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Writing to Win: Legal Writing and Appellate Matters

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Writing to Win: Legal Writing and Appellate Matters

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Introduction

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Justice Antonin Scalia recognized that there is "an immense difference between writing and good writing."[1] Given how much writing lawyers do, it is surprising the attention we pay to improving our oral advocacy compared to improving our written advocacy. Yet how many words will you speak in court over your career, and how many more words will you write and submit for the court's review? Compelling oral advocacy is impressive, but written advocacy is often where cases are won or lost.

This edition of the *Department of Justice Journal of Federal Law and Practice* (*DOJ Journal*) is devoted to legal writing. It contains—as you would expect—well-written articles that address strategies for improving your writing. The issue begins by discussing the importance of telling a good story in your statement of facts. A later article provides recommendations on how to take your introduction and statement of facts from good to great. The importance of storytelling is reinforced by an article that explains how to elevate your brief-writing through the psychological and rhetorical power of storytelling. And you will discover 6 writing techniques that appear in 20 "Winning Briefs"—all filed by the Department of Justice with the Supreme Court in cases in which it prevailed. Even better, the article sharing those techniques illustrates each one with examples from those briefs.

Later articles cover the nuts and bolts of brief-writing. This includes an explanation of the life of an appeal, with guideposts provided by the Federal Rules of Appellate Procedure. You will learn strategies for effectively moving to dismiss a case for lack of subject-matter jurisdiction. Jurisdiction is the subject of articles that examine both whether and how an interlocutory appeal may be available and how to sort out whether the district or the appellate court has jurisdiction over a given matter. Another article examines the utilities and drawbacks of alternative holdings and how to promote the prudent use of alternative reasoning.

This edition also provides an entertaining perspective on the following: (1) footnotes and differing perspectives on whether and how to use them; (2) an exploration of the crusade to make government-issued documents

[1] Edward A. Adams, *Scalia: Legal Writing Doesn't Exist*, ABA Journal (Aug. 9, 2008), https://www.abajournal.com/news/article/scalia_legal_writing_doesnt_exist.

easier to understand; and (3) an argument for the importance of teaching our next generation of lawyers to understand artificial intelligence's capabilities and pitfalls in legal writing. Our authors also explore how courts can negate the benefits of an appeal waiver even when upholding its validity.

I am grateful to each of the authors for the substantial efforts they devoted to researching and preparing these articles and to our excellent Office of Legal Education Publications Team who works behind the scenes to edit, review, and disseminate the *DOJ Journal*. This edition of the *DOJ Journal* would not have been published without their hard work. I hope you find these articles interesting and helpful in your practice.

As attorneys, we necessarily will do a great deal of writing. Let it be good writing.

The Best Story Wins: How to Persuade Through Storytelling

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I. Introduction

Nearly every federal trial and appellate court judge who has visited the National Advocacy Center to talk about legal writing and persuasion has said that the statement of facts is the most important part of any brief. Judges either know the law or they have clerks who help them figure it out, with or without the parties' briefing. But neither the judge nor the law clerks know anything about your case. That is where your role as an advocate is most critical.

Knowing this, why are some of our briefs boring and difficult to get through? For the most part, litigation on behalf of the United States involves interesting, cutting edge, meaningful issues. There is a reason so many movies and television shows feature crimes and criminals: They are interesting. Why would someone murder? Steal from charities? Trade child pornography? Ship boatloads of illegal drugs? The answers involve human drama, psychology, greed—all the ingredients of a good story.

II. Stories persuade

Portland, Oregon saw over one hundred consecutive days of riots in 2020.[1] Protesters battled with police on a nightly basis, and they spray-painted "ACAB," (all cops are bastards) throughout downtown.[2] Some local politicians openly discussed defunding the police force; although that did not happen, the city slashed the police budget nearly in half while officers left the force in droves, moving to surrounding areas less hostile to law enforcement.[3]

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[1] Gillian Flaccus, *Portland's Grim Reality: 100 Days of Protests, Many Violent*, Associated Press (Sept. 4, 2020), https://apnews.com/article/virus-outbreak-ap-top-news-race-and-ethnicity-id-state-wire-or-state-wire-b57315d97dd2146c4a89b4636faa7b70.

[2] This is based on the author's own experience.

[3] Rebecca Ellis, *Portland City Council Approves Budget Cutting Additional $15M from Police*, Or. Pub. Broad. (June 17, 2020), https://www.opb.org/news/article/portl

A small group of lawyers in the local U.S. Attorney's Office, inspired to shift the local focus to the positive, decided to start a community college scholarship to encourage civic-minded candidates to pursue careers in law enforcement. In the wake of George Floyd's murder at the hands of a police officer, the community needed good police officers—compassionate people who reflected the communities they served.[4] The idea made sense, but the group's initial efforts to generate interest drew little support. After three months, they had raised less than $10,000.[5] What they needed was a story, and they found one in Carmen Sylvester.

