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Presentation on

ADVANCED LEGAL WRITING AND EDITING:
Beyond Logic to Coherence and Strength

By

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Of

LAWriters

POWERFUL COMMUNICATION THROUGH SUPERIOR WRITING

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In Animal Crackers, Groucho Marx defined the issue by example:

Honorable Charles D. Hungerdunger
c/o Hungerdunger, Hungerdunger & McCormick

Gentlemen?

In re yours of the 5th inst. yours to hand and in reply, I wish to state that the judiciary expenditures of this year, i.e., has not exceeded the fiscal year -- brackets -- this procedure is problematic and with nullification will give us a subsidiary indictment and priority. Quotes unquotes and quotes. Hoping this finds you, I beg to remain as of June 9th, Cordially, Respectfully, Regards.

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THINKING LIKE A WRITER:
THE PRINCIPLES

To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers — "the law" — is in fact quite complex. Then — perhaps in law school, but usually much later — we learn that, to communicate about the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of all that complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.

In the first stage, as we learn to "think like a lawyer," we worry mostly about logic and precision — about having exactly the right information or ideas and putting them in exactly the right order. In the second stage, we realize that logic and precision are not enough. To "think like a writer," we also have to make our logic easy for our readers to see and understand. And, even if we are not writing as an advocate, we have to be persuasive: we must convince readers to accept our judgment about what matters, to believe us when we say that we have a fact or idea worth their attention.

To write clearly and persuasively, therefore, lawyers must master two kinds of clarity. They must impose a rigorous logic on often-recalcitrant material. Then they must make that logic obvious to their readers from the document's start through every page to the end. By training and inclination, most lawyers are expert at the first task. But they are seldom as good at the second. In fact, many never realize that the two are different, that an impeccably logical and precise analysis may still leave readers exhausted, confused, and unpersuaded.

To avoid inflicting this kind of pain, you must do more than create logic and precision in your material – more, that is, than think clearly and choose your words carefully. You also have to create coherence – the perception of focus and organization – in your readers' minds. A coherent document has to be logical, but it also has to be much more.

From logic to coherence:

To create coherence, begin by seeing your document from your readers' perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

When you write a document, therefore, you are organizing a complex process: the flow of information through your readers' minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arching syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. They read actively, although much of the action happens in split seconds and never reaches full consciousness. At each moment, they are deciding how much of what they just read they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

To help readers through this process, writers have to create a clarity based not just on logic, but also on how a reader's mind deals with complicated information. This "cognitive" clarity is based on three facts about how people read. In terms of logic alone, none of them matters. In terms of coherence – of clarity in the reader's head at every moment, not just at the document's end – they are critical.

- Because readers have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern – the story, the logic, the theme – enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been – and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.

- As the information flows past, they want its structure and sequence to match the logical order of the propositions or events it is describing. In other words, they want the document to unfold in step-by-step synchrony with the legal analysis or factual story it conveys, so that its form matches its underlying substance. They don't like it, for example, when your writing follows the wandering path you took in researching an issue, rather than the logic of the analysis you finally uncovered. Nor do they like it if you recite facts chronologically when the key factual issues have nothing to do with the interminable tale of who-did-what-when. They are irritated if a section is divided into five sub-sections that look of equal importance, when the fourth is logically subordinate to the third. And they are annoyed, if only subliminally, when a sentence's structure implies that three details are equally important, although two are just appendages to the other.

- With words as with food, they cannot easily ingest an unbroken flow. At both the large scale (the document as a whole) and the small (paragraphs and sentences), they want writing cut into manageable pieces, so they can pause and begin to digest each before they go on to the next.

From these facts, this program draws three principles that apply at all levels of a document, from its overall organization down to its sentences. In the summary fashion in which they are outlined below, they may seem too abstract to be useful. Properly understood and applied, however, they blossom into a rich, practical, and efficient approach to improving your writing and editing. If you edit or supervise other lawyers' writing, they will also give you concepts and a vocabulary that will enable you to talk about drafts more clearly and effectively (and objectively).

This emphasis on principles is closely analogous to a lawyer's approach to the law itself. "Thinking like a lawyer" does not mean relying on simple rules or clear-cut precedents, for the law is seldom so convenient. It means instead grasping the more abstract legal principles that underlie the rules and provide the context in which they must be understood and applied.

Correspondingly, "thinking like a writer" does not mean relying on the familiar lists of writing "tips." It means starting from the principles that lie at the foundation of effective communication.

The Principles

Principle 1. Readers absorb information best if they understand its significance as soon as they see it. They can do so only if you provide an adequate focus or framework before you confront them with details. Therefore:

- **a. Put focus before details.**
- **b. Put familiar information before new information.**
- **c. Make the information's structure explicit.**

Principle 2. Readers absorb sequences of information best if the sequence's order (its "form") is consistent with the information's purpose (its "substance"). Therefore:

- **a. At the "macro" levels of a document:**
  1. **Match the organization of your information to the logic of your analysis.**
  2. **Pay attention to the difference between how you initially encountered and understood complex information (its "superficial" order) and how you later analyzed and assessed that information (its "deep structure"). You communicate more confidently by using the latter as your organizing guide.**
- **b. At the sentence level, link the sentence's grammatical form (its "syntactical core") to the focus or theme of your information. You communicate more clearly and efficiently by telling your story through the subjects, verbs, and objects of your sentences.**

Principle 3. Readers absorb information best if they can absorb it in relatively short pieces.

- **a. Break information into segments.**
- **b. Put the most important information into the most emphatic segments.**
- **c. Make the segments concise.**

Although all these principles apply at all levels of a document, their order here is significant: They are listed in the basic order of an effective and efficient edit. Principle 1 and 2(a) are more about the “command” you have over your information – the message you want to preach – while 2(b) and 3 are more about the “control” you have over the details that comprise the message. Both levels, of course, are important to a good document. But this program is organized to emphasize the former first and the latter second. It will begin by focusing primarily on large-scale organization, for two reasons: First, contrary to what most editors believe instinctively, structural elements are more crucial than syntactical polishing to the success of any document. Second, in contrast, to the years of training writers have endured about elegant sentences, few have ever been given any practical guidance about structuring complex documents.

