knew or should have known it was falsely billing Medicare for neurology services and related medications.
18. For example, on December 31, 2005, the Clinic's Deputy Chief of Neurology raised her concerns with Clinic management about whether the Clinic was properly billing for the services and drugs.
19. Those concerns were passed on to the Clinic's Chief Financial Officer, Budget Director, Pharmacy Director, and Nursing Director.
20. Despite knowledge of those concerns, the Clinic failed to follow up and make certain that the billing problems had been corrected.

Count 1
False Claims Act, 31 U.S.C. §3729 (a)(1)

Knowingly Presenting or Causing To Be Presented a False or Fraudulent Claim

22. The foregoing paragraphs are hereby incorporated by reference.
23. The Clinic knowingly presented, or caused to be presented, to officers, employees, or agents of the United States Government false or fraudulent claims for payment or approval.
24. By virtue of the false or fraudulent claims made or caused to be made by the Clinic, the United States has suffered damages and therefore is entitled to multiple damages under the False Claims Act, to be determined at trial, plus a civil penalty of $5,500 to $11,000 for each such false or fraudulent claim presented or caused to be presented by the Clinic.

Count 2

Unjust Enrichment

25. The foregoing paragraphs are hereby incorporated by reference.
26. This is a claim for the recovery of monies by which the Clinic has been unjustly enriched.
27. As a result of the facts alleged in this Count, the Clinic has received and has continued to maintain control over certain monies to which it is not entitled.
28. By directly or indirectly obtaining government funds to which it was not entitled, the Clinic was unjustly enriched and is liable to account and pay such amounts, or the proceeds therefrom, which are to be determined at trial, to the United States.

WHEREFORE, the United States demands and prays that judgment be entered in its favor and against the Clinic for actual damages, civil penalties, interest, litigation costs, investigative costs, and an accounting, to the fullest extent as allowed by law, and for such further relief as may be just and proper.

Respectfully submitted,

Assistant U.S. Attorney
100 Middle Street
Portland, Maine 04101
Dated: _____

CHAPTER THREE

Terminating Professor Melton

Part of the work of the Legal Counsel's Office of the University of Katahdin is to review correspondence terminating the employment of any UK professor or staff member. These are important decisions for the university. They are equally important to the employee who faces involuntary separation from his or her job. Such terminations have given rise to litigation or threats of litigation that may be expensive for the university, may disrupt working relationships, and may give rise to unfavorable publicity about the University. The following correspondence and request for some strategic legal writing arises from such a situation.

THE UNIVERSITY OF KATAHDIN

Dear Counsel:

Assistant Professor Herman Melton has completed two years as a faculty member in the Sociology Department at UK. He is now in the Fall semester of his third year. Department and college officials have completed the standard review of his performance that will help determine his retention beyond the third year.

I summarize the paperwork and offer my comments as the senior administrator with responsibility for academic programs and faculty at UK. I ask you to prepare for my signature a letter to President McBee strongly recommending that we NOT offer a contract to Assistant Professor Melton for a fourth year and that we terminate any relationship with him after the end of this academic year in May.

Professor Melton's Department Chair reports that Melton's teaching evaluations regularly have been below the Sociology Department average. Melton does have several scholarly articles in print, but the Department Chair reports that they are in second-tier journals and none gives evidence of making a significant impact on his field. The Department Chair also reports that following annual face-to-face evaluation conferences with Melton she is left with the sense that this "is just a job" to Melton and that Melton rarely goes out of his way to help with departmental or university work. I suspect that part of this may be explained by Professor Melton's passionate opposition to hunting, which he expresses regularly in newspaper letters and Op-Ed pieces and in testimony and protest activities before the Katahdin legislature. You may have seen some of these diatribes. They hardly reflect a scholarly examination of anything.

The tenured members of the Sociology Department have, by strong majority, voted against renewing Melton's contract. The Dean of Melton's College disagrees and recommends another year's appointment for Melton. However, he makes no quarrel with the facts of Melton's performance so far. I find no basis for his hope that "things may turn around."

As you know, our procedures are governed by University of Katahdin Regulations. In brief, they require an annual notification to Professor Melton as to whether he will be retained for another year. That decision rests with the

president following advice from the tenured faculty members of the department, the Department Chair, the College Dean, and the Academic Vice President. The regulations provide: "The President shall inform the faculty member of his/her decision and shall promptly supply written reasons upon the request of the faculty member." We have promptly completed the review and need to present the president's letter to Professor Melton within the next six weeks.

I'm ready to dump Melton. Would you please draft the letter to the president for my signature that does this in a fashion that puts us at least risk of any successful legal actions against the University?

Sincerely,
Mary Carter, Academic Vice President

Department of Sociology Minutes – October 15

The renewal of Assistant Professor Herman Melton's contract came before the tenured members of the department. Chairwoman Susan Henrici reported that Melton's course evaluations, prepared by students in his classes, continue to be inconsistent and do not show improvement over his first year. In general, in survey classes in which students are not selecting their instructor, about 20–25 percent of the students give Melton the highest marks. Many of these students comment that Melton is an inspiration and "one of the best teachers I have ever had." However, about half of the respondents in these classes give Melton negative marks. They find him disorganized, overly opinionated, and dismissive of opinions that disagree with his own. The remainder of those students completing the evaluations give average evaluations for Mr. Melton. In advanced courses, where students are able to select their instructor, Melton's evaluations are stronger and reflect the favorable comments from the survey courses. It appears that Professor Melton has something of a cult following, a good deal of which stems from his anti-hunting activism. It is also worth noting that enrollments in Professor Melton's advanced courses are typically well below maximum possible enrollments for the classes.

Overall, despite the laudatory comments, Professor Melton has regularly ranked in the bottom quarter of all Sociology Department faculty members for numerical teaching evaluation scores.

In addition to the numerical and anecdotal student evaluations, a subcommittee of three tenured faculty members visited each of Professor Melton's classes in the last month. Their report was presented to the tenured faculty by Subcommittee Chairman Boyd Dyer. Professor Dyer reported that the classes were rather unstructured and that Professor Melton would allow discussion to move from topic to topic without much effort at providing structure or eliminating irrelevant comments. Professor Dyer also noted that class attendance seemed well below the number of students registered for the class. Although some students seemed very engaged, others appeared to "have tuned out." A review of Professor Melton's teaching notes and syllabi confirmed the view that Melton taught courses "by the seat of his pants."

Copies of the course evaluations for all of Professor Melton's courses were available to the faculty for review and comment. No faculty member questioned Chairwoman Henrici's summary of the course evaluations.

Chairwoman Henrici reviewed Professor Melton's published scholarship. She noted that a subcommittee of the Sociology Department had reviewed the three published articles that Professor Melton presented in satisfaction of the "high quality academic scholarship" requirement for retention and promotion in the department. The subcommittee divided. Two members felt the works were adequate evidence of performance for a young faculty member. They agreed that stronger work would need to be shown before a grant of tenure would be appropriate in Professor Melton's seventh year of employment, but felt Melton was making progress toward that standard. Two members felt the writings were below quality even for a beginning member of faculty. They characterized the articles as "sloppy, unoriginal, and poorly written."

Chairwoman Henrici added her comments. She noted that her scholarship was in fields quite close to Professor Melton's and that she knew the literature that he cited very well. She sided with the opponents of Melton's work. She noted Melton's last publication had been overdue to the publisher and contained half a dozen mistakes "that would embarrass a second-year graduate student."

Chairwoman Henrici then reported on Professor Melton's service to the community, the university, and the department. She characterized it as "below par, but probably adequate for a reappointment decision."

The floor was then opened to general discussion. Professor John Clune stated that it was well known that Henrici had a personal grudge against Melton because of Melton's frequent television appearances and provocative testimony before the State Legislature on hunting issues. Prof. Henrici had been particularly upset by a newspaper report of Melton describing hunters as "orange-clad storm troopers" to a legislative hearing. Professor Sharon Washington said that Melton should be fired on the basis of being arrested in an antihunting protest at the state capitol. Professor Washington said this was harmful to the university at a time the legislature was also considering the university budget. Professor Jack O'Connor said he had heard rumors that

Professor Melton was encouraging students to carry on protests in the woods during hunting season, going to the extent of placing themselves in positions where they might be shot by a careless or spiteful hunter. Professor Clune responded that Melton had never been arrested or convicted on any criminal charges.

A motion was made to retain Professor Melton for the following academic year. The motion failed by a vote of 5 YES and 11 NO.

THE UNIVERSITY OF KATAHDIN

Dean Martin Fenick
College of Arts and Sciences
University of Katahdin

Dear Dean Fenick:

I enclose the report of the Sociology Department tenured faculty on the reappointment of Assistant Professor Herman Melton. I will not repeat what is in the report. I think the minutes accurately reflect a ninety-minute discussion by the faculty on a difficult issue. I fully support the decision to end relations with Professor Melton after this academic year.

I do wish to offer some comments of my own that may not be fully reflected in the minutes.

First, in two years as Melton's Chair I have been visited by numerous students with complaints about Mr. Melton's teaching. I don't keep notes of such meetings, but I don't recall another member of the faculty who has drawn so many hostile comments. Most of the students were thoughtful in their assessments of Prof. Melton but came down seriously against the quality of his teaching and his tendency to turn the classroom into a soapbox. I know that several of the students are among our very best majors in the department.

Second, I note the division on the department subcommittee on scholarship. Leaving aside my position as Chair, I would contend that Professor Giannini and I are the two members of faculty whose work is closest to the areas in which Professor Melton purports to specialize. We both strongly opposed Melton's reappointment. I suspect a number of our older colleagues who supported Melton have not done work in his area and are, frankly, a decade or two out of touch with what constitutes significant scholarship in the field. If Professor Melton hasn't shown something by now, it isn't going to happen – ever!

Third, as the chairwoman of the department, I have to note that Professor Melton contributes little to the work of the department. He serves on committees as assigned. However, I can recall no significant contributions that he has made. He always has an excuse why he can't take on extra work.

At our evaluation conferences, I always have the sense that to Melton this "is just a job" that inspires him no more than would working at Wal-Mart or flipping hamburgers. This is not a "role model" that I want to offer to newly hired faculty.

I strongly oppose the reappointment of Assistant Professor Herman Melton.

Sincerely,

Sharon Henrici, Chair
Sociology Department
University of Katahdin

THE UNIVERSITY OF KATAHDIN

Dr. Mary Carter
Academic Vice President
University of Katahdin

Dear Dr. Carter:

Following our procedures, I present the materials regarding the reappointment of Assistant Professor Herman Melton in the Department of Sociology. You will note the divided vote of the department and the negative vote of Chairwoman Susan Henrici.

I have reviewed the materials with care. I have also talked on several occasions with Chairwoman Henrici. I respect her views and those of the members of the department. I have no quarrel with the facts they offer about Professor Melton's teaching and scholarship. I do differ with the conclusion that they draw.

Our tenure standards encourage young faculty to experiment and to grow in their early years as members of the academy. We do not encourage fast decisions or an avoidance of any mistakes by the young professor. Based on my thirty-five years as a member of faculty and university administrator, I think intelligent decisions about the career-long potential of a faculty member are best made only after the full six-year period of review. There are late bloomers. There are faculty members who overcome early missteps. I have seen some of those who then become outstanding members of faculty for the rest of their careers.

With that in mind, I'm inclined to continue our evaluation of Professor Melton and renew his contract for the next year. His teaching indicates that he does inspire a significant number of his students. I find that preferable to the teacher who inspires no one, but doesn't aggravate anyone either. It is still early to make a final judgment on Professor Melton's published scholarship. I would much prefer to see the record several years from now when we face a tenure decision. Lastly, I'm troubled that personal issues may have entered this decision. I'm a hunter myself, but I admire Professor Melton's passion on this issue and his willingness to exercise his rights as a citizen. Others, evidently, do not.

On balance, I endorse the reappointment of Assistant Professor Herman Melton for the next academic year.

Sincerely,

Martin Fenick
Dean, College of Arts and Sciences
University of Katahdin

THE UNIVERSITY OF KATAHDIN

Memorandum to: University Counsel
From: Attorney Ted Garvey, UK Legal Counsel's Office

Dear Boss:

You asked for a copy of the United States Supreme Court opinion in *Board of Regents v. Roth* around which our UK retention and tenure standards are drafted. I also enclose the Katahdin legislation and the UK Regulations that set out our faculty hiring, retention, and tenure processes that might be relevant to the Melton matter. Here it is with deletions of some footnotes and irrelevant material. Good luck.

BOARD OF REGENTS V. ROTH, 408 U.S. 564 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment. There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures. A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."

In conformance with these rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969–70 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights ["nor shall any State deprive any person of life, liberty, or property, without due process of law"]. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech. [Amendment One: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

[The District Court ruled for Roth on the procedural argument. It ordered University officials to provide Roth with the reasons for his nonretention and provide him a hearing. The Court of Appeals affirmed.]

The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. . . . Undeniably, the respondent's re-employment prospects were of major concern to him – concern that we surely cannot say was insignificant. . . . But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. . . .

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. . . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. . . . [T]he respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities. . . .

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* [397 U.S. 254 (1970)] had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipient's "property" interests in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment. . . .

[R]espondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting:

Respondent Roth . . . had no tenure under Wisconsin law and . . . he had had only one year of teaching at Wisconsin State University-Oshkosh – where during 1968–69 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group

of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the black episode, and one day, instead of meeting his class, he went to the meeting of the Board of Regents. . . .

[T]he First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state actions when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment, and the Fourteenth protects "liberty" and "property" as stated by the Court. . . .

No more direct assault on academic freedom can be imagined that for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs.

KATAHDIN REVISED STATUTES

Section 37.05 Faculty Appointments. The Board of Trustees is authorized to create a system of tenure for faculty at the University of Katahdin. The Trustees shall provide the details of such system. Under no circumstances shall tenure be granted to a faculty member in a period shorter than five academic years.

UNIVERSITY OF KATAHDIN REGULATIONS

Chapter 9 Hiring, Retention, Tenure, and Promotion of Faculty

9.01. Faculty who are new to the University of Katahdin shall be hired on a one-year contract. This fact shall be reflected in a letter to the faculty member from the Provost. The letter shall specify the dates of the appointment and shall make clear that the letter makes no promise of employment beyond that period.

9.02. Faculty may be reappointed to subsequent one-year contracts for up to seven years. In the seventh year of appointment, faculty will be considered for a permanent tenured appointment. See, Sections 9.13–21 Consideration for Tenure. By February 15 of each year, all untenured faculty members will be notified concerning their retention or nonretention for the ensuing year. The President shall give such notice by letter.

9.03. No reason for nonretention shall be given in the initial letter of notification. At the request of the faculty member, the President shall provide reasons for the nonretention. Consistent with United States Supreme Court guidance in *Board of Regents v. Roth*, the faculty member has no entitlement to a hearing, appeal, or other formal review proceedings.

9.04. "Dismissal" as opposed to "Nonretention" means termination of responsibilities during an academic year. When a nontenured faculty member is dismissed, the President may, in his discretion, grant a request for a review within the University, either by a faculty committee or by the President, or both. Any such review is informal in nature and is advisory only. The dismissed faculty member may also request a hearing from the Board of Trustees. The Board in its discretion may grant or deny the request for correction.

You have reviewed the information in the Melton retention case. It is time to do some strategic thinking before you begin writing. What are the objectives of your letter to President McBee for Vice President Carter? She feels strongly about how the decision in the case should come out. So long as that is consistent with the law, you need to express that viewpoint to the president. What else should go into your strategic thinking?

CHAPTER FOUR

How to Draft a Motion

For your second litigation assignment, you are a summer associate for the law firm that represents Melody Richardson, the woman who is trying to auction the sculpture "Boothbay Falcon." Your job is to draft a motion to dismiss the Complaint that you prepared in Chapter Two. The assignment arrives in the form of the following memo:

MEMORANDUM

The Law Offices of Jones, Jones & Day
100 Commercial Street
Portland, Maine 04101

To: Summer Associate
Fr: Stephen Jones, Senior Partner
Re: *United States v. Melody Richardson*, Civil Docket No. 2002–04-EJR

I have a new assignment for you. Our client is Melody Richardson, a very nice woman from San Diego whose grandfather was David Collins, the American Ambassador to Canada from 1944–1947. It seems that our client inherited a sculpture from her grandfather, and the government is now trying to take it away from her.

From our perspective, venue is very important. Our client simply cannot afford to litigate this case in Maine and incur the cost of flying back and forth from California. I want you to draft a motion to dismiss the Complaint on the grounds of improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). You should rely on the appropriate portion of the venue statute, 28 U.S.C. § 1391.

Attached is an affidavit from our client. As you can see, she is a resident of California, and the sculpture was never in Maine. Put together an argument that venue is improper in Maine and that the case should be dismissed pursuant to the applicable subsection in 28 U.S.C. § 1391.

For legal authority, please rely on *Smith v. Fortenberry*, 903 F. Supp. 1018 (E.D. La. 1995) and *SeaRiver Maritime Financial Holdings, Inc. v. Pena*, 952 F. Supp. 455 (S.D. Texas 1996).

You should also argue that the Complaint should be dismissed because the Plaintiff failed to obtain a writ of replevin as required by Maine law. For your assistance, I have attached a copy of the applicable section from Professor Zillman's torts treatise, which explains the importance of that prerequisite. In your motion, you also need to discuss the seminal case of *Doughty v. Sullivan*, 661 A.2d 1112 (Me. 1995), which explains what happens if you fail to obtain a writ of replevin.

Here are some tips for organizing the motion:

1. Start with the caption. Delete the part about "jury trial demanded," because you only need that in a Complaint (or an Answer).
2. Center the following heading: "**MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW**."[1]
3. Then start with a sentence like this: "**NOW COMES** the Defendant, by undersigned counsel, and hereby moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12."
4. Center the following heading: "**INTRODUCTION**."
5. Under that heading, include one paragraph that summarizes the entire motion and introduces a "theme."
6. Don't forget that our client is Melody Richardson. Try to personalize her story. You might start by saying something like: "This is a case about. . . ."
7. Center the following heading: "**BACKGROUND**."
8. Unlike a Complaint, a motion does not require separately numbered sentences. Therefore, you need to build your argument in narrative form using paragraphs as your basic building block. That means every paragraph should have one point, which is often succinctly stated in the opening sentence. With that approach, the reader can follow your argument more easily.[2]
9. Make sure your Background section includes enough facts so that the reader can understand the "story" of the case, from our perspective, without having to read the government's Complaint. You also need to include all the facts necessary to support our motion to dismiss.
10. In the Background section, you might want to include one paragraph that summarizes the allegations in the Complaint (together with citations to

[1] The phrase "incorporated memorandum of law" is a holdover from the days when the court required two separate documents: (1) a motion that specified the relief requested; and (2) a supporting memorandum of law that explained the factual and legal authority in support of the motion. I predict that someday the court will amend the Local Rules to eliminate the distinction, but for now it is required.

[2] Here's an example:

Even if the Court finds that Baker's statement was sufficiently widespread, Count V should be dismissed on account of Jones' consent. In a privacy case, consent offers a complete defense. *Veilleux v. NBC*, 8 F.Supp.2d 23, 39 (D. Me. 1998). In this case, Jones agreed to proceed with the interview in Richardson's presence (Facts ¶ 25–27). Jones did not stop the conversation or insist that it be kept confidential (Facts ¶ 28). Under these circumstances, Jones's consent provides a complete defense. Accordingly, Count V should be dismissed.

the Complaint). The rest will most likely derive from the facts set forth in our client's declaration (with citations to Richardson Decl. ¶).

11. Don't forget to simplify names when you identify people and entities. You should start with the full name and follow up with a shorthand version. Don't switch back and forth.[3]
12. The next heading should be "**STANDARD FOR MOTION TO DISMISS**."
13. Under that heading, feel free to insert the following, verbatim: "When considering a Rule 12(b) motion to dismiss, the Court must accept as true all well-pleaded factual allegations, draw all reasonable inferences in the claimant's favor, and determine whether the Complaint sets forth sufficient allegations to support the challenged claims, or whether the Complaint fails to state a claim for which relief can be granted. *Clorox Co. v. Proctor & Gamble Commer. Co.*, 228 F.3d 24, 30 (1st Cir.2000); *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 508 (1st Cir.1998). The Court, however, need not credit conclusory allegations or indulge unreasonably attenuated inferences. *Aybar v. Crispin-Reyes*, 118 F.3d 10, 13 (1st Cir.1997); *Ticketmaster-NY, Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir.1994)."
14. Center the following heading: "**ARGUMENT**."
15. The next heading, flush left, should be: "**I**. ***Failure to Obtain a Writ of Replevin***."
16. Under that heading, explain the general law of replevin in one paragraph. The only legal authority you need is the portion of the Zillman treatise that explains the applicable three-step procedure for replevin cases.
17. In the next paragraph, you need to *apply* that general law to the facts of this case and explain how the government failed to satisfy all three elements.
18. In the next paragraph, explain the *Doughty* case. Try to write the paragraph so the reader can quickly understand what happened in *Doughty* and why the court ruled the way it did.
19. In the next paragraph, *apply Doughty* to this case.
20. The next heading, flush left, should be: "**II**. ***Improper Venue***."

[3] Here's an example:

The Defendant in this case is Melody Richardson ("Richardson"). Richardson is a resident of San Diego.

21. Under that heading, explain the general rules regarding venue, including a statement of which party bears the burden of proof. I would suggest that you devote the majority of the paragraph to explaining the alternatives for venue pursuant to the applicable portion of the venue statute. It's up to you to figure out which sub-section of the venue statute applies. 28 U.S.C. 1391.
22. In the next paragraph, you should *apply* those general legal principles and the statutory provisions to the facts of this case. You should devote the majority of the paragraph to an explanation as to why, in this case, a "substantial part of the events or omissions giving rise to the claim" did *not* occur in Maine. Here's a hint: think about the nature of the claim and the location of the events that gave rise to it.
23. In the next paragraph or two, you should explain what happened in the *Seariver* and *Fortenberry* cases and why.
24. Next, you should *apply* those cases, and the common principle that can be derived from those cases, to the facts of this case.
25. The next heading should be "**CONCLUSION**."
26. Under that heading, feel free to include the following, verbatim: "**WHEREFORE** for all the foregoing reasons, the Defendant respectfully requests that the Court grant this motion to dismiss the Complaint."
27. Add a signature block and a date.

Thanks again for your help. I look forward to reading the draft, which should be about four to five pages, double-spaced.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 2002-04-EJR**
	)	
MELODY RICHARDSON	)	
Defendant	)	

DECLARATION OF MELODY RICHARDSON

1. My name is Melody Richardson. I own the sculpture "Boothbay Falcon" ("the sculpture") by William Summers. I am fifty-two years old and a lifelong resident of San Diego, California.
2. I make this declaration based on personal knowledge, unless otherwise stated or implied.
3. I inherited the sculpture from my grandfather, David Collins. My grandfather was also a lifelong resident of San Diego, California.
4. My grandfather was born in 1897. He was the American Ambassador to Canada from 1944–1947. My grandfather died in 1968. I have owned the sculpture ever since.
5. My grandfather was a highly respected member of the United States Diplomatic Corps. It is my personal belief that my grandfather must have received the sculpture as a gift from the federal government upon his retirement from government service. I can't imagine that he received the sculpture in any other fashion.
6. The sculpture was one of my grandfather's favorite works of art. It was always displayed in a prominent place in his home in San Diego. I have numerous photographs in my possession (some taken in the 1950s) that show the sculpture displayed above his fireplace.
7. I am not familiar with any time that the sculpture left the State of California.
8. I asked Munjoy Galleries in Portland to offer the sculpture at their upcoming auction. As a result, Munjoy Galleries included the sculpture in their

auction catalog. However, I never delivered the sculpture to Munjoy Galleries. Under our agreement, I was not required to deliver the sculpture until one week before the auction. It was more than two weeks before the auction when the U.S. Attorney's Office demanded that I turn over the sculpture. That's when I decided to keep the sculpture in my house in San Diego.

9. I am not a lawyer, so I don't know what it means to be "served with a writ of replevin." However, I can state with certainty that no one has ever handed me a document entitled "writ of replevin." My only contact with the U.S. Attorney's Office was by telephone when an Assistant U.S. Attorney called me in California and demanded that I give him the sculpture. I refused.

I declare under penalty of perjury that the foregoing is true and correct.

_____ _____

Melody Richardson Date

ZILLMAN ON MAINE TORTS: THE DEFINITIVE TREATISE

§18.13 REPLEVIN

The ancient writ of replevin is one of the oldest known remedies. In Maine, there is a three-step procedure that must be followed. First, the Plaintiff must file a complaint with the Court, together with a motion for approval of the writ of replevin, as well as affidavits that establish an immediate right to possession of the property. Second, the Plaintiff must win a court-ordered seizure of the property. Third, the Court asserts its jurisdiction to adjudicate which party owns the property. If a Plaintiff fails to follow the three-step procedure, the Court lacks jurisdiction, and the Plaintiff has no power to request a Court determination as to ownership.

DOUGHTY V. SULLIVAN, 661 A.2D 1112 (ME. 1995)

LIPEZ, Justice.

Ethelyn Sullivan (Ethelyn) appeals from the judgment entered . . . in the District Court . . . in favor of Cecil Amos Doughty (Amos) on his complaint requesting a writ of replevin and damages for Ethelyn's wrongful conversion of an 18-foot Pointer boat which Amos allegedly purchased from Neil Doughty (Neil). . . . We vacate [the] judgment[ ].

Background

The record reveals that Bernard Doughty loaned his son, Neil, $1,000 to enable Neil to purchase an 18-foot Pointer boat. To evidence the loan, Neil gave his father a signed "receipt" which stated, "Received from Bernard Doughty $1,000 for one 18-foot Pointer and 45 H.P. motor." Neil Doughty signed this receipt. Bernard believed the receipt gave him a security interest in the boat. Neil testified that he did not intend to give his father a security interest in the boat. He simply wanted his father to have the boat if something happened to him while he was at sea.

Neil stored the boat during the winter of 1989–1990 in the yard of John and Ethelyn Sullivan, his sister. Although Neil used the boat a few times, during the summer of 1990 seawater disabled the engine and Neil left the boat on its mooring in Chandler's Cove. According to John Sullivan, he towed the boat from Chandler's Cove to Bennett's Beach in early October 1990, where he left the boat on the beach for a couple of weeks. Bernard testified that he instructed John to haul the boat back to the Sullivan's' yard because he was concerned that the boat would be destroyed over the winter unless it was removed from the beach. Sullivan and a friend testified that they hauled the boat to the Sullivan's yard in late October or early November. Bernard believed that he had a right to repossess the boat because Neil had not yet repaid the loan. On November 19, 1990, Bernard signed a document which stated: "As of this date I transfer my ownership and claim to the note for $1,000.00 from Neil Doughty, for the boat (18 Pointer) and 45 HP Chrysler motor as yet unpaid to Ethelyn L. Sullivan." The document was witnessed and signed by a family friend.

During this same time period, Neil accepted an offer by Amos to buy the boat for $500. On November 21, 1990, Amos gave Neil a check for $500 which Neil cashed that same day. Both Neil and Amos testified that, contrary

to the Sullivan's contentions, the boat was still lying on the beach when the sale occurred. Neil could not recall how the boat got from the mooring in Chandler's Cove to Bennett's Beach. Amos testified that he had no idea that someone else claimed an interest in the boat. Sometime after Neil sold the boat to Amos, Amos discovered that the boat was in the Sullivan's yard and he asked Ethelyn to return it to him as he was now the owner. Ethelyn refused, asserting that Bernard owned the boat.