Carmen was the first black female police officer hired by the Portland Police Bureau (PPB) in 1970.[6] She was also among the first four women assigned to patrol duties.[7] She patrolled the streets, played basketball with neighborhood kids, and as a single mother to four daughters, she knew what it felt like to struggle to pay for basics like utilities.[8]

A photograph of the newly sworn in Officer Sylvester, smiling and holding up her badge while standing next to the police commissioner, was an inspiration.[9] This photograph is in Figure 1.[10] Carmen's smile reflected the joy many of us feel when starting a new career, but for Carmen, it also revealed the grit of a trailblazer.

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and-police-budget-15-million-defund-cannabis-council-vote/.

[4] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022).

[5] This is based on the author's own experience.

[6] James Hill, *Carmen Sylvester Knocked Down Barriers in Law Enforcement and Still Is*, PORTLAND CMTY. COLL. (Feb. 10, 2023), https://www.pcc.edu/news/2023/02/carmen-sylvester/.

[7] *Id.*

[8] *See id.*

[9] *Carmen Marie Sylvester, in 1974, Receiving Her Badge from Then-Deputy Chief Wayne Sullivan, as She Became Portland's First Black Woman Police Officer, in* Maxine Bernstein, *Portland's First Black Woman Cop Now "the Inspiration" for a New PCC Criminal Justice Scholarship*, THE OREGONIAN/OREGONLIVE (Aug. 26, 2020), https://www.oregonlive.com/education/2020/08/portlands-first-black-woman-cop-now-the-inspiration-for-a-new-pcc-criminal-justice-scholarship.html.

[10] *Id.*

Figure 1: Officer Carmen Sylvester

So the small group of attorneys named the scholarship after Carmen, tethering the goal of improving the ranks of the police force to Carmen's historic role with the PPB.[11] The local press took an interest, writing about Carmen and the scholarship effort.[12] By year's end, the group raised over $100,000, which was enough for a permanent endowment and funding for up to two annual full-ride scholarships for criminal justice students.[13] If the story had been "group of federal prosecutors wants you to donate money for a criminal justice scholarship," how many of you would pull out your credit card? But the pitch was more persuasive once the story became this: Let us encourage compassionate members of our community—hard-working people like Carmen—to join the criminal justice system.

Stories have power. They can turn good ideas into meaningful action. And they can overcome the audience's objections or reticence. Stories also win cases at trial and on appeal. An effective fact section for an appellate brief can, and often will, closely resemble a persuasive opening statement. We would not want to begin an opening statement like this: "Members of the jury, the defendant in this case has been charged in a four-count indictment with knowingly transporting child pornography in violation of 18 U.S.C. 2252."[14] That is not the way we want to begin the fact section of a brief either. It is accurate but not persuasive, and it fails to capitalize on the strength of so many of our cases: the facts. Defendants charged with federal crimes do mind-bogglingly terrible things, and yet they often defend their cases offensively: The police were sloppy, negligent, or corrupt. The defense's opening brief will likely tell the story from the defendant's perspective, highlighting alleged police malfeasance and

[11] This is based on the author's own experience.
[12] Bernstein, *supra* note 9.
[13] This is based on the author's own experience.
[14] 18 U.S.C. § 2252.

diminishing (or omitting) the crimes that prompted law enforcement's response.

Stories stick. You may or may not remember someone telling you not to lie, but most of us remember the story about the boy who cried wolf. It is a simple story, stripped of unnecessary details, with a simple message: If you lie, the consequences may be dire.

So if we want to tell a story that will persuade your audience to rule in your favor and avoid beginning with a dry recitation of the charges, how do we accomplish that? There are several options.

A. Begin with a quotation from the defendant

Defendants say the darndest things, and this can be a powerful way to show (not tell) the court something about the defendant's character. For example, a sex trafficker said this to the underage girls who worked for him: "You don't work, you don't eat."[15] It was a powerful line in the government's opening statement, and the first heading in the appellate brief's fact section.[16] There was no need to tell the court that the defendant was callous and driven by greed; his own words and actions conveyed those points more persuasively than our characterizations of them ever could.

B. Tell the story from the perspective of the victim, not the defendant

And tell the story of the crime, not the investigation. Unless specific dates matter because there is a Speedy Trial Act or statute of limitations issue, avoid beginning the fact section with a date.[17] Dates tend to yield a chronology rather than a story; the former is a trudge, and the latter sweeps the readers along and captures their interest.

C. Use admitted photographs, maps, and diagrams to illustrate points

These add color and credibility to your brief. For example, instead of describing a photo array your agent showed to a crime victim, include the image right in the brief. If the defense argues that the array was unfairly suggestive, rest assured the court will want to see the array itself. Describing it, even in painstaking detail, will not satisfy the court. Seeing the image will, however, and you will help the court by making it easy to find what they need by including it in the brief's text.

[15] United States v. Wilmer, No. 13-30332 (9th Cir. Nov. 25, 2013).
[16] *Id.*
[17] 18 U.S.C. §§ 3161–3174 (Speedy Trial Act).