Overall, the program has three specific goals and two more general ones. It will show you how to:

- capture and hold a reader's full attention, even when your reader is impatient, irascible and tempted to skim;
- create not just average clarity, but what we'll call "super-clarity," by analogy with super-glue: a clarity that will reach out and adhere to the mind of even the most hurried reader; and
- write a prose that is energetic, perhaps even graceful, and that projects an image that enhances your credibility.

In addition, the program will:

- make you a more effective, disciplined editor; and
- allow you to talk about drafts with other people more clearly and analytically.

IMPLEMENTING PRINCIPLE 1: THE IMPORTANCE OF "META-INFORMATION"

The three corollaries to Principle 1 reflect a challenge: To be an effective communicator, you must provide your reader with two different kinds of information. One is obvious, although a challenge all by itself to grasp and organize – the law or facts that form the substance of your argument or analysis. The other, however, is far less obvious and a separate challenge. For your reader to appreciate your substantive information, you must also provide information *about* your information, information that prepares your reader's mind to absorb your substance. This critical preliminary perspective we call "meta-information," and the corollaries capture the methods for presenting it to your reader most effectively and efficiently.

Principle 1, Corollary a:

PUT FOCUS BEFORE DETAILS

Unless they have photographic memories, readers cannot absorb and remember complicated information if they don't know why the details matter and which ones matter most. If they can't grasp the significance of the details, they will balk at reading them. As a result, before you dump data on readers, you must provide a focus. The focus's job is to make them smart enough to understand why the details matter, which will be most important, and how they are organized.

FOCUS BEFORE DETAILS: EXAMPLE #1

Before:

MOTION TO SUPPRESS AND
EXCLUDE EVIDENCE
UNLAWFUL SEARCH AND SEIZURE

At approximately 4:00 p.m. on December 7, 1981, West Carolina State Troopers Charles Jones, Ronald Brown and David Green, accompanied by Assistant State's Attorney Frank Smith, went to Torrance's home located at 1819 Fawn Way, Centerville, West Carolina. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red note book from Torrance's bedroom. Torrance attempts to suppress these items.

Torrance had developed as a prime suspect in a homicide which occurred during the afternoon of December 7, 1981. That fact led the troopers to his residence. At trial, Troopers Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

Jones stated that Brown was in charge, and that upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the troopers was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance. The troopers and Mrs. Torrance waited in the kitchen for the arrival of Mr. Torrance, a wait of some fifteen to twenty minutes. During the wait two events took place. First, Brown testified that while they waited they observed and listened for the signs of any movement in the house. Second, as a result of a conversation between Brown and Mrs. Torrance about a gun missing from the ....

After (insert before the original first paragraph):

Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. They conducted the search after Torrance's father had signed a form permitting them "to search my home . . . in an attempt to locate my son ... and to seize and take any letter, papers, materials or other property that they may require for use in their investigation." The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

At approximately 4:00 p.m. on ....

FOCUS BEFORE DETAILS: EXAMPLE #2

Opening paragraphs of a judicial opinion.

Before:

This is an appeal from a dismissal of a suit to enforce a compromise settlement and judgment rendered pursuant to the settlement.

Appellant filed a claim with the Industrial Accident Board (IAB) for a work-related injury that he had sustained on October 10, 1970. Dissatisfied with the outcome of that proceeding, and in a timely manner, he filed suit in the district court of Hightop County, West Carolina, to set aside the award of the IAB. On March 17, 1972, the parties entered into a compromise settlement whereby an agreed judgment was rendered in favor of the appellant, setting aside the IAB award and granting him $6,000. Further, as a part of the agreed judgment, the appellee agreed to provide necessary future medical treatment and other related services incurred within two years of the date of judgment.

During that two-year period, appellant made a request for further medical treatment, which was refused by the appellee. Appellant then filed suit in district court on the agreed judgment alleging that appellee's refusal to provide the requested service was wrongful and in fraud of his rights. Appellee answered the suit ....

After (substitute for first paragraph):

Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court had jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.

Appellant filed a claim ....

Principle 1, Corollary b:

PUT OLD INFORMATION BEFORE NEW INFORMATION

One way of putting focus before details is to put "old" information before "new" information. To apply this principle, you should recognize that old information comes in a variety of forms. Some of it is information you are certain your audience possesses before it begins to read. This can range from the very basic, like the meaning of "case law," to the more particular, like the methods by which courts interpret statutes, to the very specific, like the law of fraudulent conveyance. The other large block of old material is the information you give them as they read, so that they approach each new paragraph (and sentence) with a constantly increasing stock of old information.

OLD INFORMATION BEFORE NEW: EXAMPLE #1

Before:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. The Supreme Court applies a reasonableness test to determine whether a citizen's rights have been violated in unreasonable search cases. The test balances the citizen's privacy interests against the government's interests that are furthered by the search.

After:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the Supreme Court applies a reasonableness test. This test balances the citizen's privacy interests against the government's interests that are furthered by the search.

OLD INFORMATION BEFORE NEW: EXAMPLE #2

Before:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. The concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum -- is at the center of this struggle. The attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers, is one reason for the recent popularity of this concept. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. Although the market shares of the several component firms within their individual markets remain unchanged in conglomerate mergers, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

After:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. At the center of this struggle is the concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum. One reason for its recent popularity is the attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. In these conglomerate mergers, although the market shares of the several component firms within their individual markets remain unchanged, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

Principle 1, Corollary c:

MAKE THE STRUCTURE EXPLICIT

The challenge continues: It's not enough for your writing to be organized logically. The organization also has to be obvious to the reader, from the start and at each step along the way.