In December 1990, Amos decided that he could not engage in commercial lobstering during 1991 because Ethelyn would not return the boat that he had intended to use. Amos did not attempt to replace the boat until 1992, when he purchased another boat for $1,000.

Amos filed a complaint on July 6, 1992, against Ethelyn, alleging that she had wrongfully converted the boat after he purchased the boat from Neil. Amos sought a writ of replevin pursuant to 14 M.R.S.A. § § 7301–12 (1980) to obtain possession of the boat and damages for Ethelyn's wrongful conversion. . . . At the time he filed his complaint, Amos did not attach a bond or an affidavit to support his request for a writ of replevin. . . .

Prior to the trial, Ethelyn filed a motion to dismiss Amos' complaint for failure to file the pleadings required by M.R.Civ.P. 64 to obtain a prejudgment writ of replevin.[4] Ethelyn contended that 14 M.R.S.A. §§ 7301–7312 and M.R.Civ.P. 64 provided a writ of replevin as a prejudgment remedy only. Amos attempted to cure his failure to conform to M.R.Civ.P. 64 by filing a motion for a writ of replevin and a personal bond for $1,000 and an affidavit before trial.

After a trial, the District Court concluded that it had subject matter jurisdiction pursuant to 14 M.R.S.A. § § 7301–7312 (1980), and that Amos was entitled to seek a postjudgment writ of replevin without first seeking a prejudgment writ of replevin. The court further decided that regardless of whether the receipt signed by Neil evidenced a valid security interest, Bernard had not perfected the interest by the time Amos bought the boat from Neil because

[4] M.R.Civ.P. 64(c) provides in pertinent part: A replevin action may be commenced only by filing the Complaint with the court, together with a motion for approval of the writ of replevin and the amount of replevin bond. The motion shall be supported by affidavit or affidavits setting forth specific facts sufficient to warrant the required finding. . . . Except as provided in subdivision (h) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner provided in Rule 4 at the same time the summons and complaint are served upon that defendant.

it was more likely than not that the boat was in Chandler's Cove at the time of the purchase and not in Bernard's possession. The trial court concluded that Amos was a bona fide purchaser for value and was entitled to possession of the boat and entitled to $3,680.10 for damages he sustained when Ethelyn converted the boat and prevented him from lobster fishing in 1991. Accordingly, a judgment was entered in favor of Amos. . . .

Jurisdiction to Issue a Post-Judgment Order of Replevin

Ethelyn [ ] contends that because Amos had failed to replevy the boat before the action was tried, the District Court erroneously concluded that it had jurisdiction pursuant to 14 M.R.S.A. §§ 7301–7312 to issue a writ of replevin after a judgment had been entered [footnote omitted]. According to Ethelyn, the statute provides a prejudgment remedy only. Ethelyn further contends that even if Amos was permitted to cure his failure to request a prejudgment writ of replevin, Amos still did not provide a bond "with sufficient sureties." *Ford New Holland, Inc. v. Thompson Machine, Inc.*, 617 A.2d 540 (Me. 1992) (holding personal bond insufficient to satisfy statute). Hence, the District Court was without subject matter jurisdiction to hear Amos' action in replevin.

Amos responds that the bond requirement is intended merely to provide security to the defendant in a replevin action when the plaintiff seeks a prejudgment writ of replevin. Because he was willing to wait until after a judgment was entered before he obtained possession of the boat, Amos argues that requiring him to post a bond is superfluous. According to Amos, the filing of a complaint confers jurisdiction on the District Court to hear an action in replevin pursuant to 14 M.R.S.A. § 7301, rather than the filing of a prejudgment writ of replevin. After a careful review of the laws of other states and our own statute, we conclude that 14 M.R.S.A. §§ 7301–7312 confers jurisdiction on the District Court to hear an action in replevin only if the plaintiff has already replevied the property through the issuance of a prejudgment writ of replevin.

Replevin is one of the oldest legal remedies available under the common law. Historically, replevin lay to recover immediate possession of a specific chattel as compared with other common law actions for trespass or conversion which lay to recover damages for the wrongful taking of a chattel. Cobbey, A Practical Treatise on the Law of Replevin, § 17 (2d ed. 1900). Replevin

sought only to establish the right to possession and not the right to legal title. The common law action of replevin could be commenced only by the issuance of a writ of replevin and seizure of the property which was deemed necessary for the court to obtain jurisdiction over the action. *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599, 600 (1899).

The plaintiff would apply for a writ of replevin from the court by supplying an affidavit alleging the right to immediate possession of the goods currently in the wrongful possession of a third party [footnote omitted]. If the affidavit satisfied the common law formalities, the court would issue the writ directing the sheriff to seize the chattel and to deliver the same to the plaintiff. Before the sheriff could serve the writ and seize the property, however, he had to obtain a bond from the plaintiff for twice the value of the goods sought to be replevied [footnote omitted]. Upon receiving possession, the plaintiff would bring the action in replevin seeking a judicial determination of his right to possession and any damages incurred by the defendant's wrongful retention of the chattel. Hence, replevin was a unique common law action that entitled a plaintiff to a prejudgment seizure of the chattel, leaving the merits of the plaintiff's claim of right to be tried later. . . .

In Maine, replevin has been a statutory remedy at law since the replevin statute was first enacted in 1821 and copied from the Massachusetts replevin statute enacted in 1789 [footnote omitted]. *Seaver v. Dingley*, 4 Me. (Greenl.) 306, 315–16 (1826). 14 M.R.S.A. §7301 (1980) provides in pertinent part:

> When goods unlawfully taken or detained from the owner or person entitled to the possession thereof, or attached on mesne process, or taken on execution, are claimed by any person other than the defendant in the action in which they are so attached or taken, such owner or person may cause them to be replevied [footnote omitted].

There is no statutory language suggesting that a writ of replevin is merely ancillary to the underlying replevin action. Nor is there any provision that permits the plaintiff to forgo obtaining possession of the chattel until after a judgment on his action. Indeed, all of the provisions presuppose that the property has in fact been replevied before trial. . . .

We also note that our civil rules of procedure contemplate that a replevin action be commenced by applying for a writ of replevin. M. R.Civ.P. 64(c) provides that "a replevin action may be commenced *only* by filing a complaint

with the court, together with a motion for approval of the writ of replevin and the amount of the replevin bond."

In summary, our replevin statute does not authorize the court to issue a postjudgment writ of replevin. The writ of replevin referred to in 14 M.R.S.A. §§ 7301–7312 and Rule 64 is a prejudgment remedy only. [footnote omitted]. The replevin statute does not confer jurisdiction on a court to adjudicate a claim of possession pursuant to the replevin statute until the procedural requirements have been satisfied. If, on the other hand, the plaintiff seizes the property pursuant to a writ of replevin and has provided the appropriate bond to the defendant, the court has jurisdiction pursuant to the replevin statute to determine who is the rightful possessor and to award damages resulting from the wrongful detention of the chattel.

Turning to the facts in the present case, Amos did not file a motion for approval of a writ of replevin, nor did he file the required affidavits alleging his immediate right to possession or a bond for twice the value of the boat, at the time he filed his complaint. Without Amos's affidavit or bond, the District Court had no jurisdiction to issue a writ of replevin to restore the boat to Amos's possession as requested in Amos's complaint. Moreover, because no writ was issued and because the boat was not replevied, the court had no jurisdiction to finally adjudicate which party had the right to possess the boat pursuant to 14 M.R.S.A. § 7301. . . .

SEARIVER MARITIME FINANCIAL HOLDINGS, INC. V. PENA
952 F. SUPP. 455 (S. D. TEXAS 1996)

ATLAS, District Judge.

Plaintiffs have brought suit seeking a declaratory judgment that Section 5007 of the Oil Pollution Act of 1990 ("the OPA"), 33 U.S.C. § 2737, is unconstitutional and contrary to United States treaties and international law, and ask the Court to enjoin permanently the enforcement of Section 5007 against Plaintiffs. . . . Plaintiffs invoke venue in this judicial district [the Southern District of Texas] pursuant to 28 U.S.C. § 1391(e). The Government has filed a Rule 12(b)(3) Motion to Dismiss for Improper Venue. . . . For the reasons stated herein, the Government's Motion is GRANTED, and this action is DISMISSED WITHOUT PREJUDICE.

Factual Background

In 1990, Congress passed the OPA, of which Section 5007 provides: "Notwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska." 33 U.S.C. § 2737.

Plaintiffs own the S/R *Mediterranean*, formerly named the *Exxon Valdez*. Plaintiffs state that the *Mediterranean* was the only U.S. flag vessel to which Section 5007 applied at the time of passage in 1990, and that the statute "effectively bars the vessel from participating in any trade from Alaska to other U.S. ports, which was the original purpose in constructing the vessel". . . .

Section 5007 has not yet been enforced against Plaintiffs. The First Amended Complaint does not allege that the vessel has yet done anything to violate Section 5007's prohibition against navigation in Prince William Sound, nor that any enforcement action has been taken or threatened against the vessel. Rather, the only allegation is that SeaRiver "wishes" to have the vessel sail through Prince William Sound so as to participate in Alaska North Slope trade, which was the purpose for the vessel's construction. . . .

Plaintiffs have presented evidence of the connection of this cause of action to Houston, including the following: the S/R *Mediterranean* is owned and operated by two Houston-based companies; all decisions regarding the

ownership and operation of the vessel are made in Houston; the decision to construct the vessel was made in Houston; and the restrictions of Section 5007 have caused "significant losses" for the Plaintiff companies, based in Houston, who own and operate the vessel. . . .

The Government claims that "[t]he only district involved in these events is the District of Alaska, where the *Exxon Valdez* implicated Section 5007 by spilling approximately 11,000,000 gallons of oil, and also where that ship would have to operate before Section 5007 would be violated and could be enforced". . . . The Government points out that the only past event identified by Plaintiffs is the Valdez spill, which occurred in Alaska. *Id*. at 20. The Government also argues that, to the extent future events would be relevant, they would necessarily have to occur in Alaska since Section 5007 bars navigation only in Prince William Sound. *Id*. at 23.

Discussion

The applicable venue statute, 28 U.S.C. § 1391(e), provides that a civil action in which the defendant is the federal government may be brought (1) where the defendant resides, (2) where a "substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated," or (3) where the plaintiff resides if no real property is involved in the action. . . .

A. Is Venue Proper in the Southern District of Texas?

Plaintiffs argue that venue is appropriate under two provisions of Section 1391(e): because Plaintiffs reside in Houston, and because a "substantial part of the events or omissions giving rise to the claim occurred" in Houston.

1. *Burden of Proof*. Once Defendants have raised a proper objection to venue in this judicial district, the Plaintiffs bear the burden of proof to establish that the venue they chose is proper. *Smith v. Fortenberry*, 903 F.Supp. 1018, 1019–20 (E.D.La. 1995); *French Transit, Ltd. v. Modern Coupon Systems, Inc.*, 858 F.Supp. 22, 25 (S.D.N.Y. 1994) [footnote omitted]. As another district court has noted, the burden should be on the plaintiff to institute an action in the proper place, because "[t]o hold otherwise would circumvent the purpose of the venue statutes – it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue." *Delta Air Lines, Inc.*

v. Western Conference of Teamsters Pension Trust Fund, 722 F.Supp. 725, 727 (N.D.Ga.1989) [footnote omitted]. Therefore, Plaintiffs bear the burden to establish that the Southern District of Texas is an appropriate venue for this action [footnote omitted].

2. *Residence of Plaintiff*. The Court holds that Plaintiffs' residence is Delaware, the state of incorporation for all three Plaintiffs. Section 1391(e)(3) therefore provides no basis for venue in this judicial district.
3. *Substantial Part of Events*. It is, of course, possible in a given case that there could be more than one district in which a "substantial part of the events . . . giving rise to a claim occurred," and therefore there could be more than one proper venue for a certain cause of action. *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.1995); *Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir.1994); *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 867 (2d Cir.1992). A court is not obliged to determine the "best" venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper. *Setco, 19 F.3d at 1281; Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir.1994) [footnote omitted]. Therefore, even if another district's contacts with the controversy are more substantial than this district, the court need determine only whether substantial events occurred in this district.

   The Government argues not that the connections with Alaska are "more substantial" than those with Texas, but rather that the only event giving rise to application of Section 5007 to Plaintiffs is the Alaskan oil spill, and therefore that *none* of the past events giving rise to Plaintiffs' claims have occurred in the Southern District of Texas. . . . The Government argues further that any future "events" involving possible violations of Section 5007 giving rise to Plaintiffs' claim would take place in Alaska. . . . Plaintiffs, however, argue that the effects of Section 5007 (which, at the time of passage, applied to only SeaRiver's vessel) are felt in Houston, and that these local effects give rise to venue. The Court is not persuaded. The "effects" to which Plaintiffs refer are the injury resulting from Section 5007, rather than an "event giving rise to a claim". . . .

   Events that have only a tangential connection with the dispute at bar are not sufficient to lay venue. *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir.1994). Moreover, the Court is persuaded by the analysis of the Eighth Circuit, when it stated that, by referring to "events or omissions giving rise to the claim," it is likely that "Congress

meant to require courts to focus on relevant activities of the defendant, not of the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.1995). . . .

In the instant case, Plaintiffs' decisions in Houston regarding the S/R *Mediterranean* and the harm felt in Houston by the vessel's inability to sail to Prince William Sound also do not bear a sufficiently substantial connection to the events giving rise to Plaintiffs' claims. . . .

Therefore, the Court holds that a "substantial part of the events or omissions giving rise to the claim" did not occur in this judicial district, and that Section 1391(e)(2) does not provide a basis for venue here.

SMITH V. FORTENBERRY, 903 F. SUPP. 1018 (E. D. LA. 1995)

JONES, District Judge

Pending before this Court is a Motion to Dismiss on Grounds of Improper Venue . . . filed by defendant Millis Transfer, Inc. . . .

Background

On July 25, 1993, plaintiff Eric Smith, a Louisiana resident, allegedly was traveling south in Mississippi on a highway towards Louisiana. At that time plaintiff contends that defendant Gregory Fortenberry, allegedly a Mississippi resident, was backing an 18-wheel tractor trailer into a driveway and allegedly blocked both the north and southbound lanes. Plaintiff alleges that codefendant Millis Transfer, Inc. ("Millis"), owned the tractor trailer and is a Wisconsin corporation. Plaintiff alleges that plaintiff's vehicle collided with the trailer, causing him to sustain severe injuries [footnote omitted].

On July 19, 1995, plaintiff filed this lawsuit in this Court, alleging jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

Millis responded by filing the instant motion, contending first that, because venue is improper in this district, the matter should be dismissed [footnote omitted]. . . .

Plaintiff counters that venue is proper in the Eastern District of Louisiana because under 28 U.S.C. § 1391(a) – the applicable venue statute – venue is proper in "a district in which a substantial part of the events or omissions giving rise to the complaint occurred." 28 U.S.C. § 1391(a)(2). According to plaintiff, this portion of the statute is applicable because his injuries arise here [footnote omitted]. Plaintiff further posits that venue in this matter is valid and apropos under subsections (2), in particular, and (3), in general, of § 1391(a), which defendant misinterpreted. . . .

Law and Application

I. Improper Venue

The initial issue is whether venue is proper in the Eastern District of Louisiana. "[T]here are cases holding that the burden is on the objecting defendant to establish that venue is improper. But 'the better view' and the clear weight of authority, is that, when objection has been raised, the burden is on the plaintiff to establish that the district he chose is a proper venue."

Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3826 at p. 259. Thus, the burden is on Smith to show that venue is proper in this district.

> A civil action founded on diversity of citizenship may be brought in: (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

In the case at hand, §1391(a)(1) is inapplicable because all defendants do not reside in the same state, according to the Complaint, which alleges that Fortenberry is a resident of Mississippi and Millis is a Wisconsin corporation.

The next question is whether venue is proper under § 1391(a)(2) because "a substantial part of the events or omissions giving rise to the claim" occurred in the Eastern District of Louisiana. In Smith's memorandum in opposition, he concedes that "[t]he accident itself occurred in Mississippi" . . . Even so, Smith declares that venue is proper in this district because he continues to undergo treatment in Louisiana for injuries caused by the accident with Fortenberry, and "has continued to reside in Louisiana during the cause [sic] of his convalescence and disability". . . . Smith further proclaims that because "there may be more than one district in which a substantial part of the events giving rise to the claim occurred, and that venue would be proper in each such district," quoting *Sidco Industries, Inc. v. Wimar Tahoe Corporation*, 768 F.Supp. 1343, 1346 (D.Or.1991), and because his injuries have been treated in Louisiana, venue is proper here under § 1391(a)(2).

The Court finds that Plaintiff's contention flies in the face of the pertinent, plain language of § 1391(a)(2) that venue is proper in "a judicial district in which *a substantial part of the events or omissions giving rise to the claim* occurred." (Emphasis added.) The events or omissions giving rise to the Plaintiff's claim involved the alleged negligence of Fortenberry and Millis' accident in Mississippi, which gives rise to Plaintiff's claim for injuries. . . .

The instant case . . . involves a simple albeit injurious vehicular accident that occurred in Mississippi. The substantial part of the events giving rise to

Plaintiff's claim must be informed by the accident between Smith and Fortenberry. Smith's claim that his treatment in Louisiana should be considered as the substantial part of the events giving rise to the claim is misplaced because the injury he sustained from the accident is the defining event, not the hospitals or physicians' offices where he obtained treatment. Thus, nothing in provision (2) countenances Plaintiff's proposition that medical treatment in Louisiana was "a substantial part of the events giving rise to the claim," and nothing in the cited jurisprudence lends support to plaintiff's misguided epiphany that venue is applicable in the Eastern District of Louisiana.

The Court also finds that §1391(a)(3) is inapplicable. . . .

Hence, the Court holds that venue has not been properly shown for maintenance in this district.

Drafting Considerations

Now that you have reviewed the materials, it's time to consider strategy. Why file this motion at all? As Melody Richardson's lawyer, if you point out the government's failure to serve and file a writ of replevin, won't the government just cure the problem and refile? As for venue, isn't Maine venue sufficient based on Richardson's attempt to sell the sculpture in Maine? Why fight this fight?

In this case, while a motion to dismiss presents a variety of advantages and disadvantages, there is one factor that may tip the balance in favor of filing: the opportunity to advance your "theme," or what some call "the story of your case." Here, Richardson needs to develop a theme that takes into account the government's strong factual and legal position. Richardson's best hope is that the court might sympathize with her plight as the "innocent owner" of the sculpture and rule against the government based on a technical flaw in the government's case (most likely an evidentiary problem). With that in mind, it makes some sense for Richardson to begin the case with a hard-hitting motion that argues: (1) the government is trying to take away a sculpture that has been in Richardson's family, without incident or challenge by the government, for sixty years; (2) the government, in its zeal to take the sculpture, failed to satisfy the most basic jurisdictional requirement of obtaining and serving a writ of replevin; and (3) to make matters worse, the government, with its infinite resources, chose to litigate the case in Maine (at great cost to Richardson) when the sculpture never left California. Although those arguments ultimately may not succeed, they might put the government back on its heels, which in turn might lead to a reasonable settlement.[5]

You should never expect that your theme will make the difference between winning and losing. Indeed, in many cases, there is no need for a theme at all. However, when a theme resonates with the underlying facts and law, it can have a subtly persuasive effect, particularly on a busy judge who just might remember your case as "the one in which the government was trying to take away that nice lady's sculpture."

One way to further your theme is to place the "story of your case" within a larger, favorable, and commonly understood context. For example, imagine a scenario in which a man is charged with a crime, the court dismisses the

[5] Some might call that strategy "seizing the initiative," which is a common approach in the world of chess. B. Pandolfini, *Every Move Must Have a Purpose: Strategies from Chess for Business and Life* (Hyperion 2003).

criminal case on a technicality, and the man proceeds to file a civil rights action against the arresting officer for false arrest. If you are the lawyer defending the officer against the false arrest charge, you might place your case in the following context:

> Probable cause is one of the hallmarks of our criminal justice system. The Fourth Amendment makes clear that "no warrants shall issue, but upon probable cause." That famous phrase provides one of the fundamental protections for citizens in a free society.
>
> Probable cause also provides another protection that is less well known, but equally important. When an arrest warrant issues upon probable cause, there are certain immunities for those who assist the criminal justice system, such as victims, witnesses, investigators, prosecutors, judges, and juries. A well-functioning criminal justice system relies on those immunities in order to prevent subsequent harassing lawsuits by disaffected criminal defendants. This is one such lawsuit.

There are several advantages to that approach. First, it focuses the debate on the ultimately winning issue for the officer: that he is entitled to immunity from suit because the warrant was issued based upon probable cause. Second, by focusing on probable cause, it helps the reader understand that the officer's immunity is part of a well-functioning criminal justice system and not just some technicality. Third, by pointing out that "this is one such lawsuit," it helps define the category of cases where this belongs.

A well-chosen theme can also help you develop a "narrative" to describe "your side of the story." For example, imagine that you are defending a doctor who committed malpractice, but you are trying to argue that the malpractice did not cause the patient's death. In such a case, you might describe "the story of your case" like this:

> This is a case about finding the source of cancer. Over the course of many decades of bitter experience, doctors have learned the common and uncommon pathways for the spread of cancer. For example, it is common for bladder cancer to spread almost anywhere in the body. In contrast, it is extremely unlikely for a cancerous cheek lesion to spread to the bladder.
>
> In this case, Plaintiff's estate adopts the unlikely theory that the patient died because of a cancerous lesion on his cheek that spread to his bladder. The reason Plaintiff's estate relies on the cheek cancer is because the hospital

> admittedly delayed performing a biopsy of the cheek lesion that revealed a malignancy. From that premise, Plaintiff's estate contends that the cheek lesion was the source of the problem.
>
> But the facts support the opposite conclusion. In this case, Smith's bladder cancer spread to the cheek, not the other way around. The likelihood of Smith's bladder cancer spreading to his cheek far exceeds the likelihood of Smith's cheek lesion spreading to his bladder. Moreover, the medical evidence in this case confirms that bladder cancer – not a cheek lesion – was the source of the problem and the cause of death.
>
> In this case there is no allegation of malpractice with respect to the discovery of the patient's bladder cancer. On the contrary, it is common for primary tumors, like the patient's bladder cancer, to remain hidden for a considerable time, and even "appear" for the first time long after the discovery of evidence of their spread to other sites.
>
> That is what happened in this case. The patient died because of a virulent form of bladder cancer that not only spread to his cheek, but it triggered the urinary problems, the wasting disorder, and the renal failure that caused the patient's death. The delay in performing a biopsy of the cheek lesion made no difference because, by the time the patient's bladder cancer spread to his cheek, there was no effective cancer treatment.

For a theme, you can also use a common phrase or metaphor that serves as a unifying principle for your case. For example, imagine a situation in which a Coast Guard officer candidate is discharged for cheating on an examination. The officer, a white male, contends that his discharge was unfair because the Coast Guard did not discharge an African-American officer who cheated on a different exam. Now assume you are the Coast Guard's lawyer, and you are defending the decision to discharge the white officer. In the absence of a theme, your motions might include an introduction like this:

> Mr. Larry Anderson ("Plaintiff") was properly separated from the Coast Guard, under the appropriate notice and comment procedures, after admittedly cheating on an examination at his basic officer training course. Afterwards, he petitioned the Secretary of the U.S. Department of Homeland Security ("the Secretary") for reinstatement, arguing he was entitled to reinstatement because (1) he took too much prescription medicine before he cheated, and (2) a minority officer was retained after cheating on a different examination at the same course.

> The Secretary, in accordance with the recommendations of all three members of the Board for Correction of Coast Guard Records ("the Board") rejected Plaintiff's overmedication and reverse discrimination arguments. The Secretary also found, in accordance with the recommendation of one board member, that Plaintiff's case did not warrant equitable relief because he failed to demonstrate the character traits required of a Coast Guard officer.
>
> Because the Complaint and the documents attached thereto establish, as a matter of law, that the Secretary's decision was authorized by statute, procedurally sound, and well supported by the record, dismissal is warranted. Moreover, dismissal is particularly appropriate given the unusually deferential review accorded military personnel actions under the Administrative Procedure Act ("APA").

There is nothing particularly wrong with that introduction, but it lacks persuasive power due to the absence of a theme. It reads more like a collection of individual points without any particular context or unifying idea. The following is a revised version that includes a reasonable theme:

> This case presents a tale of two Coast Guard officers. One Coast Guard officer, Plaintiff Larry Anderson ("Anderson"), cheated on a test by copying answers from a fellow student. Anderson claims that he cheated because, earlier that day, he ingested too much pain medication, which caused him to be confused. Anderson's method of cheating, however, suggests that he was not confused. Prior to the cheating incident, Anderson was counseled numerous times, failed an exam, and was a barely average student. When confronted with the cheating incident, Anderson suggested that his supervisory officers were partly to blame because they supposedly "did not care" about him. After the cheating incident, Anderson failed another test and continued to have discipline and attitude problems.
>
> The other Coast Guard officer, Michael Rogers ("Rogers"), cheated on a different exam, in a different way, under a different Commanding Officer. Moreover, Rogers responded with a completely different attitude. When confronted, Rogers accepted full responsibility, and he did not try to blame anything or anyone else. Rogers' grade point average placed him in the middle of his Coast Guard class. Rogers never required counseling for any other incident. After the incident, Rogers was an exemplary Coast Guard officer.
>
> The Coast Guard issued a punitive letter of reprimand to Rogers, but he was allowed to remain in the service. The Coast Guard, however, discharged

> Anderson. Anderson contends that the different treatment was "arbitrary and capricious."
>
> The undisputed facts provide ample distinctions between Anderson and Rogers to justify the different administrative treatment. Moreover, pursuant to the extremely deferential standard of review that applies in this case, the decision should be upheld even if reasonable minds could differ on the issue. In this case, the Court should uphold the Coast Guard's decision because, as a matter of law, it was based on substantial evidence after sufficient administrative due process, and it was not arbitrary or capricious.

Notice that the theme does not involve name-calling or hyperbole or anything else that would distract from the underlying facts and law. Instead, the theme seeks to amplify the facts and the law, from the Coast Guard's perspective, by highlighting the differences between the two officers. Indeed, the Coast Guard wants to focus the debate on the "tale of two officers" because the different circumstances justify the different treatment. Indeed, even if you skipped the phrase about a "tale of two officers," you would still have a perfectly valid narrative.

When selecting a theme, however, you must always consider the risk that the other side will turn it against you. Continuing with the example of the Coast Guard officer, opposing counsel might find a way to "embrace" your theme and use it against you, like this:

> Anderson agrees with the Coast Guard that this is a "tale of two naval officers." However, in this case, it is a tale of unfairness. The issue in this case is whether it was "arbitrary and capricious" for the Coast Guard to treat two officers so differently when their circumstances were so similar. On this factual record, and particularly for this motion where the Plaintiff is entitled to the benefit of all reasonable inferences, the answer is yes.

A response like that would bring the case back to the issue that favors the Plaintiff: whether it was unfair for the Coast Guard to expel the white officer but not the African-American officer.

When developing a theme, remember that, in many ways, litigation writing is story-telling with rules. The rules are designed to make sure the case is fairly grounded in the admissible facts and the applicable law. The theme is merely a rhetorical device to amplify the strength of your client's position on the merits. But litigation writing should be more than a boring recitation of factual and legal citations. To make your case come alive, consider using a theme.