D. Choose your words carefully

Many of us spend a lot of time reading Federal Bureau of Investigation (FBI) 302s, DEA-6s, police reports, and presentence reports.[18] These documents provide helpful information we need to determine whether to bring criminal charges, which charges to bring, or what sentencing recommendation to put forward. But most of our law-enforcement partners do not write stories. They produce factually accurate, colorless chronologies. It is our job as attorneys to translate that material into something that will inspire our audience to care about our case, our victims, and our ask for the court to affirm a guilty verdict or a specific sentence. How do we do this?

1. First, read good writing.

Remember literature?[19] Revisit your favorite books, magazines, or news publications. It is easy to pick up on cop-speak when that is all you read. Did someone just exit a vehicle? Was it a school bus, an ambulance, a Volkswagen bug? Those are all vehicles, but they conjure different imagery. If your defendant was driving a white Jeep, call it a white Jeep. Additionally, do not ever refer to a "child, male in gender." That is a boy.

2. Next, do not accept your opponent's characterization of events.

Defendants may claim they were "interrogated" by officers, but that is a legal term of art. Asking defendants for their name is not an "interrogation," and we should not call it that.

3. Finally, if you are ever tempted to include an adverb (that is not in quotation marks), pick a better verb instead.

For example, earlier in this article, I wrote: "Defendants charged with federal crimes do mind-bogglingly terrible things, and yet they often de-

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[18] An FBI FD-302 is "the form that the government uses to memorialize an interview and report information that may become testimony." *Glossary: FBI's Interview Report Form FD-302*, Thomson Reuters, https://1.next.westlaw.com/Glossary/PracticalLaw/I5a46ff877ecc11e8a5b3e3d9e23d7429 (last visited Nov. 20, 2025) (citation modified). A DEA-6 is an agency term used for a report of a witness interview—like a police report. It is case-specific.

[19] A couple of books on fiction writing to inspire turning your facts into compelling stories include Stephen King's *On Writing: A Memoir of the Craft* and Anne Lamott's *Bird by Bird*. Stephen King, On Writing: A Memoir of the Craft (2001); Anne Lamott, Bird by Bird: Some Instructions on Writing and Life (1995).

fend their cases offensively: The police were sloppy, negligent, or corrupt." Instead, I should have written, "Federal defendants often commit horrific crimes, and yet they defend their cases." And instead of writing, "Defendant quickly ran from the bank," write: "Defendant sprinted from the bank."

E. Lead with your best facts, and do not bury them

If your officers arrived at a defendant's house because there was a dead body on the defendant's front porch, then your reader wants to know that detail on page 1, not page 13. That a drug customer suffered a heart attack after injecting fentanyl and died steps away from where the customer purchased the drug from your charged defendant is a compelling fact. We should highlight it, not hide it. Even the most jaded audience will sit up and pay attention to this story. They will be less inclined to accept the defendant's claim that the officers lacked reasonable suspicion to knock on the defendant's front door.

F. Use subheadings

Imagine you are on a 10-mile uphill hike, and you see a park bench under a tree canopy. That is what subheadings do for your reader. They offer a welcome rest with a view. They guide the reader and keep the writer organized and on topic.

III. An example: responding to a Fourth Amendment challenge

Andrew Kowalczyk tortured and sexually abused three little girls and videotaped himself doing so.[20] His victims were two-year-old twin girls and their nine-year old sister, and the videos included sound; Kowalczyk barked commands as the girls cried in pain and screamed for their mother.[21] Kowalczyk was convicted of producing child pornography following a jury trial, and the judge imposed a 270-year sentence.[22] On appeal, Kowalczyk raised a single issue: whether police violated the Fourth

[20] United States v. Kowalczyk, No. 3:08-95, 2012 WL 3201975 (D. Or. Aug. 3, 2012).
[21] *Id.*
[22] Press Release, U.S. Immigr. & Customs Enf't, Former Portland Resident Sentenced to 270 Years in Federal Prison for Sexually Exploiting Children While Babysitting (Sept. 9, 2019); Maxine Bernstein, *Man Described as "Worst of the Worst" Sentenced to 270 Years for Repeated Sex Abuse, Tortue of Three Young Girls*, The Oregonian/OregonLive (Sept. 9, 2019), https://www.oregonlive.com/crime/2019/09/man-described-as-worst-of-the-worst-sentenced-to-270-years-for-repeated-sex-abuse-torture-of-three-young-girls.html.

Amendment when they searched his luggage immediately following his arrest after a high-speed chase.[23]

The story in this case was a nightmare. The facts were compelling and egregious, and the opening brief on appeal side-stepped the facts entirely; instead, it focused on the officers' actions following a traffic stop.[24] He neither conceded nor challenged his guilty verdict or sentence.[25] So how should we respond?

Federal Rule of Appellate Procedure 28(a)(6) requires a "concise statement" of the facts "relevant to the issues submitted for review," and including the "relevant procedural history."[26] As a technical matter, it would be possible to begin with the traffic stop and omit the underlying details of the crime. But judges are human, and most are naturally curious about what brought a defendant to law enforcement's attention. And a 270-year sentence will raise anyone's eyebrows: What on earth could someone do—short of murder—to merit 270 years?