MAKING THE STRUCTURE EXPLICIT: EXAMPLE #1

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a non-forfeitable interest in a non-qualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less often than unfunded ones for two reasons. First, they have tax disadvantages: If an employee is given a non-forfeitable interest in a non-qualified trust, he will be taxed immediately on the amounts set aside for him. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a non-forfeitable interest in a non-qualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

MAKING THE STRUCTURE EXPLICIT: EXAMPLE #2

Before:

You have asked me to research whether our client, a corporation seeking to interview a former employee suspected of wrongdoing, has a duty under the penal laws of Ohio or of the United States to report any criminal activity it becomes aware of during the interview. In addition, you have asked me whether under the penal laws of Ohio or of the United States, the corporation may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

After:

Our client, a corporation, seeks to interview a former employee suspected of wrongdoing. You have asked whether, under the penal laws of Ohio or the United States, our client:

1. has a duty to report any criminal activity it becomes aware of during the interview, and

2. may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

MAKING THE STRUCTURE EXPLICIT: CREATING ROADMAPS

Example #1:

This case raises two hearsay issues, one relating to the business records exception and one relating to out-of-court admissions. We will consider each in turn.

* * * * * *

Example #2:

The Division's claim raises three issues. Was an overpayment made? If so, does W.C.S.A. 44:10-4(a), and the case law interpreting it, authorize a client to recover the money? If not, can the Division rely on W.C. Reg. 44:10(4), which purports to authorize a lien despite the lack of direct statutory authorization?

* * * * * *

Example #3:

By this motion, Smith seeks dismissal of the only claim in Jones's complaint that survived the jury's verdict. The complaint recited six causes of action. One, breach of contract, was dismissed by Jones prior to trial. Another, tortious interference with business relations, was dismissed by this Court at the close of Jones's case. Of the four claims that went to the jury, the jury found in Smith's favor on three: fraud and breach of express and implied warranties of title. The only claim on which the jury found in Jones's favor was breach of the implied warranty of merchantability.

In this memorandum, we shall demonstrate that judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion. First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether "The Orchard" would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

Second, the alleged breach of warranty occurred with respect to goods that were never sold to Jones. Jones was therefore left to argue that Smith had anticipatorily repudiated its contract within the meaning of Section 2-609 of the Uniform Commercial Code. But before there can be a finding of anticipatory repudiation, a party must make a written demand for adequate assurance of due performance. Jones made no such written demand.

Third, there is a fundamental inconsistency between the jury's findings that the warranties of title were not breached and that the warranty of merchantability nevertheless was. Jones alleged no defects in "The Orchard" other than a defect in title. He claimed that the painting was unmerchantable because title was defective, and for no other reason. The jury found no defect in title and thus removed the only basis for finding a breach of warranty of merchantability. Jones has, in effect, proceeded on the theory that a breach of warranty of merchantability is a "lesser included offense" of a breach of warranty of title. No case decided under the Uniform Commercial Codes supports that theory.

Fourth, even if there was a breach of the warranty of merchantability, that breach was not a proximate cause of any injury to Jones. It is undisputed that Gekkoso, Jones's client, knew that Romania had tried to seize the painting in Spain in 1982. Knowing this, it was nevertheless willing to enter into a contract with Jones to purchase the painting. If Jones's view of the evidence is accepted, Gekkoso ultimately cancelled because it believed that Jones had lied about this incident. Under this view, it was Jones's deception, and not any breach of warranty, that caused him injury.

* * * * * *

Example #4 (how not to do it):

Generally, a court will not second-guess the decision the directors of a corporation make when it can be shown that the directors acted in an informed manner, in good faith, and in the honest belief that the action taken was in the best interest of the corporation. As will be discussed below, we think that you can show that you have complied with these requirements.

1. Good Faith .....
2. Disinterestedness .....
3. Due Care .....

MACRO-ORGANIZATIONAL ISSUE #1

META-INFORMATION THROUGHOUT THE DOCUMENT:

CREATING FOCI AND ROADMAPS WHEREVER NECESSARY

Example #1:

The BCCI Liquidators' task has been a daunting one. The former management of BCCI—all of whom were displaced by the regulatory actions of July 1991—left a morass caused by mismanagement, self-dealing and fraud, and a shortfall between realizable assets and liabilities of several billion dollars. That shortfall will come from the pockets of depositors and other creditors, all of whom are truly "victims" of BCCI. The mission of the BCCI Liquidators, in essence, has been to maximize the funds available for ultimate distribution to these victims. Included in the funds potentially available to diminish this inevitable shortfall were an estimated $550 million in accounts, loan portfolios and other assets of BCCI in the United States as of the time of the collapse.

[MAP & FOCUS:] The BCCI Liquidators have pursued their goal by two means: (1) initiating proceedings under Section 304 of the Bankruptcy Code that would enable the entire BCCI estate to be administered in a foreign proceeding for the benefit of creditors worldwide; and (2) reaching an agreement with the United States that would prevent the forfeiture of all BCCI assets in this country.

A. The Section 304 Proceedings

On August 1, 1991, in the United States Bankruptcy Court for the Southern District of New York, the BCCI Liquidators filed petitions pursuant to Section 304 of the Bankruptcy Code. Section 304 is an unusual provision because its use does . . . .

* * * * * *

Example #2:

Although the cases above present favorable support for defendant's position, the 25th Circuit has declined to follow Carter's holding.

[FOCUS:] In four decisions, the 25th Circuit has held that a promise of immunity made by a United States Attorney in one district does not necessarily bind a United States Attorney in another district. Instead, these cases have held that an agreement that includes a promise of immunity must be construed in light of its circumstances.

In a 1972 case, United States v. Smith, Judge Green listed two factors that limit the enforceability of such an agreement . . . .

In a 1979 case, in contrast, Judge Green upheld an agreement on the grounds that . . . .

Example #3:

Service of process upon the Secretary of State as a designated agent of the foreign state under state long-arm statutes runs contrary to the Congressional intent of the FSIA. If plaintiffs could sue foreign state-owned corporations by service upon the Secretary of State, they could defeat the Act's goal of uniformity and render meaningless the exclusive jurisdictional requirements of Sections 1330 and 1608. And if a foreign state were subject to the varied service provisions of <u>every</u> state, there would be confusion over jurisdictional procedures and requirements among foreign sovereigns. This would result in the disparate treatment of foreign entities involved in U.S. lawsuits.

[MAP & FOCUS:] Moreover, details both in the House Report and in Section 1608 indicate that Congress did not contemplate service of process on Secretaries of State.