How to Construct a Motion

Once you have decided to file a motion, you need to focus on the required elements. What should you include? How should it be organized?

When you file a motion, the first question in the judge's mind will be: what authority supports the request for relief? As you answer that question in your motion, we suggest that you *start with the general and move to the specific*. In other words, you should begin the discussion of each issue with a statement of general legal principles (typically found in statutes, regulations, or "black letter" descriptions of the law) followed by any specific analogous cases. It is much easier for the court to follow an argument that moves from the general to the specific.

As you work through those authorities, remember that the court expects you to *define the controlling test*. Continuing with the example of the Coast Guard officer who was discharged for cheating, consider this statement of the applicable standard of judicial review:

> The Administrative Procedures Act "provides, not for *de novo* review, but only for a judicial determination whether the agency has taken actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or not supported by 'substantial evidence.'" *Farley v. Perry*, 1994 WL 413316 at *3 (D.D.C. July 20, 1994) (quoting 5 U.S.C. § 706(2)(A) and (E)). "The arbitrary and capricious standard is a narrow one that reflects the deference given to agencies' expertise within their respective fields. As long as the agency provides a rational explanation for its decision, a reviewing court cannot disturb it." *Henry v. U.S. Dep't of the Navy*, 77 F.3d 271, 272–73 (8th Cir. 1996) (citing *Nat'l Wildlife Federation v. Whistler*, 27 F.3d 1341, 1344 (8th Cir.1994)). In a case like this, which arises in a military context, the standard of review is even more circumscribed.
>
> Review of a military agency's ruling must be extremely deferential because of the confluence of the narrow scope of review under the APA and the military setting. Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir.1989). Our review of a military correction board's decision is limited to deciding "whether the Board's decision making process was deficient, not whether the decision was correct." *Watson*, 886 F.2d at 1011 n. 16. In appraising the agency's fact finding, we note that substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not indicate that substantial evidence fails

> to support an agency's findings. *See, e.g.*, *Baker v. Secretary of Health and Human Services*, 955 F.2d 552, 554 (8th Cir.1992).

There are several points to note about that statement. First, it does the job – it fully informs the court of the applicable governing standard in the case. Second, in many cases, the standard of review is outcome-determinative. In your legal career, you will be amazed at how many disputes are resolved, not strictly on the merits, but based on the standard of review or the burden of proof or what we would call "tie-breaker" rules.[6] In many cases, once the court determines the overall governing standard, the winner is fairly obvious and the case is effectively over. Third, the earlier description of the standard of review puts the case in a favorable context. In other words, this is not just a case of judicial review of an employment decision – it is about the Coast Guard's authority to enforce military discipline.

Applying the Law in Two Paragraphs

If you are involved in litigation during the course of your legal career, you will certainly write plenty of complicated legal motions. To prepare for that, however, it is convenient to practice with some simple exercises. In that regard, one helpful skill is what we call the art of "applying the law in two paragraphs."

With this simplified approach, use one paragraph to explain a case or legal point; use a second paragraph to apply that case or legal point to the present facts. By using two paragraphs, you avoid the common mistake of confusing the description of the law with its application. Here is a simple example from a privacy case:

> In *Hawley*, this Court dismissed a privacy claim in part due to the lack of widespread publicity. Hawley was an account executive who was fired for the improper accounting of certain sales. *Hawley*, 1994 WL 505029 at *1. Although Hawley alleged the company invaded his privacy by distributing an investigative report about his misconduct, the court dismissed the claim due

[6] The world-famous O.J. Simpson case presents an excellent example. In the criminal case in which O.J. was accused of killing his wife, he was found not guilty based on the criminal standard of "beyond a reasonable doubt." In the civil case, however, O.J. was found liable for killing his wife based on the civil standard of a "preponderance of the evidence." Similar facts; different standard; different outcome. *Buell ex rel Buell v. Bruiser Ken*, 1999 WL 390642 at *3 (E.D.N.Y. 1999) (explaining why the O.J. Simpson civil case was not collaterally estopped by the acquittal in the criminal case).

> to the report's "limited" disclosure to six people. *Hawley*, 1994 WL 505029 at *3–4.
>
> The same is true here. Jones complains that Barnes revealed information to one person, Allison Marshall (Amended Complaint ¶ 10). But that allegation does not satisfy the tort's "widespread publicity" requirement. Indeed, in this case, Barnes' statement is more "limited" than the one dismissed in Hawley. Accordingly, the Court should dismiss Count V.

Notice how the first paragraph is only three sentences, but the reader learns the two critical elements in the description of any case: what happened and why. Notice also how the second paragraph applies the law without surplusage. The point is clear: if the disclosure to the six people in *Hawley* was not "widespread publicity," then the disclosure in this case to one person is not "widespread publicity" either.

Moreover, don't forget the larger context in which you are applying the law to the facts of your case. When you make an analogy to a case, or when you distinguish a case, you are engaging in a process of seeking justice through fairness.[7] When you argue by analogy, you are saying to the court: "My client wants the same treatment that another litigant received because the circumstances are the same." In contrast, when you distinguish a case, you are telling the court that "this case should be treated differently because the circumstances are so different." Ultimately that process – treating similar things similarly, and different things differently – is the essence of justice.[8]

"Universal Motion Template"

Drafting a motion is not as complicated as it may first seem. As explained in Chapter Two, Federal Rule 7 defines a motion as an "application to the court for an order," which shall "state with particularity the grounds" and "shall set forth the relief or order sought." The Rules offer scant guidance on what that means. However, many motions follow a similar pattern, and it makes good strategic

[7] The concept of "justice as fairness" is the hallmark of John Rawls' seminal treatise, *A Theory of Justice* (Belknap 1971).

[8] Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 1974) ("The determination of similarity or difference is the function of each judge"); *see generally* C. Sunstein, *On Analogical Reasoning*, 106 Harv.L.Rev. 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning. It dominates the first year of law school; it is a characteristic part of brief-writing and opinion-writing as well.").

sense to follow the pattern so the court is not distracted from your substantive arguments. Accordingly, we have developed what we call a "universal motion template." Here is a description of each element:

1. *Caption*. Federal Rule of Civil Procedure 7(b)(2) requires that you use the same caption that applies to other filings in the case.
2. *Opening Line*. The first line tells the court who is filing the motion. A common (albeit archaic) opening line is "NOW COMES [insert the name of the party], by undersigned counsel, and hereby submits this motion for [insert request for relief]."
3. *Introduction*. Although an introduction is not necessary in a short or simple motion, it can be helpful in a longer or complex motion. If you use an introduction, it should (a) summarize your best points; and (b) introduce a theme.
4. *Background Facts*. A "Background" section should include all the facts upon which your motion relies. Preferably, the facts should be organized in chronological order. Better yet, the facts should be presented in a narrative format that tells a coherent "story" about the case that illustrates the strength of your client's position. Personally, we prefer to read a background section in which the dates are consistently placed at the beginning of each sentence, which helps the reader follow the sequence of events.
5. *Overall Legal Standard*. Some motions are governed by an overall legal standard. For example, when filing a motion for summary judgment, the legal standard is found in Federal Rule of Civil Procedure 56. In such cases, the court will expect you to state that standard clearly. Here is an example:

> The role of summary judgment is to look behind the facade of the pleadings and assay the parties' proof in order to determine whether a trial is required. *Plumley v. S. Container, Inc.*, 303 F.3d 364, 368 (1st Cir.2002). A party moving for summary judgment is entitled to judgment in its favor only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A fact is material if its resolution would affect the outcome of the suit under the governing law," and the dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*,

> 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing the record for a genuine issue of material fact, the court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. *Merchants Ins. Co. of N.H., Inc. v. United States Fid. & Guar. Co*., 143 F.3d 5, 7 (1st Cir.1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir.2002).

6. *Argument*. The court will expect you to organize your motion into different arguments, preferably broken down by issue under argument headings. Within each argument, as described earlier, start with the general and move to the specific. In other words, start with a statement of the general legal standards, and then apply those standards to your facts. Follow with a statement of any particular analogous cases, and then apply those cases to your facts.
7. *Conclusion*. The conclusion is neither substantive nor novel. Instead, as the name suggests, it merely states in conclusory terms the "bottom line" relief that you are requesting. For example, when filing a motion for summary judgment, you don't need to say anything more elaborate than this: "Wherefore, for the foregoing reasons, the Court should grant this motion for summary judgment."
8. *Signature Block*. Of course, you need to comply with the Local Rules and sign your name, which constitutes a certification that you have made a good faith inquiry into the matters asserted. Fed.R.Civ.P. 11.
9. *Certificate of Service*. You also need a certification that you have served all interested parties. Fed.R.Civ.P. 5.

Putting together all these elements, here is an illustration of a typical motion:

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF [INSERT STATE]

[INSERT PLAINTIFF'S NAME]	)
Plaintiff	)
	)
v.	) **Case No. Xxxxx-xx**
	)
[INSERT DEFENDANT'S NAME]	)
Defendant.	)

MOTION FOR WHATEVER
or
RESPONSE TO WHATEVER
or
REPLY TO WHATEVER[9]

NOW COMES Whoever, by undersigned counsel, and hereby submits this Whatever.

INTRODUCTION

[summarize your arguments and introduce your theme]

BACKGROUND

[Tell the "story" of your case in chronological order. Preferably, put any dates at the beginning of each sentence so the reader can easily follow the sequence of events. Include every fact upon which you rely.]

[9] In most jurisdictions, the Local Rules provide for a motions practice that involves three steps: (1) a "Motion"; (2) a "Response" (sometimes called an "Opposition" or a "Response in Opposition"); and (3) a "Reply." Although the Reply allows the moving party to have the "last word," it is a common mistake to "save arguments" for the Reply. Courts frown on sandbagging, and the judge would have an understandable tendency to discount assertions in the Reply because they generally are not subject to further adversarial challenge.

STANDARD OF REVIEW

OR

STANDARDS FOR MOTION FOR WHATEVER

[Tell the court what legal standards govern its overall review. Does the court review this under the standards for a motion to dismiss or a motion for summary judgment? Is the court reviewing agency action under the "arbitrary and capricious" standard? Who has the burden of proof?]

ARGUMENT

I. *Pithy Statement of Argument Number 1*
A. [explain the general legal standards found in statutes or black-letter law]
B. [apply those standards to the facts of this case]
C. [explain any particularly analogous specific cases]
D. [apply those cases to the facts of this case]
II. *Pithy Statement of Argument Number 2*
A. [explain the general legal standards]
B. [apply those standards to the facts of this case]
C. [explain any particularly analogous specific cases]
D. [apply those cases to the facts of this case]

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should grant this request for Whatever [or deny the other side's request for whatever].

Respectfully submitted,

You, Esq.
The Law Firm of You And Me
100 Commercial Street
Portland, Maine 04101

Dated: Whenever

CERTIFICATE OF SERVICE

I hereby certify that, on [insert date], I caused the foregoing to be served by first class mail, postage prepaid, to the following counsel of record:

Her, Esq.
The Law Firm of Her and Them
200 Commercial Street
Portland, Maine 04101

Him, Esq.
The Law Firm of Him and Them
200 Commercial Street
Portland, Maine 04101

You, Esq.
The Law Firm of You and Me
100 Commercial Street
Portland, Maine 04101

CHAPTER FIVE

Mr. Blaustein's Gift

One of your regular clients as the University Legal Counsel is the Vice President for Development. The Vice President for Development has numerous duties in her position, including public relations and community relations. However, the most prominent is fundraising for the university. In recent years, with a decline in support from the Katahdin legislature, private funds have become a crucial part of the overall University of Katahdin budget. Fundraising often involves the negotiation and drafting of precise legal documents. In that context, you receive the following materials from the Vice President.

THE UNIVERSITY OF KATAHDIN

Dear Counsel:

Over the last three months, members of my staff and I have had meetings with Mr. Albert Blaustein. Mr. Blaustein is a graduate of the UK class of 1949. He has not been a regular donor to UK. Mr. Blaustein initially called me and set an appointment for a visit. In a very pleasant first meeting, Mr. Blaustein caught me up on his career since graduating from the College of Engineering at UK in 1949. Mr. Blaustein specialized in nuclear engineering. He recalled that in 1950 it "looked like the wave of the future and I wanted to catch that wave." For a time he worked with the nuclear Navy under the leadership of the legendary Admiral Hyman Rickover. On one project, he shared office space with a young Georgian named Jimmy Carter. After that Mr. Blaustein worked for two major electric generating utility companies as they entered the nuclear electric field. By the mid-1960s, Mr. Blaustein was ready to begin his own consulting business. He was very successful in that business and for the next twenty-five years worked around the world helping to develop nuclear electric generating facilities. As Mr. Blaustein put it: "I didn't do badly financially, either."

That explained the visit. Mr. Blaustein is now widowed and has taken care of his children financially. He would now like to make some gifts to institutions that have meant something to him during his career. Happily, the University of Katahdin is on that list.

Mr. Blaustein has proposed the creation of the Blaustein Prize with a one-time endowment of $500,000. The income from that corpus will endow an annual prize to be given to the outstanding UK student in the Nuclear Engineering Department. Mr. Blaustein's strong interest is in helping to encourage the "uncool" career field of nuclear engineering. As Mr. Blaustein put it: "The United States has given up its lead in this essential technology. Foreign countries have moved into the vacuum, and some of them are not our friends. If we are serious about controlling global warming and unstable foreign sources of petroleum and natural gas, nuclear power HAS TO BE part of our future." With that in mind, Mr. Blaustein wants to limit the prize to only natural-born U.S. citizens who plan to spend their career working in the United States or working for an American company overseas.

Needless to say, we are very excited about the possibility of this gift. Our nuclear engineering department has barely kept its head above water during the last two decades. It has survived, barely, several attempts to close it. The revival of interest in the nuclear option and the energetic new leadership of Chairman Chen Liang have helped to turn this around. Chairman Liang was thrilled with the possible Blaustein Prize. He said this would be a very valuable recruiting tool to attract students to the nuclear program and to the University of Katahdin.

Normally, I would just be asking your usual help to draft the precise language of the gift for acceptance by our Board of Trustees. Here, things are more complicated. I enclose the portion of the Trustees' Regulation that deals with discrimination, more accurately, nondiscrimination in university gifts. We may have a problem. I also attach Development Department memos that reflect some earlier gift efforts that have helped to define the somewhat open-ended Regulation.

As you may know, the Regulation was adopted in the early 1970s after the university received substantial negative publicity about several student scholarships that were limited to "white Christians only." The new policy was designed to change that. I also know that several influential members of the Board are passionate advocates for the nondiscrimination policy and would be quite ready to reject a proposed gift that returned "to the bad old days." We certainly don't want that to happen!

I need two separate writings from you. The first is a letter from me to the Board of Trustees urging the acceptance of the Blaustein Prize. You should advocate for the value of the gift to the university. You should also address any issues that arise under the university nondiscrimination regulation in a way that evidences clear compliance with the regulation, but that gives as much respect to Mr. Blaustein's wishes as the regulation allows. The second is a document that reflects the exact terms of the agreement for which you advocate in the letter. In essence, this states the terms of the gift or the terms of a contract between Mr. Blaustein and the university for Mr. Blaustein's provision of $500,000 in consideration for the advancement of objectives of Mr. Blaustein.

Thanks so much for your help. Call me with any questions.

Karen Havel
Vice President for Development
University of Katahdin

Dear Karen:

Thank you so much for your visits over the last few months. I have felt very welcomed back to the university that was such a formative part of my life. I was a rural Katahdin kid when I showed up on the university's doorstep so many years ago. The university launched me into a career that I could not have imagined. During those years, I drifted away from my alma mater. I regret that and am delighted to reconnect.

I'm glad that you share my passion for a revival of nuclear power in this country. It is amazing how folks who wouldn't talk to me a decade ago are suddenly thinking nuclear isn't so bad. Times change.

I've greatly enjoyed getting to know Chairman Liang of the Nuclear Engineering Department. He has just the enthusiasm and background that can grow the department. I'm delighted he sees the value of the Blaustein Prize.

I do want the conditions on who gets the award. I suppose we always think back on our own experiences as we create a scholarship for the next generation of college students. However, I would like to encourage young men from around the state to consider a nuclear career. What I don't want to see is an award to foreign students whose stay in the United States runs no longer than the time it takes to get their degree. They will then spend their careers helping to see that American nuclear engineering does not return to its place of preeminence. My information is that currently about 60 percent of nuclear engineering enrollment at UK is of noncitizens headed back to their homelands. More power to them. But I don't want to subsidize them with this award.

Please know that I'm happy to work with you on the fine details. I do understand the concerns about discrimination that the university has. I'm confident your lawyer can work something out.

All best wishes,

Albert Blaustein

University of Katahdin Regulations 23 – 18 Acceptance of Private Gifts

1. All private gifts to the University must be accepted by the Board of Trustees. No gift can be announced until it has been formally accepted by the Board at a regular meeting. The resolution of acceptance shall state the precise terms of the gift.
2. No gift may be accepted that contains a condition that limits beneficiaries by reason of race, religion, sex, national origin, or sexual orientation. Where educationally justified and where consistent with the spirit of the previous sentence, a gift may indicate a nonbinding preference for a category of recipients.

THE UNIVERSITY OF KATAHDIN

Memorandum for File: Development Office
Re: UK Nondiscrimination Regulation

August 1993

We were approached by a UK alum who proposed to endow a scholarship to honor annually the outstanding student in creative writing. However, the donor was insistent that the award be limited to students of Scandinavian-American heritage. That is the donor's ancestry and he is very active in Scandinavian activities in the community. We sense no hostility to other students, simply a strong preference for Norwegians, Danes, and Swedes. The Geography Department estimated that 35 percent of the population of Katahdin can claim Scandinavian heritage. That group is one of the dominant groups in the state and has been for a century and a half.

Development Office personnel expressed contradictory views about the gift. We quietly inquired about it with several members of the Board of Trustees. Their reaction was uniformly negative. We politely informed the potential donor and he withdrew his offer.

THE UNIVERSITY OF KATAHDIN

Memorandum for File: Development Office
Re: Nondiscrimination Policy

March 2002

We were approached by a retired couple who had recently moved to Katahdin City. Neither was a UK alum and they appeared to have no ties to UK prior to arrival in the state. Both were born in the Middle East and migrated to the United States in their late teens. They met at another American university, married, and have made a life and career in the United States.

They wished to endow a scholarship to be given annually to the outstanding student paper written on Islamic culture. They would like a preference to be given to a student of the Islamic faith. They explained that in the wake of 9/11, they felt it was enormously important both to encourage students of the Islamic faith and to call to public attention that "terrorism does not represent Islam." They hoped the award and the publicity given to it would help achieve those objectives.

We tested the proposal with two members of the Board who serve on the Gifts Committee. They had some reservations, but after discussion were persuaded that "the good outweighs the bad." They saw the positives in encouraging students of the Islamic faith and in stimulating study of Islamic culture. Although other students would be excluded, this was only one scholarship of several hundreds awarded annually. Furthermore, even without the religious limitation, the Board members anticipated that an award for the best paper on Islamic culture would be quite likely to go to a student of the Islamic faith in any case.

We proposed and the Board accepted the scholarship.

It is strategic thinking time again. Before you write, identify the goals of your letter to the Trustees and the document that accompanies it. What would you regard as the most desirable result? What are acceptable compromises? How can your letter help to achieve the most desirable result? You should review the Guidelines discussed in Chapter One. Which ones may have special pertinence to our situation?

The second part of the assignment provides your one experience in this course in document drafting. This is not a document-drafting book. Document drafting has its own rules and customs and deserves a course of its own. Document drafting also requires a strong grounding in the substantive law in which the document is grounded.

Nevertheless, we do want to provide an introduction to the differences between a letter or memorandum of the kind we have been preparing and a document. Documents range from contracts, to instruments for the transfer of land, to incorporation papers, to wills and trusts. In general, the purpose of a document is to structure a legal relationship. This may involve a one-time transaction. Party A leases a piece of real estate from Party B. The document may also create a longer-lasting relationship that may set the stage for many transactions over a considerable period of time. A labor agreement between employer H and Union I sets the terms of employment relationships between the two parties for a fixed period.

If you are assigned to prepare a writing that has the attributes of a document, return again to the instructions we offered in Chapter One. Begin with item three and discover whether there is already a document to do the job you need. Your office may have a standard form lease, an employment contract for professional staff members, or a model joint venture agreement. Almost certainly you will want to use that document rather than to draft the entire writing anew. You save time and the client's money. You may also receive the assurance that the document you have taken from the firm's files has been road tested in prior cases and found satisfactory. Possibly, court decisions have approved its use for the intended purposes. Obviously, you will want to be careful that the names and circumstances of the new parties have been inserted. Failure to do so can result in embarrassing, or even costly, mistakes. But you need not reinvent the wheel.

If the case of the Blaustein Prize were set in the real world, you would probably examine some prior gifts to the university that addressed similar situations to that of Mr. Blaustein. There may be standard paragraphs ("boilerplate") that

are routinely inserted in all gift agreements. Other language can be adopted with only modest changes. However, a good deal of care must be given to the precise language of the document.

Return to the other suggestions in Chapter One for guidance. Pay particular attention to the strategic aspects of the document. What are your objectives? Who are the parties to the agreement? What are they required or encouraged to do? What are the consequences of satisfactory or unsatisfactory performance? How is that performance measured? Remember that your objective is a single writing that captures all of the essential elements of the agreement between the university and Mr. Blaustein. We suggest a few features to consider.

1. Are the parties to and purposes of the document clearly and consistently identified? Pick a term that identifies each party and use it for every reference to the party. Don't refer to "Mr. Blaustein" in one sentence and "the donor" in the next.
2. Be clear about matters that are required and ones that are left to the discretion of one or more parties. Must the university award a Blaustein Prize every year? Or, may they choose not to do so if no candidate appears worthy or the income from the endowment has declined?
3. Be clear why you are using every word. In a letter or memorandum you may offer more verbiage than is needed to strengthen your position or to repeat your advice or to offer a vivid turn of phrase. In a document, that kind of writing runs the risk of muddling your meaning.
4. What matters do not need to be in the document? For example, in the Blaustein matter, is it essential to specify how the university shall select the prize winner? Mr. Blaustein may feel strongly that only the department chair should make the choice, or alternatively, that it must be done by a vote of all members of the tenured faculty. The university may be reluctant to tie itself down to one method of selection for the life of the agreement; here, potentially, forever.
5. Particularly for a document that describes a long-term relationship, have you provided for changes in circumstances in the document? Suppose the United States abandons nuclear power two decades from now. Should your document address such a possibility?

CHAPTER SIX

How to Respond to a Motion

For your third litigation assignment, you are an Assistant U.S. Attorney in the Criminal Division. You are prosecuting a perjury case in which the defendant, Nick Sutton, fabricated an e-mail message and then lied about it – twice – under oath. Sutton pleaded guilty to the offense and decided, in effect, to "throw himself on the mercy of the court" and request the most lenient sentence possible. To that end, Sutton has filed what is known as a "motion for downward departure," which is a motion that asks the court, based on special circumstances, to enter a sentence below the recommended range of the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."). Your assignment is to prepare the government's response in opposition to Sutton's motion for downward departure. The assignment arrives in the form of the following memo.

MEMORANDUM

To: Acting Assistant U.S. Attorney
Fr: Jon Chapman, Criminal Chief
Re: *United States v. Nick Sutton*

Nick Sutton recently pled guilty to perjury. Attached is our Prosecution Version,[1] which explains the facts the government was prepared to prove at trial (had that been necessary), and which form the underlying factual basis for Sutton's guilty plea. Also attached is a copy of the motion filed by Sutton's attorney, which argues for a downward departure based on so-called "aberrant behavior" under the United States Sentencing Guidelines. We have no quarrel with the vast majority of Sutton's motion. However, we believe it fails to establish two necessary elements.

First, the Guidelines define "aberrant behavior" as a "single criminal occurrence or single criminal transaction." In this case, however, Sutton lied twice. As a result, in our view, Sutton does not qualify for a downward departure. In support of that argument, you should rely on *United States v. Orrega*, 363 F.3d 1093 (11th Cir. 2004).

Second, in order to qualify for an "aberrant behavior" downward departure, the offense must be committed "without significant planning." Based on Sutton's own rendition of the facts, however, it appears that Sutton engaged in at least *some* planning before he committed perjury. On that issue, our best case is *United States v. Bailey*, 377 F.Supp.2d 268 (D. Me. 2005), which also includes a very helpful summary of the applicable law in the First Circuit.

Everything you need is either in the government's "Prosecution Version," Sutton's "Motion for Downward Departure," or the attached excerpts from *Orrega* and *Bailey*.

Your response should be respectful and approximately five pages. We simply oppose the downward departure because, on these facts and the applicable law, we don't think this case justifies that kind of a special break.

I suggest you organize your Response as follows:

[1] A "Prosecution Version" is the government's written statement used at sentencing for the purpose of setting forth the facts that would have been proven if trial had been necessary. Some courts allow the government to present those facts orally, but our court requires them in writing.

1. Use the same caption as the Prosecution Version.
2. Center the following heading: **RESPONSE TO DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE**.
3. Under that heading, the first sentence should say something like this: **NOW COMES** the United States of America ("the government"), by undersigned counsel, and hereby responds in opposition to the Defendant's Motion for Downward Departure ("Motion").
4. Center the next heading: **BACKGROUND**.
5. Under that heading, tell the "story" of the case from the government's perspective. Preferably, state the facts in chronological order and make it clear "what happened when." Make sure you include all the facts necessary to support the two legal arguments in your Response. Feel free to use any facts stated in the Prosecution Version or the Motion, but you need to cite each fact, which should look something like this: (Pros. Version at 3) (Motion at 2).
6. Center the next heading: **STANDARDS FOR DOWNWARD DEPARTURE**.
7. Under that heading, explain the applicable standards, which are well stated in *Bailey*. Feel free to quote the standards verbatim because the exact language is often critical. Make sure that you provide the definition of "aberrant behavior" and explain how downward departures are only appropriate in "extraordinary" circumstances.
8. Center the next heading: **ARGUMENT**.
9. Under that heading, include a one-paragraph summary of your argument. I strongly suggest that you do not write this summary paragraph until after you have written the background section (above) and the two argument sections (below). In my experience, it's very difficult to write a summary paragraph until after you have written the materials to be summarized. I recommend that you summarize your argument in a way that makes it clear you are asserting two distinct arguments.
10. Next you need a pithy heading for your first argument about how Sutton lied twice. The argument heading should be labeled as Roman Numeral I, flush left. The text of the heading should be underlined and bold. If you are unsure of the formatting, take a look at Sutton's Motion. Unlike an appellate brief, which often calls for somewhat long-winded argument headings, I suggest you use something that fits on one line (two lines at most).