The fact section for the government's brief in *United States v. Kowalczyk* did what the opening brief did not: It began by telling the story of the case, beginning with the victims' mother.[27] She was a single parent who spiraled into drugs and alcohol after her brother died.[28] She had relied on her brother to help parent her children, and she felt his loss keenly.[29] Kowalczyk appeared to offer a lifeline. He volunteered to watch her children free from charge, and he offered to pay for their apartment.[30] So while the mother looked for work or partied, Kowalczyk was free to engage in and memorialize his most sadistic fantasies. By the end of the fact section, no judge would have wondered about the reasonableness of the sentence.

The following subsections then detailed the events surrounding the arrest from the officers' perspective.[31] The final subsection explained the case's procedural history, including the district court's detailed fact-findings and its conclusion that while the officers were credible, Kowalczyk was not.[32] Hence, every factual assertion in the defense's opening brief

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[23] Opening Brief of Appellant Kowalczyk, United States v. Kowalczyk, No. 19-30216 (9th Cir. Feb. 14, 2020), 2020 WL 957093, ECF No. 15.
[24] *Id.*
[25] *Id.*
[26] Fed. R. App. P. 28(a)(6).
[27] Answering Brief for Review, United States v. Kowalczyk, No. 19-30216 (9th Cir. Sept. 11, 2023), 2024 WL 3158487, ECF No. 92.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

that depended on the defendant himself had been considered and rejected. Unless clearly erroneous, none of those facts could support reversal.

IV. Nuts and bolts

There are a few universal truths about an appellate brief's fact section. First, do not argue. Save your arguments—including inferences drawn from the facts—for the argument section.[33] Improper argument within a fact section often takes the form of an adjective or adverb not found within quotations. In our fact section, the defendant ran from the officers. In our argument section, the defendant ran from the officers because he knew he was guilty. This does not mean that our facts cannot be persuasive, and we can accomplish that by telling the story of the crime from the perspective of the crime victims or law enforcement. Think Frederick Douglass rather than Raymond Chandler.[34]

Next, address the case's factual weaknesses. Dodging the weaknesses will harm your credibility, and failing to address them in the brief gives away your opportunity to explain to the court why we should win regardless of that bad fact.

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[33] The Seventh Circuit adopted a local rule that expressly prohibits argument in the fact section. 7th Cir. R. 28. The court has sanctioned attorneys who fail to comply. *See, e.g.*, United States v. Partridge, 507 F.3d 1092, 1096–97 (7th Cir. 2007) (issuing a show cause order why he should not be fined $10,000—naming the attorney several times—for failure to abide by the rules governing fact sections, and other violations). The Ninth Circuit criticized an attorney who described, in his fact section, a declaration describing his client's encounter with police as one in which the officers told the plaintiff they were arresting him in retaliation for his refusal to cooperate. The court checked the record and discovered that the declaration simply stated that the officers arrested plainti for Grand Theft, and it made no mention of any retaliatory motive. Hart v. Parks, 450 F.3d 1059, 1068 (9th Cir. 2006). In describing this, and other inaccurate factual references, the court called it "disingenuous," and observed: "Even the most innocuous quotation, when disfigured through the liberal use of brackets, can appear invidious; that does not mean, however, that a genuine issue of material fact is presented. We remind counsel (again), that the 'fact' section of a brief is for facts; it is not an opportunity to engage in imaginative additions with wanton disregard for the record." *Id.* Consider this the modern-day, judicial version of the head on a spike outside the castle wall.

[34] Emphasize fact, not fiction. Our goal is to accurately communicate facts in a way that engages with our readers. *See generally The Life of Frederick Douglass*, United Negro Coll. Fund, Inc., https://uncf.org/pages/the-life-of-frederick-douglass (last visited Nov. 20, 2025) ("[Frederick Douglass's] courage, passion, intellect and magnificent written and oratory skills inspired hundreds of the world's most prominent civil rights activists of the 20th century, as well as pioneers of the women's rights movement."); *Raymond Chandler*, Encyc. Britannica (Sept. 23, 2025), https://www.britannica.com/biography/Raymond-Chandler (describing Raymond Chandler as "an American author of detective fiction").

Finally, each factual assertion must be followed by a citation to the record. Bulk citations appearing at the end of a long paragraph violate the rule and make it hard for the judge (and law clerks) to verify our details. And factual assertions without a citation are a red flag for readers. It could mean that the statement is inaccurate or an exaggeration.

V. Conclusion

As an advocate for the United States, many of us immerse ourselves in our cases. We learn the defendant's history, our victims' stories, and the consequences of the crime. Use those facts to educate and inspire your audience to rule in your favor. By sharing these stories with our juries and judges in evocative ways, we do justice.

About the Author

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Start with Story: Drafting Persuasive and Ethical Briefs

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I. Introduction

Once upon a time, in a courtroom not so far away, a lawyer filed a brief. This brief contained more than mere boilerplate language and strings of citations. This brief had a compelling narrative. It turned the litigants in the case into characters—characters in conflict. It invited the judge reading the brief to act, and it highlighted the consequences of inaction. This brief elevated what could have been a mundane legal dispute into something much more. It told a story.