Notably, the House Report on the FSIA expressly states that "[i]f there is no special arrangement [for service of process under Section 1608(b) (1)] and if the agency or instrumentality has no representative in the United States, ..."

Furthermore, within Section 1608, when service of process upon the U.S. Secretary of State is a proper method . . . .

* * * * * *

Example #4:

.... To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

An indispensable instrument is defined in Restatement of the Law, Security § 1 comment (e), as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

[FOCUS FOR DETAILED DISCUSSION OF CASE:] The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

Example #5:

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession*. First, the lender must take actual "possession" of the vessel or facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Managerial control*. The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

MACRO-ORGANIZATIONAL ISSUE #2: STRONG INTRODUCTIONS

To apply the Principle 1's ideas of "focus before detail" to a document's Macro-Organization, the writer must consistently do three things throughout a document: make the reader smart, attentive, and comfortable. In the introduction of a long document, you will have to make the reader smart enough to cope with all the complexities that will follow. Here are the basic ingredients to include in the introduction and any place in the document that addresses new material.

SMART – provide information about your information.

- Label: What is the topic? How can it be described so that it triggers a reader's "old" information – the knowledge he or she brings to the document?
- Map: What is the document's structure?
- Point: What should readers look for or think about as they read? Legal significance?

Even if your introduction does a superb job of making readers smart, however, it may still fail unless it succeeds at two other tasks: capturing their attention and making them comfortable. To do this, the introduction will have to answer three questions that every reader brings to every document:

ATTENTIVE – specify the information's relationship to the reader.

- "*Bottom line":* How will this help me – in concrete, practical terms?
- *Efficiency:* Will you waste my time?

COMFORTABLE – establish common ground.

- *Comfort:* Are we from the same planet? Do we speak the same language? Share the same assumptions? Want the same things?

How you respond to these challenges depends upon your audience, and the more you know about its expectations and assumptions the better your introductions will be. Although the chart below is greatly over-simplified, it illustrates the kind of analysis that can help you think about how to capture your readers' attention and make them comfortable:

	Clients	*Judges*	*Senior lawyers*
Bottom line	Make or save money; complete or block project	Do justice; dispose of case quickly	Help to advise client; protect from error
Efficiency	Get to the point quickly; omit marginal details	Explain the case's big picture; zero in on the legal jugular	Provide all relevant information; explain analysis thoroughly
Comfort	Avoid pomposity & legalese; think like a business person	Write to help the judge, not to attack your opponent	Match format, length and style to the task

STRONG INTRODUCTIONS: EXAMPLE #1

Letter from outside counsel to client's associate general counsel, who will pass it on to a banker

Before:

Dear Mr. Jones:

You have asked us whether, under West Dakota law, ABC's proposed mortgage on XYZ will take priority over a mechanic's lien for certain engineering services performed before the recording of the mortgage.

Under West Dakota law, mechanics liens are preferred to all other titles, liens or encumbrances which may attach to or upon construction, excavation, machinery or improvements, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of the construction, excavation or improvement. . . . .

The statute has been interpreted to mean that any mechanic's lien, whether filed before or after a mortgage is recorded, has priority over that mortgage if construction began before the mortgage was recorded. There is no . . . .

First revision:

Dear Mr. Jones:

You have asked us whether, under West Dakota law, ABC's proposed mortgage on XYZ would take priority over a mechanic's lien for certain engineering services performed before the recording of the mortgage.

The mortgage would lose its priority only if the engineering services were held to be the start of construction. They probably would not be.

Under West Dakota law, mechanic's liens are preferred to all other titles, liens or encumbrances which may attach to or upon construction, excavation, machinery or improvements, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of the construction, excavation or improvement. . . . .

Second revision (for in-house counsel):

Dear Mr. Jones:

You have asked us whether, under West Dakota law, ABC's proposed mortgage on XYZ would take priority over a mechanic's lien for certain engineering services performed before the recording of the mortgage.

For ABC to ensure that the mortgage takes priority, we recommend that it is revised so that it becomes a construction mortgage. Section III of this letter provides more details about the necessary changes. If you decide to take this approach, we would be glad to provide a draft of the revised mortgage.

Without these changes, ABC risks that the mortgage could be held to have lost priority. Under the relevant West Dakota statute, the mortgage would lose its priority only if the engineering services were held to be the start of construction. West Dakota courts have held that a start must involve visible construction work on the site, a criterion that would not be met by engineering services. However, no West Dakota court has directly addressed this issue for 10 years, and more recent cases in other jurisdictions have employed broader definitions of the start of construction. We believe, therefore, that there is a substantial risk that a West Dakota court today would follow the trend that has developed in other states. Our analysis of this risk follows.

I. <u>Priority of Mechanic's Liens</u>

Under West Dakota law, mechanic's liens are preferred to other liens or encumbrances, such as a mortgage, if the latter are "given or recorded subsequent to the commencement of the construction, excavation or improvement." [Citation] (The text of the statute is attached.) The statute has been interpreted to mean that any mechanic's lien, whether filed before or after a mortgage is recorded, has priority over that mortgage if construction began before the mortgage was recorded. No evidence of . . . .

Third revision (for the banker):

Dear Mr. Jones:

After analyzing your proposed mortgage on XYZ, we recommend that it be revised into a construction mortgage. This revision will avoid the risk that, if XYZ becomes insolvent, your claims would take second place to claims by HighRise Engineering for services it will have performed before your mortgage is recorded.

As is explained in more detail below, a construction mortgage differs from your proposed mortgage in two ways: . . . . Neither change involves any disadvantage or additional risk, compared to the terms of your proposed mortgage. If you were to ask us to revise the mortgage, we would expect our legal fees to be approximately $[ ], and for the revisions to take approximately [ ] days.

The risk attached to your proposed mortgage arises because there is some chance, although not a strong one, that a court would find HighRise's engineering services to be the start of construction on the site. In that case, under West Dakota law, HighRise's claim – a mechanic's lien – would take priority over the proposed mortgage. Although West Dakota courts to date have held that the start of construction must involve visible construction work on the site, no West Dakota court has addressed this issue for 10 years, and more recent cases in other jurisdictions have employed broader definitions of the start of construction. This trend might be followed by a West Dakota court facing the issue today.