11. Under that heading, describe *Orrega*, preferably in one paragraph, but no more than two paragraphs. Make sure you explain what the court did in *Orrega* and why. Note the difference between the outcome before the District Court and the Eleventh Circuit. Use selected quotes to focus attention on the most important aspects of the case. For extra credit, instead of starting the paragraph with a boring sentence (such as "In the case of *United States v. Orrega*. . . ."), consider using a topic sentence that provides a general sense of the importance of the case.
12. Next, you need a paragraph that *applies* the "lesson" of *Orrega* to Sutton's case. Preferably, start the paragraph with something to let the reader know, unequivocally, that you are about to apply *Orrega* to the facts of this case. The most common approach is to begin the paragraph with the phrase "In this case. . . ." Then you should explain why Sutton's case is similar to *Orrega*, so a downward departure should be denied here, as it was in *Orrega*.
13. Now you need a pithy heading for your second argument (Roman Numeral II) about how Sutton's conduct was not "without significant planning."
14. Under that heading, you need to describe *Bailey* in one, or no more than two, paragraphs.
15. Next, you need one paragraph that *applies Bailey* to Sutton's case.
16. Center the final heading: **CONCLUSION**.
17. Under that heading, say something like this: **WHEREFORE**, for the foregoing reasons, the Court should deny the Defendant's Motion for Downward Departure.
18. Finally, include the date and a signature block. Use a format similar to the one used in our Prosecution Version, but include your name as the Assistant U.S. Attorney.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Crim. No. 06–99**
	)	
NICK SUTTON	)	
Defendant	)	

PROSECUTION VERSION

Now Comes the United States of America, by undersigned counsel, and hereby offers the following as its "prosecution version" of the facts the United States would prove if this case were to proceed to trial.

Count One: False Declarations Before the Court

Since January 2000, Nick Sutton has been the Chief Executive Officer of the Casco Chair Company ("Casco"). Sutton was also the principal witness for Casco in a contract dispute with Acme Chair Suppliers. The dispute formed the basis of the civil case of *Casco Chair Company v. Acme Chair Suppliers*, Civil No. 05–11 [hereinafter *Casco v. Acme*].

In the course of that civil litigation, Casco requested a Temporary Restraining Order against Acme. In support of that request, Casco filed with the Court an affidavit signed by Nick Sutton on Tuesday, July 18, 2006, which stated in pertinent part as follows:

> ¶ 42. On February 15, 2006, I sent Carol Miller, an Acme employee, an e-mail asking about the delay in finalizing the new contract. The same day, Miller sent me a response confirming that "everything was agreed to" and that Jeff Harold, Acme's Vice President, would work with us to finalize a written contract. Exhibit 17 is a copy of the e-mail exchange.

(Sutton July 18, 2006, Affidavit ¶ 42).

Exhibit 17 to Sutton's July 18th Affidavit appears to be a February 15th e-mail exchange in which Nick Sutton asked a series of questions about the

Casco-Acme contract negotiations, together with what appears to be a series of responses from Carol Miller to each of those questions. In pertinent part, Exhibit 17 to Sutton's July 18th Affidavit stated as follows:

> Sutton: In terms of the amended contract, what is holding this up? After our meetings with Jeff, I thought that everything was agreed to.
>
> Miller: It was. Jeff will work with you to finalize.

(Exhibit 17 to the July 18th Sutton Affidavit).

On Thursday, July 20, 2006, Acme responded by filing an affidavit from Carol Miller in which she "questioned the genuineness" of Exhibit 17. In response, on Friday, July 21, 2006, Sutton filed another affidavit which, among other things, stated as follows:

> 13. Miller questions the "genuineness" of the February 15th e-mail exchange between us, as represented in Exhibit 17. However, Exhibit 17 is a true and accurate copy of an e-mail that I received from Carol Miller.

(July 21st Sutton Affidavit ¶ 9).

The next day, Saturday, July 22nd, Sutton met with his attorneys and confessed that he had fabricated Exhibit 17 and that his affidavits were false. On Monday, July 24th, Casco's attorneys notified the Court of the perjury and, at the same time, moved to voluntarily dismiss (with prejudice) Casco's civil case against Acme. On Friday, July 24, 2006, Acme responded with a motion for sanctions against Casco. On August 10, 2006, the presiding judge in *Casco v. Acme*, Judge Hoffmann, decided to hold the civil case in abeyance pending the outcome of his referral of Sutton's perjury to the U.S. Attorney's Office for potential criminal prosecution.

On September 6, 2006, the U.S. Attorney's Office filed a one-count information charging Sutton with perjury. Sutton pled guilty the next day.

If this case had gone to trial, in addition to the facts above, the government expected Carol Miller to testify (a) that she never wrote the e-mail responses attributed to her in Exhibit 17; (b) that in fact she never responded to Sutton's e-mail inquiry of February 15, 2006; and (c) that the false e-mail messages attributed to her involved issues that were material to the outcome of the *Casco v. Acme* civil litigation.

Respectfully submitted,

Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Criminal Action No. 06–99**
	)	
	)	
NICK SUTTON	)	
Defendant.	)	

DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE AND INCORPORATED SENTENCING MEMORANDUM

NOW COMES Defendant Nick Sutton, by undersigned counsel, and hereby moves for a downward departure based on "aberrant behavior" pursuant to 18 U.S.C. §3553 and the United States Sentencing Guidelines, Sections 5Hl.6, 5K2.20, and 5K2.0.

BACKGROUND FACTS REGARDING THE OFFENSE

Upon the Court's referral, the U.S. Attorney's Office charged Mr. Sutton, by criminal information, with one count of making a False Declaration Before a Court pursuant to 18 U.S.C. §1623. Mr. Sutton promptly pled guilty. Sentencing is scheduled for December 1, 2006. The offense arose in the context of a civil action, also before this Court, *Casco Chair Company v. Acme Chair Suppliers*, Civil No. 05-11 [hereinafter *Casco v. Acme*]. Currently, the Court is holding that civil case in abeyance pending the outcome of this criminal matter.

In 2000, Mr. Sutton became CEO of Casco, which had two large Maine manufacturing facilities that produced specialty chairs for a number of

national retailers. In 2002, Casco entered into a contract with Acme Chair Suppliers ("Acme"), one of the largest American chair retailers. In 2004, the domestic furniture market collapsed, which left Casco with only one customer: Acme.

In January of 2006, Casco and Acme began to discuss a new contract. During the course of those discussions, Acme demanded that Casco close its Maine facilities and manufacture all of its products in factories that Acme controlled in China. Mr. Sutton strongly resisted because of the consequences it would have on the manufacturing operations in Maine, which employed hundreds of people. Ultimately, however, Mr. Sutton was forced to close one of the two Maine facilities, since Casco's existence was completely dependent on a continued relationship with Acme.

At the same time, negotiations intensified for a new contract. Under the proposed new contract, termination of the business relationship required 360 days' notice. Despite Acme's repeated assurances that it would enter into the new contract, Acme abruptly notified Casco on Friday, July 14, 2006, that it would terminate its business relationship with Casco in 60 days, in accordance with the terms of the 2002 Casco–Acme contract. On Monday, July 17, 2006, Mr. Sutton met all day with Casco's attorneys to discuss the company's legal options, including the need to file a Temporary Restraining Order ("TRO") to prevent the impending termination of the Acme–Casco contract. Many issues were discussed, but one particularly sore subject was how Acme's representatives had repeatedly promised to abide by the terms of the new contract, which included the longer termination provision. The more the issue was discussed, the more agitated Mr. Sutton became. In the course of the discussion, the attorneys mentioned that, pursuant to the statute of frauds, the new contract terms would not be enforceable unless there was something in writing to confirm the agreement.

That night, Mr. Sutton became so distraught at the prospect of losing his company, and so infuriated at Acme's refusal to abide by the terms of its oral agreement, that he sat down at his home computer and fabricated the e-mail message dated February 15, 2006. The fabricated e-mail was based on an actual February 15th e-mail message that included various questions posed to Acme employee Carol Miller. Although in truth Carol Miller had simply ignored Mr. Sutton's February 15th e-mail questions Mr. Sutton altered the text to make it look like Miller responded to Mr. Sutton's question about whether "everything was agreed to" by writing the following: "It was. Jeff will work with you to finalize."

The next day, July 18, 2006, Mr. Sutton showed the fabricated e-mail to Casco's attorneys, together with a variety of other documents that would be used in support of a TRO. The attorneys worked all day on an affidavit for Sutton's signature that would authenticate the documents and provide other supporting factual information. In the rush to complete the TRO filing, which involved a myriad of issues, Casco's attorneys did not question Mr. Sutton about the inclusion of Exhibit 17 or its authenticity. Late that evening, Casco's attorneys filed the TRO request, which was supported by, among other things, Sutton's affidavit and the fabricated e-mail.

On Thursday, July 20, 2006, Acme filed a Response in opposition to Casco's TRO that asserted a variety of arguments. Included among the facts in support of Acme's Response was a July 20th affidavit from Carol Miller, who was somewhat coy in her comments about the February 15th e-mail. Miller did not call the February 15th e-mail an outright fabrication; instead, she "questioned the genuineness" of the e-mail, but otherwise ignored it. Likewise, Acme's legal brief focused on other issues, as if the February 15th e-mail, even if true, made no difference to the pending TRO request.

However, when Casco's attorneys read Acme's Response, including Miller's affidavit, they immediately confronted Mr. Sutton, who was adamant about the authenticity of the February 15th e-mail. To prove his point, Mr. Sutton signed a second affidavit that, among other things, reaffirmed the authenticity of the February 15th e-mail. On Friday, July 21, 2006, Casco's lawyers filed a Reply brief in support of the TRO request, which included, among other things, the second Sutton affidavit.

On Saturday morning, July 22, 2006, Casco's lead attorney received a phone call from Mr. Sutton, who was so distraught that he could hardly speak. Fighting back the tears, Mr. Sutton confessed that he had been so worried about losing the company that he had fabricated the February 15th e-mail. On Monday, July 24, 2006, Casco's lawyers notified the Court and Acme's lawyers of the perjury. Casco's lawyers also filed a motion to dismiss the *Casco v. Acme* lawsuit with prejudice. Acme responded with a motion for the Court to impose sanctions on Casco.

On August 10, 2006, the Court decided that it would hold the *Casco v. Acme* case in abeyance pending the results of a referral to the U.S. Attorney's Office for Mr. Sutton's perjury. On September 6, 2006, the U.S. Attorney's Office charged Mr. Sutton in a criminal information with one count of perjury. The next day, Mr. Sutton pleaded guilty unconditionally. Mr. Sutton now

requests a downward departure in his sentence due to "aberrant behavior" under the Guidelines.

NICK SUTTON'S PERSONAL BACKGROUND

Nick Sutton has a Bachelor of Arts degree and a Master's in Business Administration. He is Casco's Chief Executive Officer, which provides good-paying jobs with full benefits to approximately sixty Maine families. He is also a substantial citizen in his community, where he dedicates his personal time to community affairs, including youth sports and town and school activities. Those who know him best describe him in the many letters submitted to the court as a valued friend, colleague, and neighbor. The letters confirm that Mr. Sutton's isolated behavior that brings him before the court is contrary to the manner in which he has lived his entire life. For those who live and work alongside Mr. Sutton, his conduct was aberrant and explicable only by his intense commitment to his family and employees.

In the aftermath of the termination of the Acme relationship, Casco was placed in an untenable financial position. Even now, the company is struggling to survive in the absence of its business relationship with Acme. Mr. Sutton is the lifeblood of the company, and he is intimately involved in all aspects of its daily operations. His presence is essential to the company's efforts to survive the loss of Acme's business. Any significant absence from the company would make Casco's survival unlikely, with obvious consequences to its employees and their families.

ARGUMENT

Congress has expressly acknowledged "the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances" by allowing sentencing courts to depart from a particular guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. *Koon v. U.S.*, 518 U.S. 81, 92 (1996). In *Koon*, the Court observed that while the goal of the sentencing guidelines is to "provide a measure of uniformity and predictability," it also preserves the federal judicial tradition for the sentencing judge to "consider every convicted person as an individual and every case as a unique study in the human failings

that sometimes mitigate . . . the crime and punishment to ensue." *Id.* at 113. With this in mind, and for the reasons more fully explained below, the Court should impose a sentence below the applicable Guidelines sentencing range.

I. Sutton Qualifies for a Downward Departure Based on "Aberrant Behavior"

Federal Sentencing Guidelines 5K2.20 provides that a sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. The commentary to Section 5K2.20 provides that aberrant behavior "means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." As more fully discussed below, Mr. Sutton's case qualifies as aberrant behavior.

A. Sutton's Conduct Was a Single Criminal Occurrence or Transaction

The most recent amendment substituting a "single criminal occurrence or transaction" for the former "single act" standard was in response to a circuit conflict regarding whether, for purposes of a downward departure, a "single act of aberrant behavior" includes multiple acts occurring over a period of time." *Federal Sentencing Guidelines Manual*, Appendix C, Amendment 603. The First Circuit fell into the minority of circuits, which adopted the more flexible "totality of the circumstances" approach. *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word "single" to refer to the crime committed; therefore, "single acts of aberrant behavior" include multiple acts leading up to the commission of the crime); See also *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances). Conversely, the majority of circuits held that a "single act" could not include multiple acts occurring over a period of time. See *United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not "single act of aberrant behavior").

The amendment, while adopting neither the majority nor the minority standard in full, "defines and describes 'aberrant behavior' more flexibly than the interpretation of existing guideline language followed by the majority of circuits that have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless." *Federal Sentencing Guidelines Manual*, Appendix C, Amendment 603. The Commission intended that the phrase "single criminal occurrence" and "single criminal transaction" to be broader than "single act," but it was limited to offenses committed without significant planning, of limited duration, and that represented a deviation by the defendant from an otherwise law-abiding life. *Id*.

Consistent with the Commission's new standard, Nick Sutton's criminal behavior constitutes a single criminal occurrence or criminal transaction. Mr. Sutton's affidavit stated, in pertinent part, that Acme employee Carol Miller had informed him that "everything was agreed to" with respect to the new contract. Attached to his affidavit, Mr. Sutton included Exhibit 17, which is the e-mail he falsified. Acme then questioned the authenticity of the e-mail, which led to Mr. Sutton's second affidavit reaffirming the accuracy of Exhibit 17. Both affidavits were submitted in the same civil action, and the content of the affidavits did not involve or implicate more than the single act of inserting the false phrase that "everything was agreed to." Accordingly, Mr. Sutton's criminal conduct was functionally a solitary instance of criminal behavior.

B. Sutton's Conduct Was "Without Significant Planning"

Mr. Sutton felt a deep responsibility for his company and its employees particularly in the aftermath of the Acme disaster. He was concerned that the lives of dozens of families, including his own, would be severely impacted if the suit against Acme did not give the company additional time to salvage its operations. His response, while inexcusable, was committed in desperation and without significant thought or planning. It was transparently the act of desperation, impulse, distress, and fear, rather than a measured thoughtful and carefully conceived effort to perpetrate a fraud.

C. Sutton Has Otherwise Led an Exemplary, Law-abiding Life

The manner in which Nick Sutton has lived his life stands in marked contrast to the behavior that has brought him before this Court. The letters that have

been submitted to the Court testify to an extraordinarily hard-working and committed father, employee, and citizen. He contributes what little time he has left at the end of the day, and precious financial resources, to community groups and events. His commitment to his family, employees, and neighbors is noteworthy.

In determining whether to grant a downward departure based on "aberrant behavior," the Court may consider the defendant's mental and emotional condition, employment record, record of prior good works, motivation for committing the offense, and effort to mitigate the effects of the offense. In this case, the mental and emotional state in which Mr. Sutton found himself was overwhelming. Mr. Sutton had already been compelled by Acme to close down half of Casco's manufacturing facilities in Maine, and he was faced with the distinct possibility of losing the remainder. He was understandably distraught.

When his criminal behavior is viewed in the context of the circumstances swirling around Mr. Sutton at the time Acme terminated the Casco contract, including his deep emotional commitment to those who stood to lose their livelihoods as a result of Acme's action, it is clear Mr. Sutton's acts fall within the Guidelines' description of "aberrant behavior."

II. Sutton Was Motivated by Extraordinary Business Circumstances

This Circuit and others have held that it is appropriate to consider the impact that incarceration would have on a defendant's business and its employees in determining whether to depart downward at sentencing. *U.S. v. Olbres*, 99 F.3d 28 (1st Cir. 1996). In *Olbres*, the District Court convicted the appellants of tax evasion and sentenced them to 18 months' imprisonment. At the sentencing hearing, the District Court declined to grant a downward departure, believing that, as a matter of law, business failure and third-party job loss, regardless of the magnitude or the severity of the consequences, could not serve as the basis for a downward departure. The District Court reached this conclusion even though it found that if Mr. Olbres were jailed, his business certainly would fail and its employees would lose their jobs. *Id.* at 33. The District Court explained that if the fact of a business failure could serve as a legal basis for departure under the sentencing guidelines, departure would be warranted "in a manner sufficient to keep the business from fading and putting those people out of work." *Id.* at 33. Appellants appealed on the grounds that business consequences are a legitimate consideration for

a motion for downward departure. *Id.* The First Circuit agreed, holding that there was no categorical imperative that prohibited the District Court from considering that the defendant's imprisonment would likely cause innocent employees to lose their jobs. *Id.*

In *United States v. Milkowsky*, 65 Fed. 3d 4 (2nd Cir. 1995), the Second Circuit affirmed a downward departure because of the negative impact that Milkowsky's imprisonment would have on his employees. *Id.* at 6. Milkowsky was convicted of price fixing in violation of the Sherman Act and was sentenced to two years' probation. The District Court granted his motion for downward departure based on the fact that his imprisonment likely would lead to the failure of his steel businesses, and inflict severe financial hardship on his employees and their families. *Id.* The court was persuaded by unrebutted letters and testimony from family members and business associates attesting to Milkowsky's indispensability to the company. *Id.* at 8. Milkowsky was the only person with the knowledge, skill, experience, and relationships to run the business on a daily basis. *Id.* As such, his daily involvement with the company was necessary to ensure its continuing viability. The Court also reasoned that the company's dependence on *Milkowsky* was "greatly increased by the company's extremely precarious financial condition." *Id.* at 8.

The *Milkowsky* Court rejected the government's argument that there was nothing extraordinary about the prospect of imprisoning, and potentially putting out of business, a small business owner such as would warrant consideration of Mr. Milkowsky's circumstances as outside the heartland of Sentencing Guideline cases. *Id.* The Court explained that among the permissible justifications for downward departure is the need "to reduce the destructive effects that incarceration of a defendant may have on innocent third parties." *Id.* at *7*. Milkowsky's situation was distinguishable from other "high-level business people" the Court has sentenced because of the extraordinary impact the loss of his daily involvement would have on his business and its employees.

Relying on *Milkowsky*, the sentencing court in the *United States v. Somerstein*, 25 F.Supp. 2d 454 (E.D.N.Y. 1998) granted a downward departure to the business-owner defendants. Evidence presented at the sentencing proceeding revealed that the Defendant was indispensable to the business. *Id.* at 461. The *Somerstein* court also observed that the business's dependence on her was greatly increased by its extremely precarious financial condition. *Id.* at 462. As the Supreme Court explained in *Koon*, the "relevant question,

however, is not, as the government says, whether a particular factor is within the heartland as a general proposition, but whether the particular factor is within the heartland given all the facts of the case. . . . These considerations are factual matters." *Koon*, 116 Sup. Ct. at 2047 (citations omitted). Because the business was uniquely dependent on Somerstein's expertise, the court concluded that a downward departure was warranted.

Similarly, Mr. Sutton's importance to the continued viability of the company cannot be overstated. Simply, Mr. Sutton is the indispensable and driving force behind almost every important company function. His knowledge of the industry, and of the company's operations in particular, is irreplaceable and critical to whether it will survive the aftermath of the Acme debacle. *Id*. at 19. The company's dependence on Mr. Sutton is further heightened, as in *Milkowsky*, because of its difficult financial position. *Id.* at 19. The company employs dozens of families in an area of Maine that has suffered the debilitating effects of high unemployment and empty industrial plants. *Id*. at 14. The distress, both socially and financially, on the employees and their families will be acute. Downward departure, in light of these circumstances, is warranted under the Guidelines and prevailing case law.

CONCLUSION

WHEREFORE, for the foregoing reasons, Nick Sutton respectfully requests that the Court grant this request for a downward departure from the Sentencing Guidelines.

Respectfully submitted,

Daniel DeRose, Esq.
DeRose & DeRose
500 Commercial Street
Portland, Maine 04101
Counsel for Defendant
Nick Sutton

UNITED STATES v. BAILEY, 377 F.Supp.2d 268 (D. Me. 2005)

WOODCOCK, District Judge.

This Court denies a U.S.S.G. § 5K2.20 Motion for Downward Departure for Aberrant Behavior, because it concludes the Defendant, a school teacher, failed to demonstrate he did not engage in significant planning when he repeatedly used a school computer on school property to gain access to child pornography over a four-month period. . . .

I. Statement of Facts

On November 22, 2004, Gerald Bailey, the Defendant, pleaded guilty to an Information charging him with possession of child pornography, a violation of 18 U.S.C. § 2252A(a)(5)(B). . . . Mr. Bailey was a teacher at the Holbrook Elementary School in Holden, Maine, and on January 11, 2002, two students at the school reported to the school principal they had seen Mr. Bailey looking at pornographic images on a school computer in his classroom. A forensic examination of the computer revealed that between October 10, 2001, and February 12, 2002, a person using the screen name, tsetseforever, had performed Internet searches on Yahoo! using terms associated with child pornography and this person had joined dozens of sexually oriented Yahoo! clubs with names associated with child pornography. Approximately ninety images of child erotica and child pornography were found in the computer's unallocated space. Mr. Bailey admitted he had used that screen name on the school computer and was responsible for the pornographic images.

II. Downward Departure for Aberrant Conduct: U.S.S.G. § 5K2.20 (2002)

A. The Guidelines

[The applicable version of the U.S.S.G. provides:]

> A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous

> weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point . . . , or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter 4.

Mr. Bailey is not excluded under (1)-(5) from application of § 5K2.20; the question is whether he merits its application.

B. Guideline Commentary

The Commentary to § 5K2.20 is illuminating. Application Note 1 states:

> "Aberrant behavior" means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.

U.S.S.G. § 5K2.20, Application Note 1 (2002). The Commentary goes on to say: In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional condition; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense. U.S.S.G. § 5K2.20, Application Note 2 (2002).

C. Without Significant Planning

[T]his Court focuses on whether the Defendant committed this crime without significant planning. . . . In *United States v. Bayles*, 310 F.3d 1302, 1314–15 (10th Cir.2002), the Tenth Circuit concluded that an individual had engaged in significant planning when he admitted moving most of his one hundred rifles and seventy-five to eighty-five handguns because of a court order prohibiting his possession of firearms. In *United States v. Castellanos*, 355 F.3d 56 (2d Cir.2003), the Second Circuit upheld the sentencing court's refusal to depart downward under § 5K2.20, where the defendant made plans to buy heroin one week in advance and arrived at the transaction with thousands of dollars to buy the drugs. In *United States v. Dickerson*, 381 F.3d 251 (3d Cir.2004), the Third Circuit rejected the district court's granting of a downward departure based on aberrational conduct, where the defendant traveled to the Dominican Republic to pick up a suitcase full of heroin and transport it back to the United States.

This Court concludes that Mr. Bailey has failed to demonstrate his actions were without significant planning. Mr. Bailey began using the school computer to access sexually oriented material on October 10, 2001, and continued to do so until February 12, 2002, when he was discovered by students. He not only accessed child pornography web sites; he actually joined child pornography Internet clubs. He did so using a screen name. Mr. Bailey's use of the school computer was "extensive"; he joined "dozens" of child pornography clubs; he received e-mails from Yahoo! confirming his membership in these clubs; approximately ninety images of child erotica and child pornography were located in the computer's unallocated space; and, he had deleted, but not yet written over, these images. In these circumstances, this Court cannot conclude Mr. Bailey acted without significant planning under U.S.S.G. § 5K2.20.

SO ORDERED.

UNITED STATES v. ORREGA, 363 F.3d 1093 (11th Cir. 2004)

KRAVITCH, Circuit Judge.

The issue in this appeal is whether the district court erred by granting a downward departure to defendant John Orrega, who pleaded guilty to using a means of interstate commerce to entice a minor to engage in sexual acts, in violation of 18 U.S.C. § 2422(b).

I. Background

On March 28, 2002, a special agent with the United States Secret Service ("agent") signed onto a Yahoo! Internet chat room using the undercover name of Hialeahnina13. Orrega contacted the agent and identified himself as a twenty-four-year-old male. The agent told Orrega that she was a thirteen-year-old female. Orrega initiated a sexually explicit conversation and asked Hialeahnina13 to meet so that they could have sex. The meeting did not take place due to logistical reasons.

Several weeks later, on April 23, 2002, the agent was signed into the Yahoo! chat room under the name Hialeahnina13 when Orrega initiated another sexually explicit conversation. In addition, Orrega sent a real-time video feed via his web camera to Hialeahnina13. He also sent her a nude picture of himself. Orrega asked Hialeahnina13 if they could meet so that Hialeahnina13 could perform oral sex on him. The two agreed to meet behind a local supermarket that night at 8:00 p.m. Orrega stated that he would be driving a blue Volkswagen Jetta. Hialeahnina13 advised Orrega that her name was Jessica and that she would be wearing jeans, a white t-shirt, and a baseball hat.

That evening, Orrega entered the supermarket parking lot, driving a blue Volkswagen Jetta. Orrega called out "Jessica" to an undercover agent, who had positioned herself in the parking lot. The agent indicated that she was Jessica. Orrega then drove toward the agent. When he stopped, agents arrested Orrega. Orrega subsequently pleaded guilty to enticing a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). . . .

The district court. . . .granted Orrega a downward departure on the grounds that his conduct constituted aberrant behavior. The district court reasoned that Orrega had no previous criminal record, worked, and attended

school to better himself. On the basis of these facts, the district court concluded that this is a "textbook example of aberrant behavior," and sentenced Orrega to five years' probation. The United States appeals the grant of the downward departure.

II. Discussion

[A.] Downward Departure

A district court may only depart from the Sentencing Guidelines when there is an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b). When making this determination, the court may "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* Our review of a district court's grant of a departure from the Sentencing Guidelines is de novo, even if, as here, the appeal was pending at the time the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act took effect. *United States v. Saucedo-Patino*, 358 F.3d 790, 792–93 (11th Cir.2004); *see* 18 U.S.C. § 3742(e)(4).

In this case, the district court granted a downward departure on the basis that Orrega's actions constituted aberrant behavior. Such a departure is permissible "in an *extraordinary case* if the defendant's criminal conduct constituted aberrant behavior." U.S.S.G. § 5K2.20 (2002) (emphasis added). But, such a departure is not permissible if "(1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point . . . ; or (5) the defendant has a prior . . . conviction." *Id.* Thus, in order to qualify for an "aberrant behavior" departure, (1) the case must be "extraordinary," (2) the defendant's conduct must constitute "aberrant behavior," *and* (3) the defendant cannot be disqualified by any of the five listed factors.

A defendant's conduct is aberrant behavior if that conduct constitutes a "single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20, cmt. n. 1 (2002). In addition, when determining whether it should depart on the basis of aberrant behavior, the district

court "may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. § 5K2.20, cmt. n. 2 (2002).

On appeal, we must decide whether this is an "extraordinary case" and, if so, whether Orrega's conduct constitutes aberrant behavior under the guideline. . . . This case does not appear to be extraordinary. Rather, when compared to other § 2422(b) cases, this case is ordinary and is within the "heartland," *see Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (noting that a departure from the Sentencing Guidelines is only appropriate if the case is outside the "heartland" of typical cases embodied by the guideline), of typical cases covered by the applicable guideline. *See, e.g., United States v. Panfil*, 338 F.3d 1299 (11th Cir.2003); United States v. Miranda, 348 F.3d 1322 (11th Cir.2003). . . . In each of these cases, the defendant contacted, via the Internet, an undercover agent who was portraying a minor. Thus, the fact that Orrega contacted an agent and not a minor does not make this case extraordinary. Moreover, the facts in this case are more egregious than those in Panfil because, here, Orrega not only contacted the undercover agent, but also sent a video feed and a naked picture of himself to the agent.