This brief stands out to us (and likely the judge as well) because it exploited an effective persuasive technique that too often goes ignored in legal writing: storytelling.[1] You can and should use storytelling in your legal writing, and this article explains how to do so ethically.

Using the suggestions outlined in this article, you can learn to bridge persuasive storytelling with ethical legal writing and improve your written advocacy. First, this article explores the psychological and rhetorical power of storytelling. Second, it identifies five concrete storytelling tech-

[1] Jody Thomas López-Jacobs, *Feature: Story Telling Tips for Lawyers*, 41 Pa. Law. 26, 27–28 (2019) (noting that law school legal writing classes tend to drill "formal methodological frameworks for legal analysis like IRAC [and] CREAC," rather than storytelling or persuasion); Brian J. Foley, A*pplied Legal Storytelling, Politics, and Factual Realism*, 14 Legal Writing 17, 40–41 (2008) (arguing that there is more to persuasion than logic alone, despite the overreliance in law school on teaching logical reasoning); Philip N. Meyer, *Vignettes From a Narrative Primer*, 12 Legal Writing 229, 231 (2006) ("Simply put, legal writing professors rarely provide law students with the narrative tools necessary to supplement the analytical tools placed into their fledgling-lawyers' tool kits."); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L. J. 459, 462–63 (2001) (noting the emphasis on legal analysis rather than storytelling in most law school legal writing courses). *See also* Tom Galbraith, *Storytelling: The Anecdotal Antidote*, 28 Litig. 17 (2002) (characterizing storytelling as a lost art, in part due to overemphasis on analytical reasoning in the law school curriculum); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. Kan. L. Rev. 251, 252 (1992) (criticizing the overreliance on the case method of legal education).

niques you can incorporate into your legal writing. Third, it highlights common legal writing pitfalls that sap briefs of persuasive power. Fourth and finally, it delineates the distinction between acceptable and misleading advocacy.

II. The power of storytelling

What is a story? Stories are deliberate structures that shape facts to create meaning, relevance, and audience engagement.[2] Stories typically have three key components: a central character, a defined goal, and a set of obstacles.[3] Writers can broaden these core features into a fuller list that includes plot, setting, conflict, theme, tone, style, scene, and perspective.[4] Some scholars propose an even more nuanced structure: a stable initial condition, a disruption of that condition, the protagonist's response to the disruption, and an eventual resolution or transformation, followed by a conclusion that links the story's internal logic to the broader context of the storyteller and the audience.[5] Regardless of the specific definition, we all recognize stories when we see or hear them.

Why is that? In part, because there is more to a story than just its content. Beyond its content elements, storytelling also depends heavily on form.[6] Form is part of what makes a story memorable. The organization and delivery of a story—its pacing, sequencing, framing, language choices, and the selective inclusion or omission of detail—play a critical role in shaping its impact.[7] These technical elements are not incidental; they determine how a story is perceived and whether it resonates with its audience.[8] The structure is, in many ways, what transforms a sequence of

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[2] Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMM. & RHETORIC 27, 29 (2021). *See also* K. Jane Childs, *(Re)counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum*, 29 B.U. PUB. INT. L.J. 315, 318–19 (2020) (providing an array of definitions).

[3] Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 65 (2010); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1, 9 (2010).

[4] Don G. Rushing, *Storytelling: The Art of the Advocate*, 49 LITIG. 18, 19 (2023); Andrew Mishlove, *Storytelling and Allocution: How to Be Persuasive at Sentencing*, 46 CHAMPION 22 (2022); Robbins, *supra* note 2, at 29.

[5] Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 31 (2014).

[6] Robbins, *supra* note 2, at 29.

[7] Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to Classroom*, 7 J. ALWD 37, 43 (2010).

[8] *Id.*

events from a list or chronology into a compelling and persuasive story.[9]

The human brain is wired for stories.[10] Long before we developed writing systems, human beings passed down knowledge, traditions, and moral lessons through oral narratives.[11] As writing became more widespread, different social groups recorded their experiences through story.[12] We continue to tell stories today.[13]

Why have stories persisted so powerfully? There are many different reasons. Stories engage audiences.[14] Stories give order to chaos and meaning to facts.[15] Stories suggest a point of view.[16] The power of storytelling lies in its ability to reflect and reinforce the listener's worldview, social

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[9] *Id. See also* Christopher W. Arledge, *Effective Storytelling on Cross Examination*, 66 Orange Cnty. Law. 41 (2024) (noting the importance of storytelling in cross-examination); Brian Chen, *Prosecutorial Storytelling Through Intrinsic Evidence*, 2023 Pepp. L. Rev. 115, 143 (2023) (highlighting the importance of storytelling in criminal trials); James R. Olchowy, *Battling for the Judge's or Juror's Imagination: Evidence, Storytelling and Effective Trial Advocacy*, 16 Windsor Rev. Legal & Soc. Issues 1, 14 (2003) (highlighting the importance of storytelling as a trial skill).