I. Terms of a Construction Mortgage

STRONG INTRODUCTIONS: EXAMPLE #2

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PANACEA

MIDWEST SEED, INC., Plaintiff, v. FIRST CITIZENS BANK, a banking corporation; RELIABLE EXPRESS, INC., a Washington corporation; RESOURCE DEVELOPMENT COMPANY, a Lebanese corporation, Defendants.	)	No. C89-1572 MEMORANDUM IN SUPPORT OF DEFENDANT FIRST CITIZENS BANK'S MOTION TO DISMISS THE COMPLAINT

Before:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff's alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank which issued a letter of credit in connection with the transaction. Plaintiff's attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6).

FACTS

Plaintiff, a Panacea corporation, sold 1000 metric tons of seed to ....

After:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the letter could not be honored by First Citizens Bank ("FCB"), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff's complaint should be dismissed as to FCB because it does not and could not allege that FCB -- a Lebanese bank with no office or assets in the State of Panacea -- has sufficient minimum contacts with the State for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to allege fraud against FCB with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

FACTS

....

STRONG INTRODUCTIONS: EXAMPLE #3

Memorandum from associate to partner

Before:

JONES v. SMITH

FACTS
....

ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

Both. In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones's cause of action, however, would probably be considered to be brought in law, and therefore would be tried by a jury.

After:

FACTS
....

ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones's cause of action, however, would probably be considered to be brought in law because his complaint requests only money damages -- a remedy at law -- and because that remedy would be adequate restitution for his alleged loss.

To persuade a court otherwise, we would have to argue (1) that the case is too complex for a jury's understanding; or (2) that the underlying issue is a breach of fiduciary duty of a kind (such as breach of constructive trust) that is a matter of equity rather than law; or (3) that the court should follow a minority line of cases which hold any action for "disgorgement" of excess profits to be a matter of equity rather than law. None of these arguments is likely to succeed.

IMPLEMENTING PRINCIPLE 2:

AVOIDING DEFAULT ORGANIZATIONS

Our minds are stocked with ready-made organizing patterns that we use more often than we should, especially when we're tired, bored or in a hurry. For example, when we write about facts we turn instinctively to chronology. When we respond to someone else's argument, we're tempted to adopt its structure as our own. When we write about a complicated analysis, it's easiest just to retrace the path we took in thinking through the issue. None of these organizing patterns is necessarily inadequate. But they are overused, and a good writer learns to regard them with suspicion.

ORGANIZING A DISCUSSION OF THE LAW:

THE PROBLEM OF “DEFAULT” (OR “READY-MADE”) ORGANIZATIONS

The most common traps:

- Chronology (Example #1)
- History of your research or thinking (Example #2)
- Someone else's analysis (Examples #3-#4)

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

Impose an organization that matches the logic of your analysis, as you look backwards from your conclusion:

- Write a good introduction before each section of the analysis.
- If necessary, reorganize the sequence of topics or authorities.

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #1

Before:

Several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements. None deals with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? But these decisions provide useful guidance.

In the first of these decisions, John Smith v. Jones, the Supreme Court held ....

In NLRB v. Acme Manufacturing, Acme had succeeded Superior ....

Acme was followed by Clover Valley Packaging Co. v. NLRB, holding ....

Finally, in Comfort Hotels v. Hotel Employees, the Court .....

In concluding that under the circumstances of the case, the successor employer had no duty to arbitrate, the Court in a footnote made the following illuminating statement: ....

After:

Although several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements, none has dealt with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? In the absence of direct authority, we must draw guidance from decisions dealing with collective bargaining agreements in general.

As these cases show, the question cannot be answered by deciding whether the new employer satisfies a definition of "successor employer" that always entails the assumption of certain obligations. "There is, and can be, no single definition of 'successor' which is applicable in every legal context." [Citation.] A decision about which obligations a new employer has assumed must rest on the facts of each case.

In the first two decisions discussed below, the facts showed a substantial continuity of identity between the business enterprises of the predecessor and successor employers. As a result, the courts held that the new employers had to assume the obligations at issue. In the other two decisions, there was less continuity, and the courts reached the opposite result.

In NLRB v. Acme Manufacturing ....

In Comfort Hotels v. Hotel Employees ....

In John Smith v. Jones ....

In Clover Valley Packaging Co. v. NLRB ....

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #2

Before:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his complaint primarily on Executive Jet Aviation, Inc. v. City of Cleveland. In that case, the plaintiff, whose jet aircraft sank in Lake Erie ....

Callahan suggests that Executive Jet requires a significant relationship to traditional maritime activity in all cases, not just those involving aircraft. Several Courts of Appeal have taken this view....

In Edynak v. Atlantic Shipping, Inc., however, the Third Circuit, assuming that Executive Jet could be read ....

Callahan argues that this discussion in Edynak signals an adoption by the Third Circuit of the "locality plus" test for admiralty jurisdiction ....

After:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his argument primarily on Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). In that case, the Supreme Court held that admiralty jurisdiction does not extend to claims arising from airplane accidents unless they bear "a significant relationship to traditional maritime activity." Callahan argues that this test must be applied to all accidents that would otherwise fall within admiralty jurisdiction, and that accidents involving pleasure craft fail to meet the test. We disagree. Executive Jet's "locality-plus" test applies only to aircraft accidents. Even if it were to apply more broadly, an accident involving pleasure craft meets the test.

In Executive Jet, the plaintiff, whose jet aircraft sank in Lake Erie ....

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #3

Before:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion.

Appellant relies upon E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978). The court there reversed the trial court and relieved the defendant from paying costs where he was not found negligent and had not prolonged the trial. The court held that:

> C.C.P. Art. 1920 gives the court discretion to assess costs but limits this discretion. The general rule is that ....

After:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion. As the court's opinion demonstrates, however, the court correctly based its assessment on the principle that costs must be assessed on the basis of the results at trial.