In addition, none of the factors considered by the district court are extraordinary. The defendant produced no evidence of mental or emotional problems or of his prior good works, and he made no effort to mitigate the effects of the offense. His motivation for committing the offense was to satisfy his sexual desires at the expense of a thirteen-year-old girl. Although Orrega went to school and was gainfully employed as a waiter in a family-owned restaurant, these factors are not extraordinary. . . .

Even assuming that this case is "extraordinary," we would reverse the district court's grant of a downward departure because Orrega's conduct does not constitute aberrant behavior. This case involves more than a "single criminal occurrence or single criminal transaction." Orrega had two ninety-minute conversations with the undercover agent almost a month apart and, in each, he requested that they engage in sexual acts. 18 U.S.C. § 2422(b) criminalizes any attempt to entice a minor to engage in a sexual act. By attempting to entice a person he believed to be a minor to commit sexual acts during each conversation, Orrega committed two criminal acts. The commission of two criminal acts by Orrega bars him from receiving an aberrant behavior departure.

Moreover, this crime was not "committed without significant planning," nor was it "of limited duration."[2] *See* U.S.S.G. Supp. to App. C., cmt. to amend. 603 at 76–77 (2002) (stating that the phrases "'single criminal occurrence' and 'single criminal transaction' . . . will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life"). "Significant planning" is not defined, but we need not decide the specific parameters of a crime that was "committed without significant planning" because Orrega's conduct goes beyond the maximum amount of planning that would allow an aberrant behavior departure. Orrega (1) initiated two conversations with a person he believed to be a minor; (2) requested that the person perform sexual acts on him; (3) sent a naked picture of himself to the person; (4) set up a meeting place; (5) discussed how he would recognize the "minor" and how the "minor" would recognize him; and (6) drove to the meeting place. Such facts certainly do not indicate that the crime was "committed without significant planning". . . .

VACATED and REMANDED.

[2] Orrega engaged in two conversations of ninety minutes each. In the circumstances of § 2422(b), such extended conversations cannot be considered "of limited duration."

Strategic Considerations under the Sentencing Guidelines

In criminal cases, the nature of the Sentencing Guidelines fosters a wide variety of "strategic" behavior by prosecutors and defense attorneys alike. To give you a "feel" for how that works, here are Nick Sutton's applicable Guideline provisions:

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

(a) Base Offense Level: 12
(b) Specific Offense Characteristics
  (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.
  (2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by 3 levels. . . .

Commentary

Statutory Provisions: 18U.S.C.§§201(b)(3),(4), 1621–1623. For additional statutory provisions), see Appendix A (Statutory Index).

Application Notes:

1. *"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination, based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.*

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
    (1) timely providing complete information to the government concerning his own involvement in the offense; or
    (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the

court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

Commentary

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United

States, 518 U.S. 81 (1996). Furthermore, "before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 75 *U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

§5K2.20. Aberrant Behavior (Policy Statement)

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter 4 (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter 4.

Commentary

Application Notes:

1. *For purposes of this policy statement –*

   "Aberrant behavior" means a single criminal occurrence or single criminal transaction that (a) was committed without significant planning; (b) was of limited duration; and (c) represents a marked deviation by the defendant from an otherwise law-abiding life.

   "Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to § IBl.l (Application Instructions).

   "Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

2. *In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (a) mental and emotional conditions; (b) employment record; (c) record of prior good works; (d) motivation for committing the offense; and (e) efforts to mitigate the effects of the offense.*

Calculating Sutton's Guideline Range

In order to determine the sentencing range for Sutton under the applicable federal Sentencing Guidelines, you begin with the offense charged – perjury – which carries a so-called "Offense Level" of 12 (Guideline Section 2J1.3(a)). Sutton, however, promptly pleaded guilty, which entitles him to a 2-level reduction for "acceptance of responsibility" (Guideline Section 3E1.1). The result is an "Offense Level" of 10.

With that "Offense Level," you can calculate Sutton's recommended sentencing range by reference to the following "Sentencing Table" in the Guidelines. The first column is for "Offense Level," which in Sutton's case is 10. The second column is for "Criminal History Category," which in Sutton's case is "I" because he has no criminal history (this is his first offense). If you match up "Offense Level 10" with "Criminal History Category I," you can see that Sutton's guideline range (which is at the bottom end of the so-called "Zone B") is 6–12 months in prison.

SENTENCING TABLE (in months of imprisonment)

		Criminal History Category (Criminal History Points)					
	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51

Using the same applicable Guideline provisions, and the "Sentencing Table," you can also see how a small change in the facts can make a big difference in the outcome. The most common example involves the defendant's decision to plead guilty and "accept responsibility." In Sutton's case, that decision reduced the range of his likely sentence by 25–40 percent. Specifically, by pleading guilty, Sutton's "Offense Level" was 10 (not 12), and his Guideline Sentencing Range was 6–12 (not 10–16) months in prison.[3]

Drafting Considerations

Now that you have reviewed the materials, and considered the Sentencing Guidelines, it is time to focus on strategy. More specifically, as the prosecutor, you need to ask yourself from the outset: Should I consent to this motion for downward departure, oppose it, or take no position?

When answering those questions, keep in mind the larger context of the Sentencing Guidelines. In various forms, the Sentencing Guidelines have been in effect since 1987 for the purpose of achieving more uniformity in criminal sentences. It is a double-edged sword, however. On the one hand, any effort toward uniformity necessarily reduces the court's discretion based on the unique circumstances of any particular case. On the other hand, the Guidelines created an objective sentencing range that provides the court with somewhat of a "safe harbor," such that the imposition of a sentence within the recommended range is less likely to be overturned on appeal.

That "safe harbor" concept also applies to the prosecutor. In some cases, a prosecutor may oppose a downward departure in order to avoid the appearance of leniency. For example, in Sutton's case, the prosecutor may not want to appear lenient toward white-collar defendants or, more specifically, those who

[3] When advising a client, you also need to consider all of the subtle enhancements found throughout the Guidelines. For example, when charged with perjury, as quoted earlier, there is a 3-point enhancement for "substantial interference with the administration of justice" (Guideline Section 2J1.3(b)(2)), which is defined to include "any judicial determination based upon perjury, false testimony, or other false evidence," or "the unnecessary expenditure of substantial government or court resources" (*Id.* Application Note 1). Thus, if Sutton had *not* confessed his perjury to Casco's lawyers, and if Casco's lawyers had *not* promptly informed the court, Judge Hoffmann might have ruled on Casco's TRO request and based his decision in part on the fabricated e-mail. If that had happened, Sutton's "Offense Level" would have been 13 (12 points for perjury plus a 3-point enhancement for "substantial interference with the administration of justice" minus 2 points for "acceptance of responsibility"), which calls for a sentence of 12–18 months in prison.

commit perjury and undermine the integrity of the judicial system. At the same time, however, the prosecutor may feel that a downward departure is warranted, particularly if the rigid application of the sentencing guidelines would lead to a sentence that is too harsh for the circumstances.

Given all this potential give-and-take, the best position is the one stated in the Criminal Chief's memo: simply oppose the downward departure because, as a matter of principle, it does not meet the required elements. With the benefit of that decision, you can then move on to the next considerations: what to say and, more importantly, what not to say.

What Not to Say

Sometimes the most important aspect of legal writing is what is *not* said. On one level, that means following the physician's rule of thumb – "First do no harm" – to avoid saying anything that is contrary to your strategic objectives. On a deeper level, however, what you choose not to say can have a persuasive effect.[4] For example, by avoiding debates about losing issues, you can significantly increase your credibility. Moreover, by conceding certain issues, you can help narrow the overall dispute to those matters on which you have the strongest chance of success.[5]

[4] The concept is similar to "the dog that did not bark," from the Sherlock Holmes classic, *Silver Blaze*, by Arthur Conan Doyle. "In that tale, Sherlock Holmes solved a murder and the disappearance of a famous race horse, Silver Blaze. . . . [T]he failure of the dog to bark – its silence when it would ordinarily be heard – was a clue the legendary detective considered in solving the crime. In other words, while the dog's failure to bark would ordinarily and independently hold little significance, in this context, Holmes found it relevant." *In re Chateaugay Corp.*, 89 F.3d 942, 954 n. 1 (2nd Cir. 1996).

[5] Consider how Abraham Lincoln used that strategy when he was an Illinois trial lawyer during the years leading up to his election in 1860 as the sixteenth American president. As described by one of his contemporaries, Lincoln was masterful at conceding points that made no difference to the outcome, while narrowing the dispute to the most favorable terrain:

> When the whole thing was unraveled, the adversary would begin to see that what he [Lincoln] was so blandly giving away was simply what he couldn't get and keep. By giving away six points and arguing the seventh, he traded away everything which would give him the least aid in [proving his point]. Any man who took Lincoln for simple-minded would very soon wake up with his back in a ditch.

Gary Wills, *Lincoln at Gettysburg: The Words That Remade America* at page 96. (Simon and Schuster 1992) (quoting *Herndon's Lincoln: The True Story of a Great Life*, pages 269–70, by William H. Herndon and Jesse W. Weik (1889), in the Paul M. Angle edition for Da Capo (1942)).

When considering what *not* to say, try to look at the case from the judge's perspective. As explained in Chapter 4, the judge will expect the litigants to provide a chronology of the facts, a statement of the legal standards, and a description of any analogous cases. Accordingly, you should avoid arguments that fall outside those parameters. For example, you should avoid arguments that suggest you are vouching for a witness or for your client, or otherwise offering your personal beliefs. Similarly, you should avoid appealing to emotions or sympathy. You should likewise avoid arguments that rely on pejorative language or hyperbole or otherwise misstate the facts. Indeed, when trying to determine what arguments you should *not* make, one helpful reference is to the case law regarding those matters the court would prohibit counsel from arguing during an opening statement or closing argument. In Maine, for example, the federal district court has collected many of the applicable First Circuit standards on the following Web site: http://www.med.uscourts.gov/practices/OpeningAndClosing.pdf.

In the Sutton case, the strongest argument against a downward departure is the fact that Sutton lied twice. It goes to the heart of the definition of "aberrant behavior" as a "single criminal occurrence or single criminal transaction." Accordingly, that argument deserves the most emphasis and should be presented first. Indeed, depending on the circumstances, one could reasonably decide to limit the Response to that one issue.

For this assignment, however, you should also include your second strongest argument, which is that Sutton engaged in some amount of planning before he perjured himself. Although that argument is not as compelling – especially since Sutton decided to lie the same day he spoke with his attorneys – it allows you to illustrate other important aspects of the case that suggest the need to deny the motion for downward departure. For example, it allows you to emphasize how Sutton used his computer to fabricate evidence, which indicates the kind of deliberate behavior that disqualifies him from an "aberrant behavior" downward departure. That fact alone indicates there was at least some planning to Sutton's fabrication of the e-mail and his perjury the next day. Moreover, taken together with your first argument, you can paint a compelling portrait of Sutton as a person who thought carefully about how to lie, and then proceeded to lie more than once.

Get to the Point

Finally, editing is an important part of the process of deciding what arguments *not* to assert. Often, the first draft of a brief includes a variety of arguments that, upon further reflection, are not worth making. Don't be afraid to delete those arguments. Although a long and complicated brief, with several alternative and overlapping arguments, may impress your friends (and even some unsuspecting clients), it will not impress the judge. The judge will be more impressed with the strength of your best arguments and your ability to "get to the point."

After having devoted a substantial amount of time to researching and writing a particular argument, it is often difficult to make the decision to leave those points on the cutting-room floor. That is understandable. It is also understandable to bristle somewhat when a more senior attorney (or an experienced secretary, for that matter) offers substantial edits to your work. Try to put your ego aside and learn something from the suggestions, especially if they reflect the perspective of someone who is reading the brief for the first time, since the judge (and the judge's clerk) will be in the same position.[6]

[6] In that respect, you can take some solace from the historical example of Thomas Jefferson, one of our nation's greatest writers, when the delegates to the Continental Congress substantially edited his first draft of the Declaration of Independence. Jefferson learned, the hard way, that his writing was meant to serve a purpose larger than his own ego:

> This was no hack editing job: the delegates who labored over the draft Declaration had a splendid ear for language. Jefferson, however, did not see it that way. . . . The more alterations Congress made on his draft, the more miserable Jefferson became. He had forgotten, as has posterity, that a draftsman is not an author, and that the [Declaration] was not a novel, or a poem, or even a political essay presented to the world as the work of a particular writer, but a public document, an authenticated expression of the American mind.
>
> Pauline Maier, *American Scripture: Making the Declaration of Independence* (Alfred A. Knopf, 1998) (pages 148–149).

CHAPTER SEVEN

Counseling Dean Covelli

You receive the following letter and documentation from the Vice President for Student Affairs. The Vice President for Student Affairs has broad jurisdiction over all matters involving student life and activities on the University of Katahdin campus.

THE UNIVERSITY OF KATAHDIN

Dear Counselor:

I need your help in preparing a direct, but polite, letter of reprimand to one of my new staff members. She is Sharon Covelli, Assistant Dean for Student Governance. The duties of her job primarily involve providing guidance and serving as the official university point of contact for the variety of student organizations, including the Student Senate.

During my eight years as Vice President, I have had six Assistant Deans for Student Governance. None has been better than mediocre. Students either have tended to ignore them, leaving important university issues unaddressed, or have treated them as part of the "evil administration." Prior to the start of this year, I would have viewed student governance as one of the most disappointing aspects of the co-curricular learning experience at UK.

Six months ago, I hired Sharon Covelli for this position. Sharon's background for the position was unusual. She had no background in university or student affairs work. I hired her as she was retiring from a twenty-year career in the United States Marine Corps. In the interview process, I was bowled over by her maturity, vitality, and organizational skills. I have not been disappointed with that judgment. Sharon quickly formed strong relationships with many student leaders. She has guided an improvement of student governing bodies and student organizations that has delighted the entire campus. Sharon has also been a superb mentor for other, and younger, professional staff members in the Student Affairs Office.

So what is my problem? One issue clouds this sunny picture. Sharon has become the promoter of a weekly poker game at her apartment. Admission is by invitation only and is limited to student leaders with whom Sharon regularly works. The monetary stakes are small. I gather that rarely does anyone win or lose over $50 per night. The one constant that I hear from student comment is that Sharon is regularly one of the winners. I first learned of the poker games from a student leader who has not received an invitation to the games. The student suggested that it was widely perceived that Sharon "played favorites" in who was invited and that "expert players weren't welcome." Discussions with other students cause me to think the student may have exaggerated somewhat, but not entirely.

I don't find anything in our UK Regulations to address the issue. My understanding is that small stakes games are not covered by the criminal laws of Katahdin on gambling. However, I am just uneasy with this.

I approached Sharon two weeks ago and casually raised the matter. Sharon confirmed the games took place. She denies that she is a regular winner or that she plays favorites in the selection of players. She regards the games as a very effective way of maintaining relations with student leaders in an informal atmosphere and of keeping current on student issues. She seemed politely dismissive of my concerns about the games that I may not have articulated very well. Two days ago I learned that the games were still going on.

I was almost ready to let this go, until I reviewed our University of Katahdin Staff Handbook. I enclose the provision that captures many of my concerns. I'm now feeling that I need to put something in writing. However, I certainly hope this can be done in a way that doesn't forfeit all the strengths that Sharon brings to her job. Based on past experience, I couldn't come close to replacing her. I'd also likely have a student revolt on my hands.

I know you will come up with just the right letter for my signature.

Thanks so much. I'll owe you big time.

Carlene Gordon

Vice President for Student Affairs

UNIVERSITY OF KATAHDIN PROFESSIONAL STAFF HANDBOOK EXTRACTS

Introduction – "This Handbook is designed to provide guidance to both new and experienced University of Katahdin professional staff members. Its suggestions are not legally binding. Rather they are suggestive of good practices for professional staff members."

Page 9 – "Relations with Students. A collegial and interactive relationship between students and staff advances the educational goals of UK. However, professional staff should always understand that they are in a position of superior power in their dealings with students. They should also appreciate that students are quick to perceive discrimination when they are denied privileges that are accorded to other students. In such matters, the good judgment of the professional staff member is often the best guide."

STATE OF KATAHDIN CRIMINAL CODE

Section 29.101

Gambling and Gaming. It shall be a felony offense to operate or promote a game of chance for money without a license from the Katahdin Gaming Commission.

Section 29.105

Exception for Small Stakes and Social Games. The provisions of this chapter do not apply to games in which less than $250 changes hands at any one session. The provisions of this chapter also do not apply to games which are not regularly organized by one player or organizations or games in which the players have an established social relationship outside of the gambling activity.

By now you should be comfortable working your way down the Guidelines in Chapter One. You are asked to prepare a letter to Assistant Dean Covelli for the Vice President's signature. However, you are entitled to make the argument (in a note attached to the letter) to the Dean of Students that this isn't yet the time for sending the letter.

Once again, do your strategic thinking. What are the objectives of the letter? What would be the ideal resolution of this situation? What would be less satisfactory results? Are there any unacceptable consequences? How does your letter help accomplish or avoid those consequences?

CHAPTER EIGHT

How to Draft a Judicial Opinion

For your fourth litigation assignment, you are a law clerk for the federal court judge who will rule on Nick Sutton's motion for a downward departure. Your assignment arrives in the form of the following memo:

MEMORANDUM

To: My New Judicial Clerk
From: Judge Anders Jackson
Re: *US v. Sutton: Downward Departure Motion*

Welcome aboard as my new judicial clerk! Here's your first assignment. I have decided to grant Nick Sutton's motion for a downward departure. Simply put, I find the motion far more persuasive than the opposition. Here's why.

As I see it, there was a single criminal transaction. Although I realize Sutton lied twice, the conduct after the first lie does not strike me as a second criminal occurrence. Instead, it seems that Sutton was, for a short time, unwilling to confess his crime and therefore reaffirmed the first lie. In this case, the government can hardly disagree because it only charged one count of perjury.

The facts also reflect very little planning for the perjury. There is no dispute that Sutton fabricated the e-mail the same day he learned from his lawyers about the need for written confirmation of the contractual agreement.

From my perspective, Sutton's behavior also appears aberrant. There's no dispute that he's never done anything like this before. I also have no doubt that he will never do it again.

Please prepare a draft decision, for my signature, in which I grant the motion for downward departure. You can use any of the facts from the Motion, Opposition, or Prosecution Version, which should be cited like this: (Motion at page 6) or (Opposition at page 7) or (Prosecution Version at 2).

In terms of organization, I suggest the following:

1. Use the same caption as the Motion, the Opposition, and the Prosecution Version.
2. Center the following heading: "**INTRODUCTION**."
3. Under that heading, include a short summary of the decision (three or four sentences) that includes a statement of the result in the final sentence. Avoid any kind of "theme" or "creative" writing. I am looking for a straightforward summary of the decision that would provide a reader, who knows nothing about the case, with a pretty good idea of what it is

about. I strongly suggest that you do not write the summary until *after* you have completed the rest of the assignment.

4. Center the next heading: "**BACKGROUND**."
5. Under that heading, include all the facts necessary to explain the underlying events and the outcome of the motion. I suggest you present the facts in chronological order. If you think the government's Opposition brief did a good job of explaining the facts, feel free to repeat that section with some minor modifications and editing, as appropriate for a judicial opinion.
6. Center the next heading: "**STANDARDS FOR DOWNWARD DEPARTURE**."
7. Under that heading, explain the applicable standards. Again, if you feel the government's Opposition brief did a good job, feel free to repeat it with some minor modifications and editing.
8. Center the next heading: "**DISCUSSION**."
9. Under that heading, you might want to start by pointing out the various elements that argue in favor of a downward departure, which were *not* in dispute. Specifically, point out how it is undisputed that Sutton had an excellent "employment record," that the crime was of "limited duration," and that it represented a "marked deviation" from Sutton's otherwise "law-abiding life." Perhaps more importantly, point out that the criminal conduct was a result of the defendant's "mental and emotional condition," and that the defendant's confession was an effort "to mitigate the effects of the offense." In one or two paragraphs, try to weave together the facts from the record that support each of those elements. As you do, I expect it will illustrate why the case is "extraordinary" and deserves a downward departure.
10. The next paragraph or two should address the primary contested issue: that the crime was a "single criminal occurrence or single criminal transaction." That requires you to distinguish *Orrega*. Perhaps in one paragraph you could work through the several significant ways in which this case is different from *Orrega* such that Sutton deserves leniency even though the defendant in *Orrega* did not. Then, in a second paragraph, you could explain how Sutton's second affidavit was really just part of the same "criminal transaction" because it merely reaffirmed the first lie. Try to work in the fact that the government's indictment only charged one count of perjury.

11. Next you should address the final contested issue: that the crime was committed "without significant planning." In that regard, I would like you to rely on the case of *United States v. Langille*, 324 F.Supp.2d 38 (D. Me. 2004). In one paragraph, explain what happened in *Langille* and why the court ruled as it did. You might want to begin that paragraph with a topic sentence to indicate that, based on *Langille*, the court finds that Sutton committed the crime "without significant planning." In a second paragraph, you should *apply* the teachings of *Langille* to show how Sutton's case is similarly deserving of leniency.
12. Next, center the following heading: "**CONCLUSION**."
13. Under that heading, summarize the outcome in one sentence.
14. Finally, include a place for me to sign and date the opinion.
15. The draft opinion should be approximately five to six pages long.

UNITED STATES v. LANGILLE, 324 F.Supp.2d 38 (D. Me. 2004)

WOODCOCK, District Judge

On October 22, 2003, Roger Langille, a seventy-year-old man living in his car, having just been denied a bank loan, marched undisguised back into the same bank, handed the teller a note threatening to shoot her, and left with just over $3,000. Within moments, he was apprehended, cash still in hand, at an auto mechanic's shop while he waited for a new car battery to be installed in his get-away vehicle. Before the turn of the year, Mr. Langille had pleaded guilty to bank robbery. This case comes for sentencing before this Court. Over the objection of the Government, this Court grants the Defendant a downward departure for aberrant behavior under U.S.S.G. § 5K2.20. The Defendant is in a Criminal History Category I with no prior criminal record. His total offense level is 21; the guideline range is thirty-seven to forty-six months imprisonment. This Court sentences the Defendant to twenty months' imprisonment and three years of supervised release with standard and specific conditions.

I. Statement of Facts

Roger Langille, now a seventy-one-year-old man, is unmarried and has no children. He is a veteran, having served in the United States Army in 1950–51. While in the Army, he sustained leg and internal injuries. Mr. Langille last worked in 2001 as a part-time security guard. Approximately four years ago, the Veterans Administration determined it had overpaid Mr. Langille approximately $20,000 in veteran's benefits. To recoup its overpayment, the VA stopped payment of his $200 monthly veteran's benefit. Despite repeated efforts to obtain employment since 2001, Mr. Langille had been unsuccessful and he found himself unable to make ends meet on his net monthly social security benefit. By October 23, 2003, his situation had become desperate and he was living in his car. On that day, he entered the Machias Savings Bank in Calais, Maine, to obtain a loan. The bank officers noted the outstanding debt to the Veterans Administration and denied his loan request. Mr. Langille left the bank.

Shortly thereafter, Mr. Langille returned to the same bank, proceeded to the teller's window, and passed a note to the teller, which stated the following: "This is a bank robbery – have gun in my jacket. Put money in bag or I'll shoot you." The teller immediately handed Mr. Langille $3,574 in cash, and he left

the bank. Mr. Langille did not, in fact, have a gun. He drove away and went directly to an auto repair shop, where he was in the process of having a new car battery installed in his automobile when he was apprehended by the Calais police. Mr. Langille had not spent any of the stolen money; the Machias Police Department has returned the full $3,574 to Machias Savings Bank.

II. Discussion

. . . .

B. Did the Defendant Meet the Remaining Requirements of Section 5K2.20 for Downward Departure for Aberrant Behavior?

Under U.S.S.G. § 5K2.20, a downward departure may be warranted for aberrant behavior only "in an exceptional case." The Guideline sets forth the specific requirements:

(1) The Defendant may have committed only a "single criminal occurrence or single criminal transaction";
(2) The crime must have been of "limited duration";
(3) The crime must represent a "marked deviation by the defendant from an otherwise law-abiding life."

U.S.S.G. § 5K2.20(b). In addition, the Application Notes provide further factors for analysis: "In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. § 5K2.20(b), app. n. 3. Moreover, the crime must have been committed without significant planning."

Finally, this Court has reviewed case law for guidance on the proper application of § 5K2.20. The seminal First Circuit case on aberrant behavior was decided before § 5K2.20 went into effect. *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *see also United States v. Dewire*, 271 F.3d 333, 335 n. 2 (1st Cir. 2001) (noting § 5K2.20 became effective November 1, 2000). In *Grandmaison*, the First Circuit ruled that in determining whether to depart downward for aberrant behavior, the courts should look at the "totality of the circumstances." *Id*. at 563. The *Grandmaison* Court directed the sentencing courts to consider such mitigating factors as pecuniary gain to the

defendant, prior good deeds, efforts to mitigate the effects of the crime, and the spontaneity and thoughtlessness of the crime.

This Court applies the Guidelines Requirements, the Application Notes, and the *Grandmaison* case to the facts in this case.

C. Guideline Requirements: § 5K2.20(b)

Mr. Langille has met all of the guideline requirements set forth in § 5K2.20(b). This was a single criminal occurrence or single criminal transaction with limited duration. Mr. Langille committed the crime without significant planning. After being denied the loan, he came back shortly and, apart from writing out the threatening note, there is no indication he had planned the crime. He made no effort to disguise or mask his face; to the contrary, he decided to rob the same bank where he had just been and where he had just divulged all his identifying information. He had no firearm or dangerous weapon. He had no apparent plan of escape. Instead of heading out of town, he proceeded to an auto repair business where he waited for mechanics to install a new battery in his car. He was picked up by the police still within the confines of the small city of Calais within moments following the crime, having neither spent nor stashed the money.

The crime was also a marked deviation from an otherwise law-abiding life. Mr. Langille had managed to spend nearly seventy years on this earth without committing a crime. There is no evidence of any prior involvement with the criminal justice system: no felonies; no misdemeanors; no charges.

D. Application Note Considerations

The Court next analyzes the considerations of Application Note 2. There was little direct evidence of Mr. Langille's mental or emotional condition before or at the time of the crime, except the Presentence Report, which stated Mr. Langille had felt "depressed" prior to his arrest due to his financial problems and homelessness. Mr. Langille's employment record substantiated he had worked for various employers up to the year 2002 and had not worked since that time. Mr. Langille's prior good works consisted primarily of his service to his country in the United States Army and the injuries he had sustained during that service. Mr. Langille's motivation for committing the offense was to obtain money for his own use. This factor weighed against him, but was placed in the context of his desperate financial straights.

E. *Grandmaison* Considerations

This Court has addressed the spontaneity/thoughtlessness, pecuniary gain, and prior good deeds factors. There is admittedly no indication of Mr. Langille's engaging in charitable activities; living in a car at the time of the robbery, Mr. Langille was, in this Court's view, a proper object of charity. The final *Grandmaison* factor is Mr. Langille's efforts to mitigate the effects of his crime. The only evidence on this issue is that the full amount of the stolen money was promptly recovered and returned to the bank.