[10] Kendall Haven, Story Proof: The Science Behind the Startling Power of Story 3–4 (2007) (asserting, based on anthropological and cognitive findings, that humans organized experience in story form from the outset of civilization); Marshall Grossman, *The Subject of Narrative and the Rhetoric of Self*, 18 Papers on Language & Literature 398 (1982) ("The construction of narrative is an essential activity of the human mind."). *See also* Jo A. Tyler & Faith Mullen, *Telling Tales in School: Storytelling for Self-reflection and Pedagogical Improvement in Clinical Legal Education*, 18 Clinical L. Rev. 283 (2011) ("Stories are a critical means by which people navigate the tangled web of human experience. The point is not just a superficial one. Stories are instinctual.").

[11] Rushing, *supra* note 4, at 18; Steven G. Mehta, *War Stories, Fairytales, and Lawsuits: The Power of Storytelling*, 39 GPSolo 50 (2022); Chestek, *supra* note 3, at 35; Galbraith, *supra* note 1, at 19; Marsh Cassady, The Art of Storytelling 13 (1994) ("In all probability storytelling is nearly as old as spoken language. Most certainly it existed for years before the written language came into being, and it continued on up through the centuries when only a small percentage of the population knew how to read.").

[12] Heather J. E. Simmons, *Practical Magic: How the Ancient Art of Storytelling Can Make Us Better Lawyers*, 94 Mich. Bar J. 52 (2015); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2435–36 (1989).

[13] Mary Ellen Maatman, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 Legal Writing 207, 210 (2008).

[14] David J. Dempsey, *Master the Magic of Storytelling*, 29 Ver. B.J. 32 (2003); Delgado, *supra* note 12, at 2415.

[15] *See* Stefan H. Krieger & Jonathan D. Krieger, *Storytelling and Relevancy*, 99 Or. L. Rev. 163, 166–67 (2020).

[16] *See* Alexea Fleming, *The Impact of Judicial Storytelling on the Supreme Court's Sociological Legitimacy*, 74 Depaul L. Rev. 1045, 1059 (2025).

perceptions, and sense of self.[17] They make difficult, abstract concepts concrete.[18] When told well, a story "rings true."[19]

But there are physiological reasons why stories remain such a pervasive form of communication. As a species, our evolutionary reliance on storytelling means that narratives activate more areas of the brain than raw data.[20] Studies in cognitive psychology have shown that stories are more memorable, emotionally engaging, and likely to change minds than abstract arguments or isolated statistics.[21] Our brains simply process stories differently.[22]

For example, psychologists have found that when people are deeply engrossed in a story, they become less critical and more receptive to the information presented.[23] This phenomenon—called the "transportation theory" of narrative persuasion—suggests that lawyers can make arguments more effective by framing them in narrative terms.[24] Stories by-

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[17] Patrick J. Lewis, *Storytelling as Research/Research as Storytelling*, 17 Qualitative Inquiry 505 (2011).

[18] Clare Keefe Coleman, *Dangerous Tongues: Storytelling in Congressional Testimony and an Evidence-based Solution*, 19 N.Y.U. J. Legis. & Pub. Pol'y 291, 297–98 (2016); Tyrone C. Moncriffe, *Storytelling and the Art of Persuasion*, 35 Champion 26, 29 (2011); Johansen, *supra* note 3, at 86. *See also* Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 Am. U.L. Rev. 453 (1992) (explaining the benefits of storytelling in legal education).

[19] Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229, 234 (2010).

[20] *See* Kathleen Dillon Narko, *Everyone Has a Story: Using Storytelling to Engage Your Reader*, 39 CBA Rec. 42 (2025).

[21] Nick Brown, *Expert Storytelling & Storytelling Experts: Why You Should Use Scientific Stories in the Courtroom*, 5 Hous. L. Rev. 157 (2015); Francisco Duarte, *Practice Points: Cross-Examination—It Is All About the Story!*, 39 Champion 49, 50 (2015); Karen J. Sneddon, *The Will as Personal Narrative*, 20 Elder L.J. 355, 364 (2013); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives.*, 45 Stan. L. Rev. 807, 822–24 (1993).

[22] Robbins, *supra* note 2, at 29.

[23] *See generally* Markus Appel & Tobias Richter, *Transportation and Need for Affect in Narrative Persuasion: A Mediated Moderation Model*, 13 Media Psych. 101 (2010) (discussing the persuasive power of fictional narratives); Philip J. Mazzocco et al., *This Story is Not for Everyone: Transportability and Narrative Persuasion*, 1 Soc. Psych. & Personality Sci. 361 (2010) (explaining the transportation imagery model and its persuasive e ect on audiences); Melanie C. Green & Timothy C. Brock, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. of Personality & Soc. Psych. 701 (2000) (defining "transportation" in the context of narrative storytelling and its effect on beliefs).