This principle arises from LSA-C.C.P. Article 1920:

....

The principle is stated even more explicitly in Comment (b) to Article 1920:

....

Although Appellant rightly points to E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978) as an authoritative application of Article 1920, he ignores crucial differences between the facts of that case and of the present situation. ....

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #4

B. The Purported Lease Restrictions Were Not Referred to in the Non-Disturbance Agreement, Nor Does the Amended Complaint Allege Facts Sufficient To Show That Defendants Had Actual Knowledge of These Restrictions

Before:

In an effort to rebut the absence of factual allegations showing actual knowledge, Mitsubishi argues that it "has clearly alleged that Capital Group knew of the Notes, the Mortgages and the Lease Assignments and/or of their material terms . . . ." Mitsubishi Mem., p. 55 (emphasis supplied). Mitsubishi reaches this conclusion by alleging that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage in favor of Mitsubishi covering the subject premises. As a result, the argument continues, Mitsubishi has pled facts sufficient to establish that Capital Group and one of its former officers, as well as an officer of First Boston, who was not even involved in the execution of that agreement, had "actual knowledge" of certain lease restrictions purportedly imposed upon Bailey Tarrytown.

Mitsubishi ignores, however, the fact that the Non-Disturbance-Disturbance Agreement does not refer to restrictions imposed upon Bailey Tarrytown's right to amend or terminate its lease with Capital Group or any other tenant of the Christiana Building. Nor does the Amended Complaint otherwise allege facts sufficient to establish that the defendants had actual knowledge of these restrictions. Mitsubishi has at best alleged facts as to which most commercial tenants have "knowledge". . . .

After:

As a prerequisite to a tortious interference claim, Mitsubishi must allege that defendants had actual knowledge of the lease restrictions at issue. Instead of alleging facts that would show actual knowledge, however, Mitsubishi adopts two tactics: (1) it attempts to establish such knowledge on the basis of inferences drawn illegitimately from the Non-Disturbance Agreement, which does not refer to the restrictions, and (2) it mischaracterizes the kind of knowledge required.

1. The Content of the Non-Disturbance Agreement

Mitsubishi alleges that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage….

ORGANIZING FACTS

The Methods:

1. Chronology
2. Main actor or other character
3. Geography
4. Issues
5. Witnesses or other sources of information

The Danger:

Relying solely on a chronological organization when some of the facts don't fit into the chronology.

PARAGRAPHS: CONTEXTS, TRANSITIONS, AND EMPHASIS

In the realm of paragraphs, the principles described on pages 1 and 2 translate into the following advice:

1. Make the paragraph's point and structure explicit.

2. Create smooth transitions: put old information before new.

3. Use the paragraph's natural points of emphasis.

MAKE THE POINT AND STRUCTURE EXPLICIT

Before:

In the circumstances of this case, several factors are relevant to the issue of Zallea's liability. In this case, there simply were no general standards of steam quality—that is, of the permissible levels of chemicals or corrodents—upon which Zallea reasonably could have relied. The evidence does not support the conclusion that Zallea did have or should have had knowledge of the likelihood of the joint failures sufficient to justify imposing liability upon Zallea. The evidence instead supports a finding that WEPCO was in a position to have superior knowledge of the actual quality and contents of its steam, and to have expertise and access to knowledge concerning the steam in its pipes. Since there were no general industry standards for levels of chemicals or corrodents in light of which Zallea could have designed the expansion joints or issued warnings, and since WEPCO was in a better position to evaluate its own steam quality and chemical or corrodent levels, the loss of the still unexplained failures must fall upon WEPCO rather than Zallea.

After:

In the circumstances of this case, Zallea should not be found liable for two reasons. First, there simply were no general standards . . . . Second, the evidence supports the conclusion that WEPCO, not Zallea, was in a better position . . . .

CREATING TRANSITIONS: PUT OLD INFORMATION BEFORE NEW: EXAMPLE #1

Before:

.... To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). A passbook that is necessary to the control of the account has been held to be an indispensable instrument. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

After:

.... To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

An indispensable instrument is defined in Restatement of Law, Security § 1 comment (e), as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ....

CREATING TRANSITIONS: PUT OLD INFORMATION BEFORE NEW: EXAMPLE #2

Before:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The purpose of the immunity of public officials is not directly to protect the sovereign, but to protect the public official while he performs his governmental function, and it is thus a more limited immunity than governmental immunity. Courts have generally extended less than absolute immunity for that reason. The distinction between discretionary acts and ministerial acts is the most commonly recognized limitation. The official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

After:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The immunity of public officials, in contrast, does not protect the sovereign directly, but only the public official while he performs his governmental function. For this reason, courts have generally extended less than absolute immunity. The most commonly recognized limitation arises from the distinction between discretionary and ministerial acts. Under this distinction, the official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

CREATING TRANSITIONS: PUT OLD INFORMATION BEFORE NEW: EXAMPLE #3

Before:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

An associate of Dr. Jones also performed a root canal on a tooth at the same time. Dr. Jones then referred Plaintiff to Dr. Skillful, who performed an apicoectomy.

Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, Plaintiff also consulted Dr. Drill, who did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

After:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

During the completion of the bridge, Plaintiff had a root canal on a tooth by an associate of Dr. Jones. In addition, after the placement of the bridge, Plaintiff was referred by Dr. Jones to Dr. Skillful, who performed an apicoectomy.

After these procedures, Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, after the second of these visits, Plaintiff consulted Dr. Drill. He did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

USE NATURAL POINTS OF EMPHASIS

Example #1:

Our logic is surrounded by a wall of paradox. Inside this boundary, logic resolves informational conflicts to our satisfaction; outside, it does not, leaving contradictions and absurdities. The difference seems to be between sense and nonsense, between logic and illogic. But perhaps this dichotomy is a bit too stark. Perhaps there exists another category between, on the one hand, those phenomena we happily accept because they can be explained by our logic and, on the other, those we comfortably reject because they are in direct conflict with logic. We would arrive at this remarkable middle category, then, by opening our minds to phenomena logic cannot explain. I will call this nonlogical mental process "faith."