III. Conclusion

Based on the record before it and over the objection of the Government, this Court concludes Mr. Langille presented a truly "exceptional case" under § 5K2.20, which justifies a downward departure from the guideline range of sentence of thirty-seven to forty-six months. Mr. Langille's crime is so amateurish, spontaneous, and ill-conceived, and such a marked deviation from his prior life that it has all the characteristics of the foolish and thoughtless act of a man pushed over the brink. The Court concludes that when the Sentencing Commission drafted § 5K2.20 allowing a downward departure for aberrant behavior, it had someone like Roger Langille and his crime in mind.

Mr. Langille's conduct was by no means blameless. He did, after all, rob a bank and threaten to shoot the teller. The fact the teller immediately handed more than $3,000 over to Mr. Langille is evidence she took the threat seriously. This Court concludes a sentence of twenty months in prison followed by three years of supervised release would best balance the congressional sentencing directives set forth in 18 U.S.C. § 3553(a), tailoring as best this Court can the punishment to fit the crime and its perpetrator.

SO ORDERED.

Drafting Considerations

Now that you have reviewed all the materials, it's time to consider strategy from a unique perspective: the position of the judge. We are not talking about some sort of strategy that a judge might employ (such as issuing a ruling in the alternative, for the sake of efficiency, in order to avoid the need to retry a case in the event one issue is reversed on appeal). Instead, our focus is on what a litigator can learn by thinking about the case from the judge's perspective.

For the most part, litigation writing has a primary target audience of one: the judge.[1] Therefore, a litigator needs to write in a way that puts the case in the most persuasive light possible from the judge's perspective.[2] Although this may seem self-evident, it is a common mistake for litigators to forget the judge's perspective and engage in overzealous advocacy that weakens the client's position. For example, consider the following admonition from the court:

> This Court cautions the parties against hyperbole. Plaintiffs' Response begins: "Defendants' endeavor to stay this litigation for an indefinite period of time is an improper tactical maneuver designed to slow this case down, thwart discovery into their well-documented illegal conduct, and stave off the certification of the class for as long as possible." It continues by alleging the Defendants engaged in "cigarette frauds," that the motion for summary judgment is "baseless," that the Defendants' motives are "disingenuous," and that their motion is "misleading," and "preposterous." Provoked by Plaintiffs, the Defendant . . . began to respond in kind . . . . *Far from having the desired emotive impact, the use of over-the-top adjectives only gives pause as to why the parties have resorted to epithets in place of reason*. This Court will address issues of law on their merits, not on the parties' attempts to characterize (or mischaracterize) each other and counsel.

[1] For now, we are putting aside issues of the secondary audience, such as discussed in Chapters 2 and 4, that might involve a desire to influence the public debate or otherwise convince your opponent to settle out of court.

[2] Focusing on the judge as the target audience helps to put many issues into their proper perspective. One example is the importance of accurate and reliable citations. *See, e.g., United States v. Freeman*, 242 F.3d 391, 2000 WL 1745228 at *1 n.1 (10th Cir. 2000) ("We admonish Defendant's counsel that the failure to provide the Court with pinpoint cites to the specific proposition in his authority has not gone unnoticed"). In order to build credibility and avoid wasting the judge's time, a strategic litigator should provide an accurate and specific cite for every factual and legal assertion.

Good v. Altria Group, 231 F.R.D. 446, 447 N.1 (D.Me. 2005) (citations omitted) (emphasis added); *See also Leavitt v. Wal-Mart*, 238 F.Supp.2d 313 n.1 (D.Me. 2003) ("I urge the lawyers for both parties to tone down their rhetoric. It does not contribute to effective advocacy to assert that the other party engaged in "bombast" or made an argument that "would waste the Court's time" or was designed "to insult the intelligence of the reader" or a "desperate attempt to convince this Court" or "ridiculous").

A strategic litigator would never make that mistake. Obviously, the better approach is to evaluate the case from the judge's perspective and consider: What will be the most persuasive? What will make a difference? What should I avoid? When answering those questions, several points will likely stand out.

First, in most instances, you will find that a detailed statement of facts is far more persuasive than a presentation of abstract legal principles. Considering that there is an exception for virtually every legal rule, the judge is looking for you to provide the precise facts that will determine whether the case falls within the category of "exception" or "rule."

Second, judges are not persuaded by conclusory statements or assertions that the court "must" rule a certain way. Instead, judges are looking for the parties to provide the *reasons* that would support a ruling, one way or the other. For example, is your position more consistent with the plain meaning of a statute? Does your opponent's interpretation lead to illogical consequences? Which side's position can better withstand scrutiny?

Finally, remember that your legal writing will be evaluated based on its reliability and precision. Nothing deflates an argument faster than inaccuracy and generality.[3] As a result, check and double-check every assertion.

[3] You should also keep in mind that the judge has a limited amount of time to devote to your case. If you have any doubt about the court's reluctance to search the record on your behalf, consider the following Local Rule in Maine, which offers a clear warning: "The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts" (District of Maine, Local Rule 56(f))(2007).

CHAPTER NINE

Advising Professor Melton

We change your employment. You are now an associate with the private law firm of Zillman and Roth. One of the firm's specialties is employment law, in which your work has concentrated. Several weeks ago the firm was contacted by Professor Herman Melton. Professor Melton had just received a copy of the letter from the Vice President for Academic Affairs to the President (that you drafted in another life!). He was persuaded that the letter and the prior University of Katahdin proceedings meant he was about to be fired.

Your firm agreed to represent Professor Melton. You have become his lawyer. The file materials here reflect what has happened since your representation began. You have also received all of the materials from the files in Chapter Three. You have had several face-to-face meetings with Professor Melton and also have talked to him frequently on the phone. Professor Melton has taken a very active interest in his case and has demonstrated a good layperson's knowledge of higher-education law.

You now need to provide a letter of advice to Professor Melton that summarizes the facts and law that you have found. Most crucially, the letter must recommend to Professor Melton what steps he and you should next take. Prepare that letter.

THE UNIVERSITY OF KATAHDIN

Assistant Professor Herman Melton
Department of Sociology
University of Katahdin

Dear Prof. Melton:

As you may know, the University of Katahdin is required to inform you by the 15th of next month whether you will be offered a renewal of your employment with the university. I regret to inform you that after review of your file, the university will not extend your contract for another year. Your employment relationship with the University of Katahdin will terminate with the upcoming May graduation.

We wish you the best of fortune in your career and thank you for your contributions to the university.

Sincerely,

Susan McBee, President
University of Katahdin

ZILLMAN & ROTH
ATTORNEYS-AT-LAW

President Susan McBee
University of Katahdin
Dear President McBee:

Our firm has been retained by Professor Herman Melton in connection with his employment with the University of Katahdin. We have seen your recent letter terminating Professor Melton's employment after this academic year.

On Professor Melton's behalf and at his request, we now request that you "promptly supply written reasons" for that decision.

Sincerely,

Zillman & Roth, Attorneys-at-Law
406 Katahdin Avenue
Katahdin City

THE UNIVERSITY OF KATAHDIN

Zillman & Roth
Attorneys-at-Law
Gentlemen:

I write in response to your request for the reasons for my decision not to retain Professor Herman Melton at the University of Katahdin following the end of this academic year. I fully endorse the recommendation that I received from my Academic Vice President, the senior academic officer on campus. The Vice President's letter summarizes Professor Melton's record as showing little production of quality published scholarship and below-average evaluations of Professor Melton's classroom teaching by both students and peers. Our obligation to our students and to the taxpayers of the state of Katahdin is to advance to tenure only those faculty members who show outstanding performance and potential in both areas. I regret that Professor Melton's work does not meet that standard.

Sincerely,

Susan McBee, President

To: Zillman & Roth, Attorneys
From: Alden White, Private Investigator
Re: Professor Herman Melton

At your request I have "nosed around" the University of Katahdin campus to gather information on your client Assistant Professor Herman Melton. For a relatively new member of faculty, Professor Melton has a visibility that is most impressive. I read several issues of the campus newspaper. In two issues Professor Melton had letters to the editor taking a strong position against hunting and urging students to make their anti-hunting views known to the Katahdin Legislature. I also saw several other letters discussing previous hunting comments and speeches by Professor Melton. The letters both sided with and opposed Professor Melton's views. The most recent issue of the paper contained an editorial supporting the Melton position against hunting. The editorial included a sentence mentioning "campus rumors that Professor Melton's views may cost him his job."

I used the editorial as an excuse to open discussions with several students at the Student Union. Two of the students had taken classes from Professor Melton. One was strongly supportive of him. The other was lukewarm at best and made it clear that, as a hunter, he was distressed by Melton's views.

I then attempted to contact members of the Sociology Department. Most professors refused comment. Two confirmed "off the record" that Professors Henrici and Melton have been at odds for most of Melton's time at UK. Neither faculty member indicated a willingness to testify on the matter. Neither seemed a strong Melton supporter, despite their harsh words for Henrici's "dictatorial style" of leadership as Department Chair.

Hope this is helpful. I remain available for further work on this and other matters. My bill is enclosed.

To: Professor Melton's Attorneys
From: Martha Baca, Law Clerk

At your request, I did some searching through U.S. Supreme Court cases that may be relevant to our situation. You already have *Board of Regents v. Roth*. Add to that the later opinion in *Mt. Healthy School District v. Doyle*, attached.

Thanks for the chance to work on this. Although I did my undergrad work out of state, Professor Melton is quite a well-known name on the UK campus. His fame has even reached the cloistered halls of UK Law School.

MT. HEALTHY CITY BOARD OF EDUCATION v. DOYLE, 429 U.S. 274 (1977)

JUSTICE REHNQUIST delivered the opinion for a unanimous Court.

. . . .

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons

of bitches," and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum – on a subject which he apparently understood was to be settled by joint teacher-administration action – was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of the reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters, which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by reference to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment" and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with back pay. The District Court did not expressly state what test it was applying in determining that the incident

in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief per curiam opinion.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with back pay.

The District Court made the following "conclusions" on this aspect of the case:

1. "If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew – even in the face of other permissible grounds – the decision may not stand.
2. A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons – the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on "'tact' – that is not to say that the 'tactfulness' is irrelevant to other issues in this case."

At the same time, though, it stated that

"[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure."

Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue, whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision – even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event. . . .

Initially, in this case, the burden was properly placed upon respondent [Doyle] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" – or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusions those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

In your previous writings, you have been part of the University of Katahdin as an employee of the University Legal Counsel who works for the university and is on its payroll. You are now in a different position. You are a private and independent attorney-at-law. You have entered into an attorney-client relationship with Professor Melton. You have done considerable work on the case. It is now time to inform Professor Melton of your factual and legal findings and to suggest what should come next. Unlike in many litigation situations, no statute or regulatory law mandates any particular form of the advice letter. However, consider the following approach to the letter.

1. *The Introductory Paragraph*. You should lay out the circumstances of your representation (e.g., "You have retained our firm to . . ."). This may seem obvious to both you and the client. However, the approach has several advantages. First, the document serves as a helpful record in the files. Imagine that three years from now, a new attorney has a similar case and

wants guidance from the firm's prior employment law experiences. Better to have the record in writing in the files than to try to track down the attorney who handled the Melton matter. Memories fade. Print remains. Second, you want to be sure that the client and the firm understand the exact nature of the representation. For example, Professor Melton may have thought he retained the firm both to contest his termination at the University of Katahdin and to serve as his employment agent as he seeks other employment. You have no understanding of the second expectation. It is valuable to clear up that point promptly.

2. *Summarizing the Fact-Finding Process*. In some instances, the client may have provided most of the facts of the case from the beginning. In other situations, like this one, you are expected to gather additional facts that Professor Melton does not know. You should carefully lay out all the fact-finding work that you have done. Who have you talked to? What documents have you reviewed? This provides necessary context for Professor Melton. This also helps to show that you have earned your fee.

3. *The Factual Story*. Lay out the relevant facts. You will make judgments as to how much detail you want to provide according to the sophistication and the interest of the client. Some clients, even sophisticated ones, may just want "the bottom line." Others will value every detail. As you have become acquainted with the mythical Professor Melton, in which category do you think he would fall? A particular question in the Melton proceedings involves how much material you should directly quote and how much you should paraphrase. You have a considerable factual record already assembled from the paper reports of the university's review of Professor Melton's re-employment. This is material that would likely come directly into evidence if the case should go to litigation. Direct quotation of some of the most relevant material is appropriate.

We would also suggest that the factual material should be presented as neutrally as possible. You may want to explain to Professor Melton that you don't necessarily believe material that is adverse to him. However, he needs to know all of the facts – the good, the bad, and the ugly – that would help decide his case. Even though Professor Melton will have seen some of the factual material, he may not have appreciated the overall case that it presents.

4. *The Law*. Having set out a comprehensive and objective statement of the facts, what does the law have to say about those facts? Gather the relevant pieces of law and apply the facts to them. Are some theories of action virtually precluded by the law and facts? Are others highly likely to succeed? Even if Professor Melton may not be a clear winner, is there a basis for negotiations with the university?
5. *The Advice*. For some clients, all that has gone before is just lawyer's work. Their question is: "Counselor, what should I do?" Don't feel insulted. Do you regularly engage your dentist or electrician in long discussions of the nuances of their services to you?

You may have a clear view of the outcome of the case. Your least happy advice may be: "Client, based on all that we have learned, I don't find that you have a basis for action against anyone. I recommend that you drop the matter." If the client presses you harder, you may need to inform her or him that your professional obligations would forbid you from bringing a lawsuit that has no basis.

If you feel that there is some merit in Professor Melton's claim, you have several courses of conduct. You may recommend beginning litigation immediately. Alternatively, you may ask his permission to begin negotiations with the university. On the other hand, you may suggest letting some time pass (being attentive, of course, to any statute of limitations issues) to see what else might develop. Consider, for example, what your advice might be if two weeks from now Professor Melton received an offer from another university for a position with tenure at double his present UK salary.

You may want to spell all of this out in the letter. We would suggest that you schedule another (and possibly final) meeting with Professor Melton to review all matters and to reach decisions on what to do next. If you do recommend a further face-to-face meeting, you should be clear about the need for the meeting and state that your final advice will come from that meeting, in addition to the advice in this letter.

CHAPTER TEN

How to Draft a Motion for Summary Judgment

For the last assignment, we return to the "sculpture" case. As in Chapter Two, you are the Assistant U.S. Attorney who filed the Complaint. At this point in the litigation, however, you have satisfied the prerequisite of a Writ of Replevin, and the court has denied Richardson's venue challenge.[1] You have also completed all your discovery, and it turns out that Richardson is unable to dispute any of your facts. In other words, you are now near the end of the litigation, and there is one last step before preparing for trial: You have the option of filing a Rule 56 motion that would ask the court to grant summary judgment in your favor. Your assignment arrives in the form of the following memo:

[1] Thus, for this assignment, we are going to assume that the sculpture was in Maine at Munjoy Galleries, that the United States requested and obtained a writ of replevin, that the United States served the writ of replevin on Munjoy Galleries, that Munjoy Galleries complied with the writ and turned the sculpture over to the United States, that the United States placed the sculpture in a secure location where it was to be held until the completion of the litigation, and that the court denied Richardson's venue challenge. You do not need to mention any of this when completing the assignment, but to avoid any confusion, those are the assumptions on which the assignment is based.

MEMORANDUM

To: Acting Assistant U.S. Attorney, Civil Division
Fr: Bill Browder, Civil Chief
Re: *United States v. Melody Richardson*

Great work with "the sculpture case." You did a wonderful job of using civil discovery to authenticate documents and prove there is no dispute about any of the facts that support our case. I especially like the way you used a Request for Admission in tandem with Interrogatories and Document Requests to pin down the absence of any contrary facts (see attached Defendant's discovery responses). In addition, thanks for telling me about the recent case summarizing the law regarding the use of Requests for Admission to narrow the disputed issues in a civil case. *Bouchard v. U.S.*, 2007 WL 690088 (D. Me. March 6, 2007).

Considering the rocky start you had in this case (when the defendant challenged jurisdiction and venue), we've done pretty well. You cured the jurisdictional problem by obtaining a writ of replevin, and the court denied the defendant's venue challenge. Now we're ready to win on the merits.

Although I realize you would like to get more trial experience, it seems to me that, with the undisputed factual record you have developed, we can win this case "on the papers" with a simple Rule 56 motion for summary judgment. That would certainly save the time and expense of trial preparation, as well as the need for Alicia Diebenkorn to travel here from Washington, D.C., in order to testify.

Given all that, I would like you to prepare a motion for summary judgment along these lines:

1. Caption: use the same caption as used previously.
2. Center the following heading: "Plaintiff's Motion for Summary Judgment and Incorporated Memorandum of Law."
3. Under that heading, write something like: "**NOW COMES** Plaintiff ("the government"), by undersigned counsel, and hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56."
4. The next heading should be: "**INTRODUCTION**."
5. Under that heading, write one paragraph that summarizes the case from the government's perspective. A theme would be nice. I strongly suggest

that you do *not* write the introduction until after you have written everything else.

6. Instead of a typical "background" section, the next heading should be: "**STATEMENT OF UNDISPUTED MATERIAL FACTS**."
7. Under that heading, include all the facts necessary for the government to win on summary judgment. The length of the factual statement is up to you, but I estimate that you need only about fifteen to twenty factual sentences. Feel free to use the facts from the Complaint that you previously drafted, but I would respectfully suggest that you do not need *all* of the facts from the Complaint. Don't include extraneous facts. For example, there is no need to include the fact that the sculpture is worth $50,000 because that makes no difference to the outcome. Instead, focus on the *material* facts (the ones that make a difference), as supplemented by any facts you need to provide sufficient background so the reader can understand what happened. As usual, I suggest you present the facts in chronological order.
8. Each factual sentence should be separately numbered. However, the rest of the brief (the introduction, the standard for summary judgment, the argument, etc.) is *not* numbered. Each factual sentence needs a supporting citation at the end, such as (Diebenkorn Decl. ¶ 2) or (Diebenkorn attachments at page 3).[2]
9. The next heading should be: "**STANDARD FOR SUMMARY JUDGMENT**."
10. Under that heading, include the following, verbatim:

> Summary judgment is appropriate where the record developed by the parties shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P.56(c). Defendant must make a preliminary showing that no genuine issue of material fact exists. *Santoni v. Potter*, 2002 WL 1930000 at *1 (D.Me. Aug. 19, 2002) (Singal, J.). If Defendant succeeds, Plaintiff must contradict the showing by pointing to specific facts demonstrating that there is, indeed a trial-worthy issue. *Id.* A factual dispute is genuine or trial-worthy only if a reasonable jury could resolve it in favor of either party. *Id. See also Rivera-Marcano v. Normeat Royal Dane Quality*, 998.

[2] Please note that in some jurisdictions, the court requires the Statement of Undisputed Material Facts to be set forth in a separate document entitled "Statement of Undisputed Material Facts." For this case, for the sake of simplicity, we are going to include everything in a single document.

> F.2d 34, 37 (1st Cir. 1993) (party opposing summary judgment must point to "concrete, admissible evidence").

11. The next heading should be: "**ARGUMENT**."
12. Under that heading, draft a paragraph that begins by quoting the Maine replevin statute. In the same paragraph, explain how that statute applies to the facts of this case.
13. In the next paragraph, use the following quotation (verbatim) to explain the general legal landscape:

> The federal government cannot abandon property. *United States v. Steinmetz*, 763 F. Supp. 1293 (D.N.J. 1991), *aff'd*. 973 F.2d 212 (3d Cir. 1992). "It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials." *Id*. Furthermore, the government's ownership interest in property is not divested by inactivity, neglect, or unauthorized intentional conduct by government officials. *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.*, 277 F.2d 308 (9th Cir. 1960); *United States v. City of Columbus*, 180 F. Supp. 775 (S. D. Ohio 1959). Congress has the exclusive authority to acquire and dispose of federal property. U.S. Constitution, Article 4, Section 3, Clause 2. *See also Allegheny County, PA v. United States*, 322 U.S. 174 (1944).

14. In the next paragraph, *apply* those general principles to the facts of our case.
15. In the next paragraph, describe the one specific case that we rely on for summary judgment: *United States v. Steinmetz*, 763 F. Supp. 1293 (D. N. J. 1991). Explain what happened in that case and why. Don't get distracted by a lot of the facts and law in that case that might not apply here. Present *Steinmetz* in a way that makes sense to someone who has never read the case. Make sure to include some pithy quotes from the case that you will use to apply the legal principles of *Steinmetz* to the facts of this case.
16. In the next paragraph, *apply Steinmetz* to this case.
17. The next heading should be: **"CONCLUSION**."
18. Under that heading, write something like: "For the foregoing reasons, the Plaintiff respectfully requests that the Court grant this motion for summary judgment."
19. At the end, include a place for the date and your signature. Feel free to use the same one as you did in the Complaint.
20. I expect the entire motion would be about five to six pages long.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 2002–04-EJR**
	)	
MELODY RICHARDSON	)	
Defendant.	)	

RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSION

NOW COMES Defendant, by undersigned counsel, pursuant to Federal Rule of Civil Procedure 36, and hereby responds to Plaintiff's request for admission as follows:

Plaintiff's Request to Admit: *That the documents attached to the Diebenkorn Declaration are true and correct copies of official records of the Labor Department Art Project that qualify as public records and/or reports pursuant to Federal Rule of Evidence 803(8).*

Defendant's Response: Admit.

I declare under penalty of perjury that the foregoing is true and correct.

_____ _____

Melody Richardson Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)
Plaintiff,	)
	)
v.	) **Civil No. 2002–04-EJR**
	)
MELODY RICHARDSON	)
Defendant.	)

RESPONSE TO PLAINTIFF'S INTERROGATORIES

NOW COMES Defendant, pursuant to Federal Rule of Civil Procedure 33, and hereby responds to Plaintiff's interrogatories as follows:

Plaintiff's Interrogatory 1: *If you deny any assertion in the Diebenkorn Declaration (paragraphs 1–13), specify each such assertion and state all the facts that support your denial.*

Defendant's Response: I do not deny those assertions.

Plaintiff's Interrogatory 2: If you deny any assertion in the Browder Declaration (paragraphs 1–5), specify each such assertion and state all the facts that support your denial.

Defendant's Response: I do not deny those assertions.

Plaintiff's Interrogatory 3: If you deny any assertion in Plaintiff's request for admission, specify each such assertion and state all the facts that support your denial.

Defendant's Response: I do not deny those assertions.

Plaintiff's Interrogatory 4: List the name and address of each person with firsthand knowledge of the facts that support your denial, if any, reflected in your response to interrogatories 1–3 above.

Defendant's Response: None.

Plaintiff's Interrogatory 5: *State the date, author, and all recipients of every document that supports your denial, if any, reflected in your response to interrogatories 1–3 above.*

Defendant's Response: None.

I declare under penalty of perjury that the foregoing is true and correct.

_____ _____

Melody Richardson Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)
Plaintiff,	)
	)
v.	) **Civil No. 2002–04-EJR**
	)
MELODY RICHARDSON	)
Defendant.	)

RESPONSE TO PLAINTIFF'S DOCUMENT REQUESTS

NOW COMES Defendant, by undersigned counsel, pursuant to Federal Rule of Civil Procedure 34, and hereby responds to Plaintiff's document requests as follows:

Plaintiff's Document Request 1: *Produce all documents that support your response to Plaintiff's interrogatories*.

Defendant's Response: None.

Plaintiff's Document Request 2: *Produce all documents that support your response to Plaintiff's request for admission*.

Defendant's Response: None.

Plaintiff's Document Request 3: *Produce all documents that support any defense you are asserting in this case*.

Defendant's Response: None.

Respectfully submitted,

Counsel for Defendant
The Law Offices of Jones, Jones & Day
100 Commercial Street
Portland, Maine 04101

UNITED STATES v. STEINMETZ, 763 F. Supp. 1293 (D. N. J. 1991)

DEBEVOISE, District Judge.

I. THE PROCEEDINGS

In this action plaintiff, the United States of America, seeks to recover from defendant, Richard Steinmetz, a ship's bell taken from the celebrated Confederate warship, the CSS ALABAMA. In response to an order to show cause, Mr. Steinmetz delivered the bell to the Court. A hearing was held on January 4, 1991. The hearing not only developed evidence required to dispose of this case; it was also a celebrative event. The final encounter of the CSS ALABAMA was recalled. Each student in the sixth grade of Maplewood's Middle School struck the bell bringing forth once again the vibrant tone heard many times at sea during the years 1862 to 1864.

Since the bell had been deposited in Court there was no need for preliminary injunctive relief. Mr. Steinmetz answered and counterclaimed, seeking (1) a determination that the bell is his property, (2) compensation on a theory of *quantum meruit* and (3) compensation on a theory of unjust enrichment. I suggested to the parties that they cross-move for summary judgment and, pending a hearing on the motion, seek to arrive at a fair and reasonable disposition of the case. Unfortunately, the efforts to reach agreement failed and it thus became necessary to rule upon cross-motions for summary judgment.

II. THE FACTS

Many events preceded the arrival of the bell in Newark. These events are recounted in the Official Records of the Union and Confederate Navies in the War of the Rebellion (Government Printing Office 1896), in the works of recognized historians of the Civil War, in the testimony in this case of Naval Historian William S. Dudley, and in the testimony of Mr. Steinmetz, an antique dealer who has great expertise in the field of military artifacts. These events can be summarized as follows:

. . .

In 1861 James D. Bulloch, representing the Confederate States of America, proceeded to England. His mission was to obtain ships for the Confederacy. Among other activities, he arranged for two warships to be

built in Liverpool. One was the vessel named the FLORIDA; the other was the ALABAMA.

For the next two years [Captain] Semmes and the ALABAMA roamed the seas and destroyed or captured 64 American merchant ships before meeting the USS KEARSARGE off Cherbourg in June of 1864.

. . . the USS KEARSARGE, under the command of Captain John Winslow, entered Cherbourg and then positioned herself in international waters beyond the harbor mouth.

Captain Semmes decided to do battle. By Saturday night, June 18, his preparations were complete. Between nine and ten o'clock on June 19 the ALABAMA proceeded to sea, accompanied by the French ironclad FRIGATE COURONNE, some French pilot boats, and the English steam yacht, the Deerhound. The KEARSARGE awaited seven miles off shore.

John Kell, executive officer of the ALABAMA, has described the battle. . .

The firing now became very hot and heavy. . . . The battle lasted an hour and ten minutes [which resulted in the sinking of the ALABAMA].

It goes without saying that the ship's bell, which is the subject of this case, accompanied the ALABAMA as "she sank fathoms deep." The ALABAMA still rests where she sank, but the bell was salvaged. Mr. Steinmetz traced its separate history.

In 1979 Mr. Steinmetz participated in an antique gun show in London. A dealer informed him that he knew where the bell of the CSS ALABAMA was located, and Mr. Steinmetz asked to see it. The dealer took Mr. Steinmetz to Hastings on the English coast where an antique dealer, a Mr. Walker, showed him the bell and documentation concerning it. It purportedly came from the Isle of Guernsey off the French coast.

Mr. Steinmetz was skeptical, but he paid a deposit, took possession of the bell, and proceeded to Guernsey to check it out.