[24] Kerry Lynn Macintosh, *Rogue Artificial Intelligence, Science Fiction, and the Law*, 41 Santa Clara High Tech. L.J. 1, 22–25 (2025); Grant M. Rost, *Campfires, Car Accidents, and the Cosmos: Persuasive Appeals to Jurors Through the Human Appetite for Wonder*, 4 Stetson J. Advoc. & L. 54, 58–59 (2017); Kevin Jon Heller, *The*

pass the usual defense mechanisms readers might have in place.[25] The story becomes a vehicle for legal reasoning, not a substitute for it. Legal writing, therefore, should tell a story.[26]

Stories are one of the fundamental tools humans use to understand the world, including the legal world.[27] Lawyers, scholars, and judges often acknowledge the power of storytelling.[28] As The Honorable Jacques L. Wiener, former federal circuit court judge, noted, "Judges are human—even if some of us may not exhibit all of the qualities of that species at all times—so you must demonstrate both why your client should win (the emotional element) and the proper legal way that your client can win (the intellectual element)."[29] This sentiment is echoed by another former federal circuit court judge, Alex Kozinski, who noted, "There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, *except* as it applies to a particular set of facts."[30]

Even the late United States Supreme Court Justice, The Honorable Antonin Scalia, who claimed it was misguided to appeal to a judge's emo-

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Cognitive Psychology of Circumstantial Evidence, 105 MICH. L. REV. 241, 271–72 (2006).

[25] JoAnne Sweeny, *#MeToo as Legal Storytelling*, 21 J. ALWD 65, 84 (2024); Mark Lanier & Rachel Lanier, *The "Best of" Litigation Update 2022: Trial Technology and Story Telling*, 99 THE ADVOCATE 154, 158 (2022).

[26] Robert J. Kapelke, *Some Random Thoughts on Brief Writing*, 32 COLO. LAW. 29 (2003) ("Good storytelling is a sound technique in brief-writing, as in oral advocacy.").

[27] Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 886 (2010). *See also* Moncriffe, *supra* note 18, at 29 ("Storytelling is a critical tool for trial lawyers and it is the use of this tool that is essential.").

[28] Brown, *supra* note 21, at 157; Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact the Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297, 318 (2012); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn From the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 J. LEGAL WRITING INST. 163, 166 (2010); Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213, 1217 (2010); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) are as Important as IRAC*, 2 5 T.M. COOLEY L. REV. 267, 272–73 (2008); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 57–59 (2008); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 132–34 (2008).

[29] Jacques L. Wiener, *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 194 (1995).

[30] Alex Kozinski, *The Wrong Stuff*, 1992 BYU. L. REV. 325, 330 (1992).

tions, used storytelling techniques in his opinions.[31] Although he was a master of logic, Justice Scalia was also adept at employing vivid examples and analogies: techniques drawn straight from the storyteller's toolkit.

He identified the value in subtle storytelling, noting:

> [T]here is a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge's emotions uninvited. You may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home. But don't make an overt, passionate attempt to play upon the judicial heartstring. It can have a nasty backlash.[32]

Nonetheless, even apparent critics of storytelling, like Justice Scalia, admit that dry legal doctrines are more compelling when placed in the context of human struggle, choice, and consequence. Law is, in essence, made up of stories.[33] Why should legal writing be any different?

Emotion is a critical element of persuasion.[34] It alters how readers view information.[35] Scientific studies reveal that emotional responses often underpin what we perceive as logical decision making.[36] Emotions are crucial to how we make decisions, often influencing us without our awareness.[37] This influence may arise from our brain's tendency to access past emotional experiences that guide our current behavior.[38] A good story taps into the brain's emotional core.[39]

This research, as well as views from the bench, suggest a paradigm shift in how we understand legal advocacy.[40] Although traditional le-

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[31] Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 32 (2008).

[32] *Id.*

[33] Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1985) (explaining that law itself is a combination of stories manifested in legislative history and precedent).

[34] Lanier & Lanier, *supra* note 25 at 159; Xiaoxia Cao, *The Influence of Fiction Versus Nonfiction on Political Attitudes*, 32 Commc'n. Rsch. Reps. 83, 84 (2015).

[35] James L. Kastely, *Pathos: Rhetoric and Emotion, in* A Companion to Rhetoric and Rhetorical Criticism 221, 225 (Walter Jost & Wendy Olmsted eds., 2004).

[36] López-Jacobs, *supra* note 1, at 28 (citing one such study, conducted by researcher António Damásio).

[37] *Id.* at 29.

[38] Sweeny, *supra* note 25, at 73–74; López-Jacobs, *supra* note 1, at 30; Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 Wash. U. Juris. Rev. 131, 140 (2014).

[39] Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 Stetson L. Rev. 89, 93 (2001).

[40] Stefan H. Krieger & Serge A. Martinez, *A Tale of Election Day 2008: Teaching Storytelling Through Repeated Experiences*, 16 Legal Writing 117, 118 (2010).

gal writing courses focus on logical reasoning—drawing on precedent and structured arguments—emerging science on decision making highlights the unconscious influence of emotional processing.[41] If emotional responses precede conscious reasoning, logical analysis may not be the sole or even primary force in persuasion. Instead, emotional framing becomes just as essential.[42] Language in advocacy does more than convey logic; it activates emotional associations in the mind of the presiding judge, influencing the judge's perceptions and choices in subtle but powerful ways.[43]

Moreover, storytelling taps into empathy, one of the most powerful forces in decision making.[44] A fact pattern may be complex and dense with legal nuance, but if a lawyer can frame that pattern as a story of injustice, perseverance, or betrayal, judges will care.[45] And once judges care, they listen.[46] Once the judge listens, that judge is open to persuasion.[47]

Persuasive storytelling is not about emotion for its own sake. It is about context.[48] It is about helping the judge or clerk understand why the law must operate a certain way in a particular case.[49] It is about showing—not just telling—what justice looks like when the facts and law come together.[50]

For these reasons, storytelling is a critical skill that any lawyer should develop. Mastering storytelling techniques allows you to weave facts and law into a seamless, persuasive whole, making your briefs not only more engaging but more effective.