72 Cal. L. Rev. 288, 318 (1984)

Example #2:

Now, while “humble pie” goes back to the French, “take it on the lam” is English in origin. Years ago, in England, “lamming” was a game played with dice and a large tube of ointment. Each player in turn threw dice and then skipped around the room until he hemorrhaged. If a person threw seven or under he would say the word “quintz” and proceed to twirl in a frenzy. If he threw over seven, he was forced to give every player a portion of his feathers and was given a good “lamming.” Three “lammings” and a player was “kwirled” or declared a moral bankrupt. Gradually any game with feathers was called “lamming” and feathers became “lams.” To “take it on the lam” meant to put on feathers and later, to escape, although the transition is unclear.

Woody Allen,
“Slang Origins,” in
Without Feathers

Example #3:

In perpetuating a revolution, there are two requirements: someone or something to revolt against and someone to actually show up and do the revolting. Dress is usually casual and both parties may be flexible about time and place but if either faction fails to attend, the whole enterprise is likely to come off badly. In the Chinese Revolution of 1650 neither party showed up and the deposit on the hall was forfeited.

The people or parties revolted against are called the ‘oppressors’ and are easily recognized as they seem to be the ones having all the fun. The ‘oppressors’ generally get to wear suits, own land, and play their radios late a t night without being yelled at. Their job is to maintain the ‘status quo,’ a condition where everything remains the same although they may be willing to paint every two years.

Woody Allen,
“A Brief, Yet Helpful, Guide
to Civil Disobedience,” in
Without Feathers

Example #4:

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters.

Winston Churchill,
History of the Second World War

EDITING EXERCISE: PARAGRAPH STRUCTURE

Assume that this paragraph comes from the middle of a memo sent to clients to discuss developments in takeover defenses. As an editor, your task is not, however, to rewrite it, but to give the author feedback that will enable him or her to return with a much better draft.

In the recent Unocal/Mesa takeover contest, Unocal foreclosed hostile bidders from calling special meetings by allowing only its own directors to call special meetings, prohibited action by shareholders by written consent and classified its board of directors. The board of directors then adopted an amendment to Unocal's by-laws which required notice at least 30 days prior to annual meetings of any shareholder nominations to the board and of any business shareholders proposed to bring before annual meetings. In a letter to shareholders 22 days before the meeting scheduled for April 29, 1985, Unocal announced its interpretation of the by-laws to the effect that if an annual meeting is adjourned it would determine whether a shareholder had satisfied the 30-day notice requirement by reference to the originally scheduled meeting date. The Delaware Court of Chancery rejected Mesa's challenge to the by-law amendments, but did conclude that "Unocal's failure to announce its interpretation of the by-laws until after the 30-day notice period had run was inequitable" and restrained Unocal from proceeding with that interpretation.

EDITING EXERCISE: MEMORANDUM
MACRO-ORGANIZATION—MEMO STRUCTURE AND CASE USAGE

M E M O R A N D U M

TO:

FROM:

DATE:

RE: Allocation of Attorney's fees in patent cases for non-patent and mixed patent and non-patent issues

CLIENT FILE NO.:

Per your request I have researched the issue of whether a prevailing party entitled to attorney fees under 35 U.S.C.A. § 285 is entitled to recovery for issues not exclusively patent related.

Section 285 of 35 U.S.C.A. provides that "the court in exceptional cases may award attorney fees to the prevailing party." Courts have repeatedly held that 35 U.S.C.A. § 285 only applies to an award of attorney fees for patent related issues. Machinery Corp. of America Gullfiber AB, 774 F.2d 467 (Fed. Cir. 1985) (when an action embraces both patent and non-patent claims, no attorney fees under statue authorizing fees in exceptional patent cases can be awarded for time incurred in litigation of non-patent issues). Hughes v. Novi American, Inc., 724 F.2d 124 (Fed. Cir. 1984) (an award of attorney fees must be set aside if the award is made for work on issues not covered by the statutory provision). H. M. Stickle v. Heublein, Inc., 716 F.2d 1550 (Fed. Cir. 1983) (award of attorney fees in patent infringement case was excessive in that it covered non-patent issues). DuBuit v. Harwell Enterprises Inc., 540 F.2d 690 (4th Cir. 1976) (where an action embraces both patent and non-patent claims no award of attorney fees can

be allowed for fees incurred in litigating non-patent issues).

Confusion on the issue arises in cases where patent and non-patent issues are intertwined such that evidence presented is an integral part of both issues. In Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288 (C.A. Cal. 1969), the court held that § 285 does not require that all of "mixed" services be assigned to patent side in making an award of attorney fees. Only a fair portion of "mixed" services should be assigned to the patent side of a case in which the bulk of the evidence prepared and presented at trial was material to both patent and non-patent issues. Id. Monolith suggests that if the issues are so intertwined then the recovery of attorney fees should be apportioned between the patent and non-patent issues. However, there have been no cases reported that explicitly state or provide guidelines on how to segregate and apportion attorney fees on "mixed" issues.

In Stickle v. Heublin, 716 F.2d at 1564, the court recognized that in an action that combines both patent and non-patent claims, the non-patent issues may in some instances be so intertwined with the patent issues that the evidence would, in large part, be essential to both types of issues. In Stickle the court found that the breach of warranty counterclaim asserted by the defendant was a wholly separate and separable claim from the patent issues since the warranty claim was not, by its nature a "mixed" claim (i.e. one asserted as a shield as well as a sword). Nevertheless, the Stickle case suggests that attorney fees on non-patent issues can be awarded to the prevailing party where the non-patent issues are so intertwined with the patent issues that the evidence is material to both types of issues.

In Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547 (Fed. Cir. 1989), the Federal Circuit recognized the precedent set in Stickle**.** In Beckman the appellant contended that it was improper for the district court to consider a non-patent claim (an antitrust

claim) in a recovery for attorney fees under 35 U.S.C.A. § 285. The court held that "in an action having both patent and non-patent claims, recovery may be had under § 285 for the non-patent claims if the issues involved therewith are intertwined with the patent issues. " Id. at 1552.