Guernsey fishermen have a sideline – wreck stripping. Mr. Steinmetz visited a Guernsey friend and the friend introduced him to various persons who dealt in shipwrecks and salvage. When these persons were shown the bell they identified it as a bell which had hung in a Guernsey bar. It developed that a diver, William Lawson, had salvaged the bell in about 1936 and most likely had traded it at the bar for drinks. There it hung until World War II. The Germans captured Guernsey from the British. Thereafter, the bar was destroyed in a British bombing raid.

After the destruction of the bar the bell passed from hand to hand until it was acquired in 1978 by the Hastings antique dealer.

Satisfied with the authenticity of the bell, Mr. Steinmetz completed the purchase and brought it to the United States. He had given the dealer other antique items having a value of approximately $12,000 in exchange for the bell.

In 1979, after returning to the United States, Mr. Steinmetz offered the bell to the Naval Academy. The Academy was unwilling or unable to trade or purchase it. Mr. Steinmetz put the bell on a shelf until December 1990, at which time he placed it in the Harmer Rooke Gallery for auction.

The bell was advertised in the gallery's catalogue. Alert Naval authorities noticed the advertisement and claimed entitlement to the bell. Mr. Steinmetz resisted the claim, and this action ensued.

III. DISPOSITION OF SUMMARY JUDGMENT MOTIONS

Each party either has, or by direction of the Court is deemed to have, moved for summary judgment. Judgment shall be rendered if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). There are no genuine issues as to any material facts and I conclude that as a matter of law the United States is entitled to a judgment in its favor.

A. *Right of Capture*. The bell is the property of the United States both by the right of capture and by virtue of the fact that the United States is successor to the rights and property of the Confederate States of America. . . .

B. *Right of Succession*. Also CSS ALABAMA is the property of the United States as the successor to all the rights and property of the Confederate Government. *See J. B. Moore's Digest of International Law* (1906), Vol. 1, Section 26 . . . C. *Lack of Abandonment*. Article IV, Section 3, Clause 2 of the United States Constitution provides: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Thus, under the above clause only Congress and those persons authorized by Congress may dispose of United States property pursuant to appropriate regulations.

In the similar case of *Hatteras, Inc. v. USS HATTERAS, her engines, etc., in rem, and United States of America, in personam*, 1984 AMC 1094, 1096 (1981), *aff'd* without opinion, 698 F.2d 1215 (5th Cir.1983) involving a claim to the wreck of USS HATTERAS and artifacts from it, the District Court for the Southern District of Texas held that although the wreck had lain untouched since the Civil War, title and ownership of the wreck remained with the United States.

Citing numerous cases, the Court observed: It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials. *Id*. at 1098.

Relying on *United States v. California,* 332 U.S. 19, 40, 67 S.Ct. 1658, 1669, 91 L.Ed. 1889, 1947 AMC 1579, 1595 (1947), the Court held that neither the maritime nor common law doctrine of abandonment was applicable to that case.

While this traditionally conceived doctrine might prove dispositive of the factual questions in this case if it concerned a dispute between private citizens,

[T]he Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. *United States v. California,* 332 U.S. 19, 40 [67 S.Ct. 1658, 1669, 91 L.Ed. 1889], 1947 AMC 1579, 1595 (1947). 1984 AMC at 1098.

The United States has never formally abandoned the wreck of CSS ALABAMA. It is, therefore, in all respects similar to USS HATTERAS. It is a sunken wreck located in non-territorial waters. In view of this, the wreck, and by extension, the ship's bell, remain the property of the United States.

Consequently, it is clear that under well-established State practice, States generally do not lose legal title over sunken warships through the mere passage of time in the absence of abandonment. They do not lose title during combat in the absence of an actual capture of the warships. Although abandonment may be implied under some circumstances, United States warships

that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence of express consent from the United States Government. *Id.* at 1005.

Thus, the lapse of time between the sinking of CSS ALABAMA and Mr. Steinmetz's acquisition of the ship's bell did not result in abandonment or the United States' loss of title to the ship and its equipment.

For the foregoing reasons the United States' motion for summary judgment must be granted and Mr. Steinmetz's motion for summary judgment must be denied. The United States is entitled to ownership and possession of the bell. I shall prepare and file an appropriate order.

Drafting Considerations

At the close of discovery, when it is time to consider a motion for summary judgment, you should be in a position to benefit from the strategic choices you made earlier in the case. By way of example, let's recap the strategic steps in "the sculpture case" that brought us to this point.

At the outset, the government stumbled across evidence that government property was about to be privately auctioned. The U.S. Department of Labor scrambled to pull together the known evidence that the sculpture was government property. The U.S. Attorney's Office drafted a fairly thorough Complaint with an eye toward convincing Richardson to settle.

Instead of settling, Richardson moved to dismiss for lack of jurisdiction and improper venue. Although Richardson did not necessarily expect to win the motion (and she didn't), it bought Richardson some time and allowed her to further her "theme" that the government was overreaching by trying to take away a sculpture that had been in her family for more than sixty years.

The U.S. Attorney's Office then used a variety of discovery techniques (a) to authenticate its documents; and (b) to otherwise establish that there was no dispute about the government's facts and that Richardson really had no ownership evidence of her own. Thus, by the close of discovery, the government had accomplished its goal of narrowing the case to the best possible situation: undisputed facts demonstrating government ownership of the sculpture and the absence of any facts demonstrating valid private ownership, all of which was in the context of some very strong legal principles that the government normally does not lose title to its property, despite the passage of time.

Accordingly, in a simple example like this, if you have successfully pinned down your opponent by the close of discovery, it may not matter whether you file a motion for summary judgment or simply proceed to trial. Either way, you have created the best possible chance for success. As a result, the summary judgment motion in this assignment is not really the *subject* of a strategic decision as it is the happy *result* of prior successful strategic decisions made during the course of discovery.

With respect to the timing of a Rule 56 motion for summary judgment, however, there can be some strategic considerations. In that regard, consider how a Rule 56 motion for summary judgment differs from a Rule 12 motion to dismiss. A Rule 12 motion to dismiss is primarily a legal argument. As discussed in Chapter Four, it is typically filed at the outset of a case. Generally

speaking, a Rule 12 motion to dismiss assumes the truth of the facts alleged in the Complaint and asserts, as a matter of law, that the allegations fail at the threshold, either because they do not state a claim for which relief should be granted, or because they fall short in some other definitive respect, such as lack of jurisdiction or improper venue.

In contrast, a Rule 56 motion for summary judgment asserts a legal argument based on undisputed facts. It is typically filed near the end of the case, after the close of discovery, when it may be apparent that the material facts are undisputed, such that one side or the other is entitled to judgment as a matter of law. In other words, a Rule 56 motion for summary judgment relies on the factual record generated by the parties during the course of discovery, including the results from document requests, interrogatories, requests to admit, as well as deposition transcripts and affidavits and the like.

In a Rule 56 motion for summary judgment, the emphasis is on the facts that are *undisputed* and *material*. In other words, the party filing for summary judgment is arguing that discovery has revealed a set of facts, about which there is no real disagreement, that determine the outcome of the case. Based on those undisputed material facts, the party filing for summary judgment is asking the court to rule on the merits without waiting for the case to proceed to trial. Most commonly, the defendant is the party that moves for summary judgment on the grounds that the plaintiff cannot prove one or more elements of the claim. However, as illustrated by this assignment, the plaintiff may also move for summary judgment.

Follow-up Sections

Chapter One Prayer at the Athletic Banquet

You have completed your first draft. How well have you addressed the following issues?

1. What is your legal conclusion in one sentence? Or doesn't the situation allow such a clear answer? If the president asked you for one or two sentences that he could offer to the students, their supporters (including legal advisors), or the media (imagine President McBee having fifteen seconds of sound bite to explain her decision for the evening news), what would you suggest?

2. Are there plausible grounds for distinguishing *Lee v. Weisman* and *Santa Fe School District v. Doe* from the situation that faces the president?

3. Are there alternatives that are allowed by the law that would support the students in some part of their request? Should you mention them here or wait for the students to ask a slightly different question?

4. Do you offer policy considerations as well as your legal opinion? For example, how valuable is it to support the views of the majority of student/athletes? Would the prayer, even if legal, be divisive or threatening to some students? Are you clear when you are discussing law (your area of professional expertise) and when you are discussing policy (a matter on which your position may be no stronger than the president's other senior advisors)?

5. Are you willing to "take a meeting" with the students if they should request it?

6. How clearly have you stated your legal opinion? Is there room for the president to misunderstand what you are saying? You should consider repeating your conclusion at several points in the memorandum.

7. Are there matters in the memo that you would not like persons other than the president to see? Imagine the reaction to the Washington or Kowalski e-mails among members of the general public.

8. How much legal analysis do you want to include in the memo? This isn't an advocacy document to another lawyer or a court. Does the president need more than a simple "It's legal" or "It's unconstitutional"?

EVALUATE THESE FIRST-DRAFT PROVISIONS FROM PRIOR BANQUET PRAYER MEMOS

Here are extracts from our former students' first drafts. What do you like or dislike as a matter of 1) good writing; 2) good legal analysis; and 3) good strategic thinking?

1. As demonstrated by the *Lee* and *Santa Fe* decisions, the current trend in the Supreme Court has been to oppose officially sponsored prayer at public school events. The same is probably true here.

2. The second issue in this matter is whether the University of Katahdin should consider the establishment of a university policy. The university should not adopt an endorsement of school prayer as a policy matter.

3. The said banquet, which will be held in two weeks, is one of the most important and publicized UK events. Therefore, the committee members would like to recommend that a "nondenominational prayer" be performed at the opening of the banquet.

4. The United States Supreme Court has addressed this issue numerous times and has reached what could be described as a solid body of cases that suggests such prayers in public schools are rarely to never upheld. Yet the support by student athletes, the Committee members, and the long-standing tradition of religion in ceremonial form does not seem to tip the scales in favoring this request as a good idea by the university.

5. Although this will no doubt be disappointing to many students, and particularly those involved in planning the banquet, this recommendation is based on the current state of constitutional law relevant to prayer in public schools as it stands today.

6. However, you might suggest that they find an alternate reading or opening that does not involve religion, such as a quote or poem involving a sports theme.

7. With regard to establishing a school policy, it would be safest to draft the policy by noting that the University of Katahdin intends to comply fully with the laws of the United States and the holdings of the Supreme Court cases outlined earlier.

8. In that case [*Lee*], the principal of a Providence middle school invited a rabbi to deliver a nondenominational prayer at the school's graduation ceremony.

ELECTRONIC COMMUNICATIONS

The file in the Athletic Banquet Prayer case is composed of both communications in writing and electronic communications that have been printed out for the file. The growth of electronic messaging over the last two decades has added a further complexity to legal writing. A seasoned transactional practitioner messaged us: "This medium [e-mail writing] has become ubiquitous, even when serious and complex legal advice is rendered. My sense is that young lawyers sometimes view this medium too casually, respond too quickly, and do not discipline their thinking."

Unfortunately, the perception has arisen that e-messages "aren't really writing" in the sense that a letter or a memorandum would be. The analogy is often to unrestrained speech. Unless your speech is electronically recorded, you are not burdened by a record of the communication that can later be summoned up and used to your disadvantage in court proceeding or media report. Your adversary can say you said one thing. You can reply that you said something else. No outside party can be sure. The parties to the conversation themselves, whose memories are fallible, can't even be sure. However, with writing, a copy can remove the doubt. Moreover, for these purposes an electronic message is far more a writing than a conversation. The electronic message can be retrieved. It also may be far harder for the writer to remember where all e-messages have gone than with an originally printed message. The electronic message can be introduced into evidence in a judicial, legislative, or administrative proceeding. Your ability to deny what you said is removed by the printed message. "I didn't really mean that" is a far weaker defense than "I didn't say that."

Electronic communication has further encouraged a contentious communication style. Things that never would be said in a written letter routinely appear in e-messages. As an example, a matter of student government practice on Don's campus turned contentious. Parties on both sides took to circulating

e-mails to campus administrators, faculty, and fellow students defending their position and attacking their opponents. One author referred to a fellow student officer as a "retard" on several occasions. The author did not know that the opponent had a developmentally disabled child and took the casual insult very personally. The relation of the two parties doubtless changed forever. Faculty and administrators also cringed as each new message crossed their computer screens.

The simple advice is to treat the e-message as you would treat a writing. Be accurate and be civil. Don't assume that only you and the recipient will ever share the message. For example, imagine what the release of the file in the Banquet Prayer matter, with the e-mail comments of Mr. Washington and Ms. Kowalski, might inspire. Save your insults or doubtful humor for a phone call or a hallway conversation.

Our colleague Professor Nancy Wanderer capably elaborates on these points in "E-Mail for Lawyers: Cause for Celebration and Concern," *Maine Bar Journal*, Fall 2006 at page 196.

IN-CLASS ROLE-PLAYING EXERCISE

You have agreed to the meeting with the students on the Banquet Committee (and possibly their lawyer). One or two of you will represent the university's Legal Counsel's Office. The remainder of the class will be the students or their representative. Be ready to explain and defend the decision if you represent the Legal Counsel's Office. Be ready to question or explore alternatives if you are the students or their representative.

Chapter Three Terminating Professor Melton

You have completed your first draft of Vice President Carter's letter to the president. How well did you address the following issues?

1. *The Context*. Remember that by university regulation, President McBee is the decision-maker. All commentary from department, department chair, college dean, and the academic vice president is advisory to the president. However, the president may be quite distant from Professor Melton's case (it is possible she hasn't even met him) and may have little familiarity with his academic field. The folks who know Melton best are likely to be in his department.

2. *The Law*. The United States Supreme Court opinion in *Roth* makes clear that Professor Melton needs to establish he has a "property" or "liberty" right in order to trigger the Due Process Clause, that is, require the university to provide him with some "process" before his "property" or "liberty" rights are terminated. At this stage, Melton would probably appreciate a degree of "process" that would require the university to give him a hearing with the right to cross-examine university officials before his employment could be ended. *Roth* also makes clear that the United States Constitution, with rare exceptions, does not create "property" rights. Those must be found in other sources of law – federal statutes or regulations, state statutes or regulations, state common law.

We look to Katahdin law. It does provide some guidance. Katahdin statute indicates that a professor, like Melton, with only two years of employment is not entitled to a tenured (propertied) status. The statute further authorizes the UK Board of Trustees to provide procedural protections for employees in Melton's position. They certainly could provide for extensive hearing procedures before Melton could be terminated. However, they have not. The regulations only require the president to notify Melton in writing about his future employment and then, upon Melton's request, to provide the reasons for the nonrenewal of his contact. No hearing. No witnesses. No cross-examination. No review (e.g., to the Trustees) beyond the president's decision.

This suggests the university needs little reason to end Professor Melton's employment. If asked for a reason, President McBee could explain that UK needed to reduce its personnel budget or that it felt stronger candidates than Melton would be available in next year's hiring pool. However, the majority opinion and Justice Douglas's dissent suggest that there may be certain grounds that the university may NOT use in making or explaining its decision. One of those grounds is the exercise of First Amendment rights.

3. How much law should appear in the vice president's letter? We don't think this is the place to provide a lawyer's brief on the *Roth* case even though it is crucial that the counsel know *Roth* and the state and university law. Instead, we favor a concise paragraph that informs the president of the decision facing her and the "standard of review" that governs. What are the essential points from *Roth* and Katahdin law that guide the president? President McBee is probably quite familiar with this language from renewal decisions in previous years. However, the "boilerplate" (which would appear in every employment

review letter) is useful to make the university's case that it followed proper procedures in reaching its decision.

4. Be careful in your choice of terms. You are "denying reappointment" to Professor Melton. You are not "dismissing" him (the word has a precise meaning in UK regulations). You are certainly not "firing" him even though that is the term Melton and his supporters will probably use.

5. What is the crucial evidence that persuades the vice president that reappointment is not appropriate? You have a considerable factual record before you on paper. The vice president may also have some personal awareness of Melton's record and some personal views on re-employment cases (e.g., a desire to give strong weight to the opinion of the department chair or a strong dislike of faculty who appear to be imprecise in their scholarship). There certainly seems enough evidence to make the case that Melton is less than an academic star. His classroom teaching is not a hit. His published scholarship is unexciting. His attitude toward work is unenthusiastic.

The tricky question is whether to make any mention of Professor Melton's anti-hunting advocacy in print and before the state legislature. This certainly appears to be legitimate citizen advocacy protected by the First Amendment. The written reports from lower levels do raise the issue. A review of all materials (a certainty if Melton decides to litigate his nonrenewal) will present the question: Did Melton get terminated because he was expressing unpopular views? We believe there are sound arguments for and against making reference to the anti-hunting matters. What do you think they might be? Explore that issue further in class.

6. Be precise in summarizing the information you received from the prior reviews. You are welcome to comment on it, but don't change it to strengthen your case. DON'T SAY: "Melton's Chair reports he doesn't give a damn about teaching." That isn't what was said or even a fair paraphrase. You MAY SAY: "Melton's Chair reports his attitude is that this is 'just a job.' Our obligations to our students entitle us to demand more of our faculty."

7. As noted, the UK regulations require a statement of "reasons" *if* Melton asks for them. Your letter will give the president a number of reasons for nonrenewal. You may anticipate that Melton will shortly be asking for them. However, you may want to make clear to the president that she should not express the reasons until Melton asks. Melton may not want to know the reasons why he was "nonreappointed." This may make it easier for him in seeking

other positions to explain his time at the University of Katahdin. "They didn't tell me, but I've heard next year's budget had been cut substantially" sounds better to a prospective next employer than "They told me my teaching was below department averages and my scholarship was unimpressive."

8. You should examine how strongly or weakly you have expressed the opinion of the senior academic officer of the university. The final decision is the president's, but Vice President Carter's opinion is likely to be highly important to the president.

SOME SELF-EDITING SUGGESTIONS

We have discussed the need for self-editing. Often you will be the last reviewer of the document before it reaches its audience(s). You want the writing to be as clear and concise as possible. Take two or more paragraphs of your draft of the Melton letter. Run those paragraphs through the following ten tests.

1. Delete all adjectives and adverbs. Reread the sentence. Reinsert only those adjectives and adverbs that are necessary.

2. Examine any sentence of more than twenty words. Is the meaning clear? Would deletions of words and phrases help? Would two sentences be better than one?

3. Check all legal terms. Are they necessary for accuracy and clarity? If not, use simple English.

4. Check all parallel "and" phrasings (e.g., "The court ruled and ordered . . ."). Are both necessary?

5. Review all references to "he," "she," "it," or "they." Is it clear who or what is being identified? If not, return to the more precise term (e.g., "Smith," "the Cadillac's driver").

6. Compare the number of active and passive sentences. Too many passive sentences detract from the vigor of your writing.

7. Review all qualifying phrases and words (e.g., "with some exceptions, the rule is . . ."; "The opinion seemed to say . . ."). Is there really ambiguity or are you being too cautious?

8. Avoid phrases that prolong sentences without adding to their meaning. For example, "Officially defined, defamation is a type of action in the general field

of torts involving, as it were, harm to reputation." Why not "Defamation is a tort action for harm to reputation"?

9. Reexamine paragraph structure. The first sentence should introduce the paragraph or summarize its contents.

10. Spelling. Any time that you would not give fifty-to-one odds that your spelling is correct, use the dictionary.

EVALUATE THESE FIRST-DRAFT EXCERPTS OF THE MELTON TERMINATION LETTER

1. The University of Katahdin has certain expectations of all faculty. They include, as most important, student evaluations of professors' teaching ability. We also look for a certain amount of scholastic publication or work. Lastly, a more intangible element is that all teachers approach their interactions with students with some amount of enthusiasm.

2. I have solicited advice from the university's legal counsel and have taken note of their recommendations for properly denying reappointment to Melton.

3. Although this policy provides for due process for faculty members, it may cause the university to be vulnerable to unnecessary litigation.

4. Professor Melton's community activism risks becoming another impediment to the quality of his teaching. I have concerns about the future effect his activism might have on his classroom performance. He has been arrested at least once for interfering with lawful hunting activity. Should he continue to seek arrest in an effort to bear witness to his personal beliefs, he may prove physically unable to teach.

5. It would be in the best interest of both the university and Melton's career for him to move on next year.

6. The university acknowledges Professor Melton's strength and passion for the community. However, unfortunately, under the UK's policy on employment, the university is not allowed to take these great credentials into account during the decision-making process.

IN-CLASS ROLE-PLAYING EXERCISES

1. The vice president receives a call from the chairperson of the Faculty Appointments Committee at a university in a neighboring state. He says, "We are considering Professor Herman Melton for a position in our Sociology Department. Professor Melton tells us he is considering leaving the University of

Katahdin because a reduction in legislative funding is starving the Sociology Department and making it difficult for him to do his research work. Is that correct?" The vice president apologizes to the chairperson for "an urgent meeting starting in five minutes" and sets a time for a return call. She immediately calls the counsel's office for advice. What do you tell her?

2. The vice president receives a phone call from the education reporter from the major Katahdin City daily newspaper. The reporter has a reputation for accuracy in reporting and doggedness in searching for facts. The reporter asks, "My sources tell me that the administration is unhappy with Herman Melton and plans to 'dump him.' We'd like your comment before we run our story." Once again, you stall for time and consult with the university counsel's office.

Almost certainly, the university will be reactive in this case. Legal and ethical standards regarding personnel matters would stop the campus from releasing a "Professor Melton terminated" news release to the press and electronic media. Even if those standards would not apply, the UK administration most probably doesn't want to make a public splash. Melton is gone and the less the community knows about it the better.

However, here the university's hand is being forced. The reporter's question ("plans to 'dump him'") suggests that someone, possibly Melton himself, has tipped off the press. A wide variety of motives can be imagined. Quite probably, the university spokesperson or senior official would have a standard response: "We don't talk about personnel decisions." However, that puts the university in the position of "refusing comment" or "failing to return our phone calls" when the story comes out. Particularly, if the rest of the story is favorable to Professor Melton, "no comment" may equal "bad press" for the university.

You should recognize that lawyers and journalists worship different gods. The lawyer may feel that personnel decisions are sacred and are not to be discussed with outsiders (the entire community if the press reports the story). This protects the interests of both the employer and the employee. The lawyer may also believe that conversations between attorney and client should be protected absolutely from public disclosure. Imagine that the academic vice president's letter to university counsel has been disclosed to a reporter by a whistleblower in a university office.

Those values are not likely to interest the journalist. She will contend that her obligation is to disclose the truth (or what appears to be the truth)

to the citizens of the community. The citizens can both decide whether this is newsworthy and whether it is true. Is one profession right and the other wrong? Not in any absolute sense. Each feels it is serving public goals in the values it defends.

With those thoughts in mind, craft your media response in the Melton termination matter.

Chapter Five Mr. Blaustein's Gift

As you review your first draft of the Development Office's letter to the Trustees, consider the following matters.

1. The most obvious objective of your letter is to persuade the Board of Trustees to accept the gift that will create the Blaustein Prize. Your initial reaction may be: "Well, of course, they will accept $500,000. How hard can that be?" Not so fast! Charitable organizations, including universities, can turn down gifts for a variety of reasons. The gift may not be consistent with the mission of the institution. The institution may not wish to link the donor's name with its mission. Would your university's business school be eager to begin the Kenneth Lay Program in Business Ethics? The gift may require scarce institutional dollars for maintenance and renovation. In addition, in the UK's case, the terms of the gift may run afoul of the school policy on nondiscrimination. You need a well-considered and persuasive advocacy document. An unstated purpose of your letter to the Trustees is to brag about the accomplishments of your office. This is the happy case of the potential donor contacting the university. Nevertheless, you can take credit for working with Mr. Blaustein to develop what you believe is a very attractive gift for the university. You don't have to spell this out in the letter. Nevertheless, you would want the members of the Board of Trustees and your bosses in the university to say, "Well done, Development Office."

2. A second audience for the letter is Mr. Blaustein. We would hope that Mr. Blaustein would regard the letter as a proper recognition of his generosity. This is only common courtesy on your part. It also recognizes the development officer's mantra that the best prospect for a future gift is someone who has already given. Some donors genuinely seek anonymity in their giving. This may be explained by personal modesty or by a desire to avoid letting other charities know of their wealth and generosity. However, our experience is that most

donors combine a desire to do good with a wish to be recognized for their generosity.

Mr. Blaustein seems quite comfortable to have his name associated with the university. The letter should provide a concise description of Mr. Blaustein, the gift, and his charitable objectives. If you have doubts about any matters (e.g., "One of Mr. Blaustein's more creative ventures was helping launch Iran's nuclear research program"), check with the donor or omit the item.

3. The difficult issue is the nondiscrimination provision. You don't want to create problems that may not be there. However, knowing that several Trustees closely monitor gifts for violations of the UK Regulation on Discrimination, we think you are best to be proactive. You should convey the following message: The Development Office is very sensitive to the nondiscrimination regulation and supports it fully. Here is why we believe that the Blaustein gift does not pose a problem.

THE HIERARCHY OF LEGAL AUTHORITY

In your assignments so far, you have encountered different forms of law. These include constitutional provisions (the religion clauses and the due process clause of the United States Constitution and the provision of the Katahdin Constitution that establishes the University of Katahdin), interpretations of the Constitution by the United States Supreme Court (*Lee*, *Santa Fe*, and *Roth*), provisions of Katahdin statutes (the authorization to create a faculty tenure system), and administrative regulations (the UK tenure regulations, the nondiscrimination provision in Blaustein, or the regulations on the use of UK facilities). Often several provisions or opinions may be involved in a single problem.

During our years of teaching, we have been reminded that law school does not always do a good job of explaining the hierarchies that determine which legal authority will control in a matter. Our attempt to provide guidelines follows.

It is useful to remember that all three branches of the state and national government are lawmakers. Legislatures (Congress and the state legislatures) write statutes. Officers of the Executive Branch (serving the president or a state governor) write regulations pursuant to a delegation of power from the legislature or pursuant to their independent authority. Courts (state and federal) both interpret laws made by the other branches and make law on their own as they create the common law of many fields (typically the work of state courts) and do the equivalent in areas where a single constitutional or statutory

provision (e.g., "due process of law" or "conspiracy in restraint of trade") is hardly self-explanatory.

Which laws control? Let us assume that we are operating using solely federal or state law on a matter. The highest authority is the Constitution of the United States or the State of Katahdin. The Constitution would override contrary legislation, administrative regulation, or individual action of a government official. Where the constitutional provision is clear, it may not be necessary to resort to a court to explain whether the constitutional provision applies to our factual situation. For example, if the Congress passed a law forbidding the exercise of the Lutheran faith, the law would clearly violate the First Amendment. Similarly, if the Katahdin Legislature abolished the University of Katahdin, the Katahdin Constitutional provision establishing the university would invalidate the work of the Legislature. Where the application of the constitutional provision is not so clear, we may need a decision like *Lee*, *Santa Fe*, or *Roth* to establish what the Constitution means.

The United States Constitution is specific about the powers given to the Congress to enact laws. Article I, Section 8 sets out the powers of Congress and the additional "necessary and proper" powers to carry out the specified powers. As constitutional law makes clear, many of those delegations are not self-explanatory. Recall the number of cases explaining what "interstate commerce" was or was not.

State constitutions generally do not follow the federal model. Typically, the state constitution gives all "legislative power" to the State Legislature without explaining what that is. In general, the State Legislature has all powers over matters within the state that do not infringe on powers of the federal government or that do not violate specific provisions of the state or federal constitutions, typically ones protecting individual rights or defining the authority of other units of government (e.g., local governments, the state university).

Here, it is worth emphasizing that the Legislature also has power over the common law or other matters that may typically been thought the province of the courts. As an example, the Rule Against Perpetuities in property or doctrines of medical negligence were originally created by the courts as the laws of property and torts evolved case by case in English and American courts. Is the Legislature free to intervene and change a 500-year-old doctrine of the common law? Yes, it is, and it can do it in a rushed piece of legislation at session's end that has barely been read by most members of the Legislature. In essence, the wisdom and deliberation of the most scholarly jurists can be overridden

by the legislator whose garbled answer about the Rule Against Perpetuities barely got her a passing grade on her property exam. If the court is unhappy about the change of "its" law, its basis for challenge is that the Legislature has violated the Constitution in what it has done. Moreover, in general, federal and state constitutions don't mandate public policy choices. That is the work of the Legislature.

The third level of law is the administrative regulation. Typically, the Legislature has enacted a statute to advance some aspect of public policy (cleaner air, healthier workplaces, more competitive business conditions). The Legislature normally writes in broad terms. Who is responsible for seeing that a law to ensure "healthy working conditions" means that Joe's print shop can't use paper cutters that lack protective devices? The normal legislative approach is to delegate that authority to a specialized agency that either already exists or is created by the new legislation. The statute normally includes language like "The Workplace Safety Commission shall have the power to draft appropriate regulations to implement this legislation." That is delegated legislation. The Legislature passes on its power to a specialized agency. That specialized agency can then draft and implement regulations that may be precise to the extreme. "No workplace may use a paper cutter without a protective device that prevents the worker's hands from coming within four inches of the cutter's blade."

Several factors explain the desire for delegation. First is legislative time. Imagine if the Legislature needed to draft every provision like the "four-inch rule." Sessions would be endless. Second is expertise. The average legislator may have only a modest understanding of the workings of a print shop and its equipment. He or she either would need a fast education on the subject or would have to rely on other legislators, staff, or lobbyists to explain what was going on. Far better to turn the work over to professionals whose full-time job is to understand workplace safety issues. Third, legislators may be most comfortable working in general terms and leaving hard specifics to the professionals in administrative agencies. The legislator, conscious of the next election, may be happy to be on the side of clean air that is reflected in a general legislative enactment. He or she may be very reluctant to write the regulation that forces a local employer to close down to prevent an excessive release of air pollutants. The legislator who rails against "bureaucrats gone mad" needs to reflect that the Legislature could have addressed the precise issue that caused the factory closure.

Railing against "bureaucrats" also extends to the view that regulations aren't really "law." If the regulation (any of our UK regulations, for example) is authorized by a specific or general grant of power to the administrator or agency, is properly implemented as a matter of procedure (including matters such as appropriate public notice), and does not violate the Constitution, it is law. Executive agencies and the courts will enforce it as such.

A final level of law is the acts of persons in authority, even if they proceed without reliance on specific regulations. Return to President McBee's role in the Banquet Prayer matter. Neither Katahdin statute nor a regulation of the UK tells her what to do about the request. However, her broad duties to lead the university give her jurisdiction over this decision because it involves a university-sponsored function taking place on university property. If there were not a constitutional objection to the practice, she would be free to support or oppose the prayer.

Note that administrative regulations will govern individual actions even if the individual actor has the power to enact and change the regulations. One of the most common errors of executives in either government or the private sector is a failure to follow their own regulations. If the matter is challenged in court or an administrative agency, the action may be invalidated and the executive told to "follow your own rules."

The previous sections indicate the hierarchy of laws. Constitutions control statutes, administrative regulations, and individual decisions. Statutes control administrative regulations and individual decisions. Administrative regulations control individual decisions. Judicial precedents may either interpret any of the other sources of law or define common law rules to govern the area. Be ready to run through the hierarchy as you assess which provisions of law govern your situation.

A final thought on the hierarchy. From a legal perspective, the lawyer will always be happier relying on a constitutional provision than a statute than an administrative regulation. In working in the real world, however, your most persuasive argument may come from the local rulebook or set of regulations. For example, you may want to persuade President McBee that she should not allow the prayer at the Athletic Banquet. Which line of argument is more likely to be effective? "President McBee, the First Amendment to the United States Constitution would regard this as an impermissible establishment of religion," or "President McBee, UK regulation 14.27, enacted by your immediate bosses, the Trustees of the university, says: 'No prayer shall be allowed at any university-sponsored function.'"

EVALUATE THESE FIRST-DRAFT EXTRACTS FROM THE BLAUSTEIN LETTER

1. Mr. Blaustein is an expert in nuclear engineering. Through his work designing nuclear plants, he has amassed a considerable amount of personal wealth.

2. Although at first glance Mr. Blaustein's wishes and the UK Regulations seem incompatible, I believe that it is possible to accept the generous gift and also uphold the Regulations.

3. This regulation was adopted in the 1960s when the civil rights movement caused discomfort for many donors and the university.

4. As UK Development Director, it is my duty to present all proposed private gifts to the Board for consideration.

5. If the university is unable to accept Mr. Blaustein's terms, the university should accommodate his wishes as completely as possible.

6. UK Regulation 26–18 requires the Board of Trustees to accept all gifts offered.

IN-CLASS ROLE-PLAYING EXERCISES

1. In your role as Legal Counsel to the Development Office, you have been asked to meet with the Development Officers and Mr. Blaustein. You have reviewed the UK Regulations on Nondiscrimination and the File Memoranda on prior interpretations of the Regulation. Be prepared to discuss the Regulations and Mr. Blaustein's wishes in a way that can preserve the gift and satisfy any reasonable concerns about a violation of the Regulation.

2. From past practice, you know that it is desirable not to surprise the Board of Trustees. You can envision a worst-case scenario if the Trustees first encounter the Blaustein gift at their meeting. Some Trustees question Mr. Blaustein's motives in public meeting. This controversy receives significant media coverage. Mr. Blaustein then angrily withdraws his gift from UK and offers it to your regional rival in the nuclear engineering field.

You ask for, and are granted, a private meeting with two key members of the Trustees' Committee on Gifts and Grants. Both Trustees are among the strongest supporters of the nondiscrimination policy. Discuss the Blaustein gift with the Trustees. Try to reach an agreement that will satisfy any concerns they may have about the gift. These Trustees can then be your advocates before the full Board.

CHAPTER SEVEN COUNSELING DEAN COVELLI

This may seem the least "legal" of our problems. We have no constitutional provision to interpret. No binding regulations guide the actions of the university and define the rights of the party opposing it. Yet there is a legal backdrop to the problem and the potential for legal consequences if matters are handled poorly. Among the issues that should be addressed:

1. What is your strategic objective in writing the letter? Do you regard Sharon as a superb, hard-to-replace employee who has a minor blind spot? Alternatively, does her failure to respond to your "friendly chat" about the poker games indicate that her virtues are overcome by a major flaw? That decision should guide your entire approach.

2. A crucial aspect of that choice of approach turns on the question: What is Sharon doing that is wrong? Do you object to gambling for money in general? Is Sharon abusing a power relationship? Is she playing favorites in a way that a student affairs administrator should not do? Does the conduct risk bad, even if unfair, publicity? All or some of the above? You want to be very careful that you don't set out an objection or two. Sharon corrects to meet your objections. You then still remain unhappy with the poker games.

3. Do you start with the carrot or the stick? Some praise of Sharon's excellent work is appropriate. Possibly, another recent letter has already done this: "You know from last week's performance review letter how much I think of your work." However, too much praise can hide the degree of your concern. Conversely, you should recognize that human beings tend to be much more alert to hearing criticism than praise. All of your kind words can be lost in one negative sentence.

4. What use, if any, do you make of the state gambling laws and the Staff Handbook? The first is clearly substantive criminal law. Does it clearly exempt Sharon's games from any possible criminal penalty? Or is there some room for unease even if you suspect a prosecutor would not prosecute the case? Then there's the Handbook. By its terms, it is not legally binding. Even if it were, what exactly is its guidance? If you decide to quote it, use the whole quote. Sharon is very likely to notice your omission of the language about her judgment being the best guide.

5. How insistent are you about change? Are you ordering, strongly suggesting, or leaving the ultimate decision in Sharon's hands now that you have made your formal written expression of concern?

6. What happens to the letter? The most serious sanction would be to place the letter in Sharon's official personnel file. Once there, it can have a variety of later harmful consequences for Sharon in promotions, pay increases, eligibility for awards, or recommendations for other positions. A less formal disposition of the letter ("I'll keep this in my files") may provide a record of the disagreement with fewer serious consequences. Alternatively, are there advantages of not making clear to Sharon what you propose to do with the letter?

7. Does the letter make clear what Sharon is expected to do (e.g., stop the games immediately, report back to you for further discussion)? Again, is it useful to leave uncertainty in Sharon's mind?

8. A final, minor point. What is the appropriate salutation to the letter? "Dear Sharon" is the most casual and probably reflects how you address her in office conversation. "Dear Ms. Covelli" helps express the seriousness of your concern. "Dear Assistant Dean Covelli" sounds positively icy.

WRITING FOR THE LAYPERSON

A colleague of ours often remarked on the tendency of lawyers to refer to the rest of the world as "nonlawyers." He wondered whether accountants or plumbers divided the world into "nonaccountants" or "nonplumbers."

Lawyerly arrogance aside, it is useful to remember that legal training imparts habits of mind that do show up in legal writing. If your primary audience for a writing is a judge or another lawyer, you can probably assume that those are shared habits.

However, as you have already seen, often the subject of your transactional writing will be a "nonlawyer." The Covelli problem illustrates this point. The lawyer is assisting a nonlawyer professional in writing to another nonlawyer professional. Let's review points worth remembering when writing for the layperson.

1. Not all laypersons are alike. We have known nonlaw-trained government officials whose legal knowledge in their particular realm is profound. Thirty years of work as the Motor Vehicle Department expert on license suspensions may give the government official a sophistication that far surpasses that of the

lawyer who has just encountered the topic. Be particularly cautious when the official says, "Of course, you are the legal expert." In the Sharon Covelli matter, the Dean of Students may have twenty years of experience in working with the legalities of university personnel policies. At the other extreme, the primary audience for your writing may have limited education and limited exposure to the subject matter being discussed. The mere thought of contact with a lawyer may induce fear, confusion, or resentment. Lawyers need to remember that most of the population lives their lives with only rare contact with lawyers. Think carefully about the legal sophistication of your audience.

2. In general, the layperson wants "yes" or "no" answers. He or she is being asked to do or not do something. Legal issues are a part of that decision, possibly the major part. Where you can provide the "yes" or "no," "go" or "No Go" answer, you are likely to satisfy the client, even if he or she doesn't like your definitive answer. The ambiguous answer is tougher. "Counselor, what does 'yes, but' mean?" You should be able to explain the reasons for your ambiguity. You should also be able to spell out the consequences of different responses: "Client, you could move ahead without the government permit, but if the government disagrees with your interpretation, likely you will face a criminal prosecution. I think you are much safer applying for the permit."

3. Be attentive to your essential message. You want to convey it clearly. You may want to repeat it several times. The Athletic Banquet prayer situation provided a good illustration. Your message was that the prayer would be highly likely to be held unconstitutional if challenged in court. Yet your audience (the president) may have hoped for the opposite answer. Stating your conclusion at the start, in the middle, and at the end of your writing may be useful. The old maxim in military teaching is pertinent: "Tell them what you are going to tell them; tell them; tell them what you have told them." The recipient may still miss your message through stupidity or stubbornness, but it will be hard to fault your writing.

4. As the prior section suggests, people will hear what they want to hear. In writing to Dean Covelli, you want to be careful that the praise ("Sharon, you are the best Assistant Dean we have had in the last decade") doesn't mask the concern about the card games. You may want to use some "highlighters." "In conclusion, I want to emphasize the essential point – any gambling with students is wrong and can't be tolerated."

5. A corollary of point four is that while people hear what they want to hear, they can be very attentive to anything that sounds like criticism. Don recalls a letter reviewing a faculty member's performance during the year. Student and colleague reports praised the professor's teaching. The professor was a fine colleague and participant in university work. The professor had several capable works published during the year. Don thought his letter had mentioned all those things. He did, however, add a sentence that he worried that the professor's publications were trying to cover too broad an area and that depth was being sacrificed for breadth. The professor reacted as though Don had subtly signaled that she would be fired at the next opportunity. It took several lengthy conversations to repair that damage.

6. A crucial part of thinking strategically is to understand the goal(s) of the recipient of your writing. For example, in the Blaustein gift letter, you need to appreciate Mr. Blaustein's passion for revitalizing the field to which he has dedicated his career. That may help you craft the response to the allegation that his gift would violate the university nondiscrimination policy. Try to put yourself in the recipient's shoes.

7. Always in your writing for the layperson, try your best to translate legal words and phrases into language that the layperson will understand. Often, it is useful to explain the objective of the law: "The law punishes perjury because it is highly important to the workings of the court system that people will testify accurately to the facts within their knowledge."

SOME FIRST-DRAFT APPROACHES TO THE COVELLI LETTER

1. As the Dean of Student Affairs at UK, I like to touch base with my assistant deans from time to time to offer encouragement and guidance. I also believe it is important to acknowledge when a job is being well done.

2. The advice of the handbook is not legally binding, and you have broken no rules. The handbook, though, does highlight the problem in this situation. It is a problem of perception.

3. I admire you for opening your home up to students. I have no doubt that the poker game is a good way to stay involved with the student leaders.

4. Finally, I would like to inform you that this incident has not affected the university's overall impression of your job performance during your first six months as the Assistant Dean for Student Governance.

5. Although I am assured that there is no credence to any of the students' complaints, the fact is that some students feel left out.

6. Although I understand the games are part of bonding with the students, I am afraid the games will ultimately be counterproductive to your efforts. . . . While I am sure that you would not intentionally exclude a student, perception is sometimes greater than reality.

Chapter Nine Advising Professor Melton

How strategically were you thinking in your first draft? We discussed in Chapter Nine the university's strategic interests in the Melton matter. What are Professor Melton's strategic interests?

Quite obviously, that depends on Professor Melton's thoughts on professional and personal matters. Professor Melton may love his academic life and enjoy the University of Katahdin despite some tensions with colleagues. He may feel that he is playing a significant role statewide in a cause that is dear to his heart. Under those circumstances, the termination of his UK employment would be devastating. More materially, Professor Melton may have scouted the job market and found the pickings are slim. This may highlight the importance of money in any resolution of the situation. Quite possibly, your assessment of Professor Melton and his own confidential self-assessment is that he would be delighted to leave the university if only he can do so without financial or career damage. Those factors will help shape the strategies you want to lay out to Professor Melton.

What are the matters that the letter of advice to Professor Melton should address?

1. You should make clear that there are two legal theories in play. Success on either one could empower Professor Melton. The first is the constitutional procedural due process issue. Government, including the University of Katahdin, cannot deprive Professor Melton of "liberty" or "property" without providing "due process of law." You and Professor Melton will likely argue that "due process" would include the opportunity for a hearing with examination and cross-examination of witnesses, appropriate appellate review, and so on. It doesn't compel the university to rehire Professor Melton. However, it does give

him an opportunity to present his case for retention. It may also disclose the UK's real reasons for his termination.

2. Unfortunately, the *Roth* decision is a major impediment. The Supreme Court emphasized that "liberty" rights aren't implicated in the university's action. "Property" rights are to be defined by Katahdin law. That law (statute and UK regulation) gives very limited rights to one in Professor Melton's position. The facts are uncontradicted that the university has complied with Katahdin law in its decision not to renew Professor Melton's contract.

If that were Professor Melton's only claim, your letter of advice to him would probably need to conclude: "I see no plausible legal remedy for you." That might not mean total abandonment of the case. The lawyer may be useful in negotiating favorable terms of termination for Professor Melton (e.g., his hiring for some adjunct teaching or a favorable letter of recommendation to other employers). However, the university would be negotiating out of collegiality or convenience rather than because it is at risk of losing a lawsuit.

3. The news for Professor Melton isn't that bleak. His second legal theory relies on the First Amendment promise that government shall not infringe on rights of free speech. Suggestions in *Roth* (see the Douglas dissent) and direct guidance in *Doyle* make the point: Even if Professor Melton can be terminated for minimal reasons that need not be further justified, he CANNOT be terminated for exercise of his First Amendment rights. Your evidence gathering and the university's paper record provide some support for this argument. Your letter of advice to Professor Melton should spell out the strongest case you could make to support this point.

4. Are you a clear winner if Professor Melton decides to take the case to court? *Doyle* should indicate that you are not. We are in an interesting situation. The university has permissible reasons to terminate Melton. Those are stated in the president's letters to him. However, the university also may have relied on impermissible reasons (the expression of his anti-hunting views) in reaching the decision. *Doyle* provides some guidance in this situation. You may be already eager to get university witnesses under oath at deposition or trial to ask them some hard questions.

5. Are you ready to file a complaint that will begin *Melton v. The University of Katahdin*? You may have sufficient evidence to present a plausible legal case for your client. However, you should think hard about whether the matter should stay in the prelitigation negotiation stage somewhat longer.

6. Unlike other documents you have drafted, more may be better than less in this letter. Professor Melton is intensively involved in the proceedings. He is likely quite sophisticated about university practices. He may have had, or have acquired since his interests were at stake, some knowledge of Supreme Court law in this field. The advice letter that leaves out significant facts or law may invite his response: "Yes, but what about . . ."

7. Go back to the discussion of the Opinion Letter and follow the steps. We support the frequent use of pertinent quotations from the record rather than paraphrases. That is more accurate. It also takes some of the burden off you. "I'm not saying this, Professor Melton. That is exactly what your Department Chair said in writing. And, that will likely appear in open court testimony if we litigate."

8. Then, you should provide your summary. Even as a sophisticated and legally interested client, Professor Melton wants to know, "Do I get my job back?" Very often the client will push you for the "Yes" or "No" answer. Much of your lawyer's training prods you to always want to respond "Maybe." Your effectiveness will depend on providing "Yes" or "No" answers unless the facts and law clearly call for a "Maybe."

For example, consider the procedural due process question. It is possible the Supreme Court is ready to overrule or modify the *Roth* decision in a way that could give Professor Melton the hearing and witness examination that he wants. It is also possible that a trial court could interpret the UK regulation to require a more detailed explanation of what exactly was wrong with Professor Melton's teaching and his scholarship. Does that persuade you to a "Maybe" answer?

9. Next Steps. We think your letter should suggest a next, and possibly final, face-to-face meeting. The letter provides a launching pad for that meeting. Professor Melton will have read and reread your advice. You may need to temper his inclination to accept the favorable portions of your letter and ignore the unfavorable ones. He may raise new facts or issues that may change your advice. Most probably, he is ready for you to push him to: "What Do I Do Next?" The choices: Terminate, negotiate, or litigate. Be ready to offer your argument to support one of the three.

FIRST-DRAFT EXCERPTS FROM THE MELTON CLIENT LETTER

1. As I stated earlier, UK has broad discretion in these decisions and can point to several permissible reasons for your nonretention, but I feel we have enough evidence indicating impermissible First Amendment violations to confront them.
2. I hope you do not see this letter as harsh, but in my opinion, your situation is unfortunate, but consists of no legal merit.
3. Unfortunately, most faculty in the Sociology Department have refused to speak to me about your review, though two persons acknowledged the tension between you and Henrici. However, neither of them has any desire to testify on your behalf, should you desire to go to trial. There is the possibility of subpoenaing them, but unwilling witnesses are not strong witnesses.
4. First, under the Fourteenth Amendment the university must provide you with due process when terminating your employment.
5. The UK's regulations appear to have complied fully with *Roth*.

MOVING FROM GOOD TO MEMORABLE STRATEGIC LEGAL WRITING

We have encouraged legal writing that accomplishes its strategic missions. There need be nothing memorable about the writing for it to do its job in exemplary fashion. In fact, that is all that the author may wish or need. Recall the observation about the athletic umpire or referee, about whom, when the contest ends, people should have to ask: "Who was the referee?" His or her performance has not gotten in the way of the game.

By the same token, the lawyer needs to be cautious when she or he becomes the story rather than the client. There will be situations in which the "celebrity lawyer" is hired as much for reputation as actual performance. The client very clearly wants the lawyer's identity known to judge, opposing counsel, jury, the media, and clients. The lawyer's style orally or in writing is a crucial part of that persona. If you have reached that stature, this book is not for you. As a beginning lawyer, you want to be very careful that elements of your character or personality do not reflect adversely on your client. Your writing offers one way of identifying you.

You need to remember that you are representing a client in most of your writing. That client could be facing a life-changing crisis in the legal matter

involved. You need to be careful about the use of colorful or memorable language even if the grammar is correct and the legal argument soundly presented.

As an example, you are representing a citizen who alleges that he was roughed up by a local police officer in a traffic stop. Your client has modest physical injuries and a witness or two who are ready to testify that the police officer made the first physical contact. That statement of the case seems rather dry and lacking in emotional appeal. So, you include in your letter or motion the phrase: "This outrageous behavior bespeaks Nazi Germany and the Gestapo rather than the streets of an American city." Is this vivid? Most probably. Is it strategic? Most probably not. The comparison is certainly excessive. You are equating an unfortunate, but predictable, citizen-police confrontation with one of history's worst episodes of genocide. Furthermore, references to Hitler, Nazis, and the Gestapo may have become so overused that your expression seems trite rather than vivid. Lastly, imagine the impact of your language on a judge or opposing counsel who had family members slaughtered by the Nazi reign of terror. You may have prejudiced your client's case with a poorly chosen analogy.

You should also remember that lawyers, like other professionals, can take a cynical view of the human condition. Humor is one way to respond. However, remember that the joke among lawyers may be the most important thing going on in the life of the client. The experienced federal judge for whom Don clerked once described a new judicial clerk who wrote his summary of the facts of a case in the form of a melodrama complete with "Ma" and "Pa" type characters. The judge concluded his summary: "After I fired the clerk . . ." Message received by the young clerks.

There can be ample reasons to restrain a literary flair or avoid a vivid image. However, there can also be excellent reasons for the well-considered writing that moves from the competent to the memorable.

Consider what we regard as examples of superb writing. We offer four examples, two written by judges and two by professional writers. See how you react to the paragraphs that follow. What examples of superb writing would you offer?

We start with a passage by Pulitzer Prize–winning historian Bruce Catton in his study of the Union Army of the Potomac during the Civil War. Catton is nearing the completion of his account of the Battle of Antietam in September 1862. The battle ended Confederate General Lee's first invasion of Northern Territory. It also still stands as the single bloodiest day in American combat history.

After horrendous losses on both sides, the Union forces reached a position from which they threatened to destroy the Confederate Army. It did not happen and Catton explains why:

> What had saved [the Confederates] was the arrival from Harper's Ferry of A. P. Hill and the leading brigades of his division, which was one of the most famous organizations in the whole Confederate Army. These soldiers came upon the field at precisely the right time and place, after a terrible seventeen-mile forced march from Harper's Ferry, in which exhausted men fell out of ranks by the score and Hill himself urged laggards on with the point of his sword. A more careful and methodical general (any one of the Federal corps commanders for instance) would have set a slower pace, keeping his men together, mindful of the certainty of excessive straggling on too strenuous a march – and would have arrived, with all his men present or accounted for, a couple of hours too late to do any good. Hill drove his men so cruelly that he left fully half his division panting along the roadside – but he got up those who were left in time to stave off disaster and keep the war going for two and one-half more years.

Our second example comes from the opening paragraphs of Ernest Hemingway's short story, "Big Two-Hearted River, Part I." This is young Hemingway, no older than most of you reading this book. In an eventful life he has already worked as a journalist and been wounded in World War I. Here, his alter ego Nick Adams is doing nothing more consequent than going fishing. See how Hemingway sets the scene:

> The train went on up the track out of sight, around one of the hills of burnt timber. Nick sat down on the bundle of canvas and bedding the baggage man had pitched out of the door of the baggage car. There was no town, nothing but the rails and the burned-over country. The thirteen saloons that had lined the one street of Seney had not left a trace. The foundations of the Mansion House hotel stuck up above the ground. The stone was chipped and split by the fire. It was all that was left of the town of Seney. Even the surface had been burned off the ground.
>
> Nick looked at the burned-over stretch of hillside, where he had expected to find the scattered houses of the town and then walked down the railroad track to the bridge over the river. The river was there. It swirled against the log spiles of the bridge. Nick looked down into the clear, brown water, colored from the pebbly bottom, and watched the trout keeping themselves steady in the current with wavering fins. As he watched them they changed their positions by quick angles, only to hold steady in the fast water again. Nick watched them for a long time.

Our third and fourth examples are from United States Supreme Court opinions. In both cases, these are not the opinions of the Court in the case. That frees the author from the burden of having to craft language that will stand as precedent. However, both Justice Robert Jackson and Justice Antonin Scalia would rank in the top ten of the Supreme Court's outstanding writers.

A colleague pointed out that Justice Jackson was such an effective writer because he was the last justice who was not law school educated. Rather, Jackson was admitted to the Bar of the State of New York after serving an appropriate law office apprenticeship. We leave it to your judgment whether Jackson's facility with a phrase is due to his having escaped three years of the paper chase of law school.

Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) is a utility rate case, normally not a subject that inspires scintillating judicial prose. Justice Jackson, writing for himself, identifies the difficulty of determining what prices (rates) can be charged for natural resources like natural gas.

> The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own.

Forty years later, Justice Antonin Scalia crafted an opinion in a case no more exciting on its facts than *Hope Natural Gas. Morrison v. Olson* involved the balance of powers between the Congress and the Executive Branch. Specifically, the Court was asked to decide under what circumstances Congress could create special prosecutors to monitor wrongdoing in the Executive Branch, which normally has the power to determine when violations of the criminal law should be prosecuted. Justice Scalia examined the congressional intrusion on the powers of the president and attorney general.

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish – so that 'a gradual concentration of the several powers in the same department' . . . can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."*Morrison v. Olson*, 487 U.S. 654 (1988) (J. Scalia dissenting).

What are the virtues of these four very different passages? First, they are clear. You don't have to wonder at the author's meaning. Ideas move along logically.

Second, there are few wasted words. I have difficulty removing words or phrases from the passages without changing meaning and usually harming it. This is true despite the fact that Catton's passage uses complex sentences that would violate our advice on brevity of sentences. Hemingway, by contrast, rarely uses a word of over eight letters and has sentences as short as four or five words.

Third, the words that are used paint a picture. You can imagine preparing to fish on the Big Two Hearted River or exploring for a natural gas field from the descriptions provided by Hemingway and Jackson.

Fourth, the authors don't overstate. Writing about war can inspire purple prose that misses reality. Catton realizes there is no need for flowery phrases. He is describing one of history's bloodiest battles and the one that gave rise to Lincoln's Emancipation Proclamation. He reports the facts with a crushing summation of how timing can be everything in warfare. He ends with the stark reminder of what resulted from General Hill's superb military leadership. Similarly, Justice Scalia suggests the larger issue of governmental power that resides in this rather obscure challenge to legislation.

Fifth, when the authors want to create a memorable phrase, they do so. "This wolf comes as a wolf." "The wit of Midas and the wealth of man." "Even the surface had been burned off the ground." "Hill himself urged the laggards on with the point of his sword." As you prepare your writings, consider whether there is a vivid phrasing that can make your meaning even clearer and leave the reader persuaded by your analogy or turn of phrase.

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