Although 35 U.S.C.A. § 285 does not provide for or require that attorney fees be recoverable for "mixed" services, case authority suggests that attorney fees are recoverable for "mixed" services where non-patent and patent issues are so intertwined that the evidence is material to both. However, neither statutory authority nor case authority suggests how attorney fees should be apportioned when the court chooses to segregate the patent and non-patent issues.

EDITING EXERCISE: CONTRACT DRAFTING

PROVISION FROM AN ASSET PURCHASE AGREEMENT: MAPPING, VISUAL STRUCTURE, CONTEXT, WORD CHOICE

2.06 **Inventories**. At the nearest practicable time prior to the Closing, the Company shall arrange for the Buyer's independent auditors, __________________, to inspect and appraise all inventories of products and materials owned, or estimated to be owned, by the Company on the Closing Date (the "Inventories"). The basis of valuation for such appraisal shall be as follows: (i) raw materials shall be valued at their replacement cost as of the Closing Date; (ii) work-in-process shall be valued at the selling price as of the Closing Date, less the sum of (A) cost to complete, (B) cost of disposal, and (C) a reasonable profit allowance for the completing and selling effort; (iii) finished goods shall be valued at the estimated selling price as of the Closing Date, less (A) cost of disposal and (B) a reasonable profit allowance for the selling effort. The aggregate appraised value thus determined shall be submitted for approval to the Buyer, and shall be the tentative purchase price of the Inventories. The Buyer's approval of such tentative purchase price of Inventories shall be a condition precedent to the obligation of the Buyer to close. At the Closing, Buyer shall pay to the Company an amount equal to eighty percent (80%) of such tentative purchase price. Within forty-five (45) days subsequent to the Closing, the Buyer's independent auditors shall establish a final purchase price for the Inventories in the same manner and with the same standards of valuation as was used for fixing the tentative purchase price of the Inventories. The final purchase price of the Inventories thus established shall be binding on the Buyer and the Company. From such final purchase price, the tentative purchase price of the Inventories paid to the Company at the Closing shall be deducted, and the balance then paid to the Company (or the credit refunded to the Buyer) within ten (10) business days after determination of such final purchase price. In connection with the transfer of the Inventories, the Company shall cease, at the close of the day prior to the Closing, all packaging and shipping, and cease, as at the close of said day, preparing, mixing or otherwise dealing with the Company's raw materials transferred hereby until the Buyer shall have inspected the inventory of raw materials.

EDITING EXERCISE: CORPORATE LETTER MEMO

SMITH, JONES, ROBERTS & GREEN

John F. Green
(222) 555-6666

February 16, 1987

James S. Client
Senior Vice President
Apex Investment Corp.
5555 Main Street
Metropolis, Florida 99999

Re: Amendment of Rule 10b-6

Dear Jim:

On January 14, 1987, the Securities and Exchange Commission (the "Commission") adopted a number of amendments to Rule 10b-6 (the "Rule") of the Securities Exchange Act of 1934 (the "Exchange Act"), which amendments will become effective as of March 1, 1987. As you know, the Rule is an antimanipulative rule that prohibits, subject to certain exceptions, persons engaged in a distribution of securities from bidding for or purchasing, or inducing others to bid for or purchase, such securities or any related securities until they have completed their participation in the distribution. The purpose of the Rule is to prevent participants in a distribution from artificially conditioning the market for the securities in order to facilitate the distribution of such securities.

The Rule does contain, however, a list of narrowly defined exceptions for transactions that are intended to permit an orderly distribution of securities or limit disruption in the market for the securities being distributed. The amendments adopted to the Rule on January 14 contain a number of important expansions of these exceptions, the most important of which concern cooling-off periods for such solicited brokerage transactions and exercises of call options.

Solicited Brokerage Transactions. Prior to enactment of the amendments, the Rule prohibited a participating broker-dealer from soliciting brokerage transactions for shares of stock of the same class and series or any related securities as those to be distributed throughout the distribution period. Exception (xi) (A) to the Rule did, however, permit an underwriter, prospective underwriter, or dealer participating in a distribution to effect ....

EDITING EXERCISE: PARAGRAPH STRUCTURE REVISION

Version A: In the recent Unocal/Mesa takeover contest, while the Delaware Court of Chancery reaffirmed a board of directors' authority to restrict access to the agenda of annual meetings, it held that a board may not do so unreasonably or inequitably.

Version B: In the recent Unocal/Mesa takeover contest, the Delaware Court of Chancery reaffirmed a board of directors' authority to restrict access to the agenda of annual meetings. [For the first time,] however, it held that a board may not do so unreasonably or inequitably.

Version C: In the recent Unocal/Mesa takeover contest, the Delaware Court of Chancery further defined the limits of a board's authority to restrict access to the agenda of annual meetings. Although it supported the board's right to require advance notice of an addition to the agenda, it rejected as inequitable the board's attempt to impose retroactively an interpretation of that requirement that blocked any additions to the agenda of an adjourned meeting.

During the contest, Unocal's board of directors adopted a series of four defensive measures, [only the last of which Mesa challenged in court]. In the first three, unchallenged steps, the board foreclosed hostile bidders from calling special meetings by allowing only Unocal's own directors to call them, prohibited action by shareholders by written consent, and classified the board. The board then took another [, more aggressive] step: it amended Unocal's by-laws to limit access to the agenda of an annual meeting by requiring that a shareholder give notice at least 30 days before the meeting of any proposal to nominate a candidate for the board or to raise any other business. This requirement became even more onerous later during the takeover contest, when Unocal's board announced a stringent interpretation of the amendment: If an annual meeting were adjourned, Unocal would determine whether a shareholder had satisfied the 30-day notice requirement by reference to the original meeting date, not the new date. This interpretation was announced in a letter mailed to shareholders 22 days before a scheduled meeting, thus preventing any change to the agenda no matter when the meeting was held.

Although the Court of Chancery upheld each of the defensive measures, including the notice requirement, it rejected Unocal's attempted use of it to control the agenda of the adjourned meeting: "Unocal's failure to announce its interpretation of the by-laws until after the 30-day notice period had run was inequitable."