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[41] *See* Rushing, *supra* note 4, at 18.
[42] Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. Rev. 399, 405 (2012).
[43] Chestek, *supra* note 3, at 2.
[44] *See* Julie Dahlstrom, *Empathic Solidarity on the Frontline*, 40 B.U. Int'l L.J. 205, 212–13 (2022) (discussing the power of empathy).
[45] Lanier & Lanier, *supra* note 25 at 159.
[46] *See* Stephen P. Lindsay, *Storytelling: Why We Do It and How to Do It Better*, 23 Champion 30, 31 (1999).
[47] *See* Heather M. Kolinsky, *Storytelling, the Sound of Music, and Special Teams: Revisiting Some Basic Legal Writing Techniques With Fresh Eyes*, 96 Fla. Bar J. 38 (2022).
[48] *See* Antonia Stabile, *The "Elasticity" of DNA Evidence? When Prosecutorial Storytelling Goes Too Far*, 28 S. Cal. Rev. L. & Soc. Just. 137, 139 (2019).
[49] *See* Krieger & Krieger, *supra* note 15, at 186.
[50] *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2105 (1989).

III. Storytelling techniques for effective legal writing

While these storytelling techniques strengthen persuasive writing, they are often undermined by recurring habits in legal drafting. Legal writing is often treated as the domain of logic, precedent, and precision—but at its most persuasive, it is also an act of storytelling.[51] After all, what is a motion but a request for action? The purpose of a brief in support of a motion is to persuade judges that they should grant the motion.[52] An appellate brief functions similarly—it is a request for the judge to act. Judges, like all readers, are human beings who process information not just analytically but emotionally and intuitively.[53]

Neuroscience and psychology increasingly confirm what seasoned advocates have long intuited: People make decisions based on story-driven frameworks, not isolated facts or abstract rules. For lawyers, this means persuasive advocacy is not just about what the lawyer said, but also about how the story was framed, sequenced, and delivered. The structure of a legal brief can either invite the judge into a compelling narrative or alienate the judge with sterile exposition.[54] Storytelling is a skill worth learning.[55]

This section explores concrete storytelling techniques that legal writers can use ethically and effectively to enhance their advocacy. These techniques are not about dramatizing or distorting facts—they are about presenting them in ways that resonate. Whether crafting a compelling introduction, organizing facts with narrative arc, using characters to create emotional engagement, framing legal issues as conflicts with resolutions, or employing visual exhibits to reinforce key themes, each method harnesses the persuasive power of story. When executed thoughtfully, these tools transform a brief from a technical document into a narrative that both informs and persuades.

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[51] *See* Rideout, *supra* note 28, at 54.

[52] Joseph William Singer, *Persuasion*, 87 Mich. L. Rev. 2442 (1989) (noting that lawyers spend a significant amount of time trying to persuade).

[53] *See* Kaiser, *supra* note 28, at 166–67 (explaining how lawyers can use stories briefs to naturally engage a judge).

[54] Raymond T. Elligett, Jr. & John T. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief,* 32 Stetson L. Rev. 415, 416 (2003) (noting that an effective fact section does not simply recite the facts but rather tells the story of the facts in a way that makes the judge want to decide for that lawyer's client).

[55] Thomas P. Gressette Jr., *A Practical Guide to Storytelling at Sentencing*, 32 Champion 16 (2009).

A. Begin with a hook

Good storytellers—including good legal writers—grab an audience's attention immediately.[56] A brief should not start with a boilerplate recitation of the procedural posture. It should start with something that grabs the judge's attention and gives the judge a reason to want to keep reading.[57] An appropriate hook for a brief can include a sentence pointing out a stark injustice, or it can begin with a question that demands an answer.[58]

For example, rather than beginning by stating, "This is an appeal from the district court's grant of summary judgment," an appellate brief might open with, "Maria Gonzalez worked 20 years without complaint, until a clerical error cost her everything." The lawyer representing the government agency defendant in this case might open the brief with, "For over a decade, the Department of Veteran's Affairs processed thousands of benefits claims a week—until one applicant's incomplete file became the basis for a lawsuit that threatens to upend established procedures."

The first opening is dull. It tells the judge nothing the judge does not already know. It could be the opening of dozens of different briefs.

Both examples of an opening that uses a "hook" are far more interesting. They front the injustice of the situation and invite the judge to continue reading to find out how the lawyer's client must be vindicated.

That is not the only reason why the hook is so effective. These hooks also introduce the judge to the characters: Maria Gonzalez and the Department of Veteran's Affairs. A named individual or entity with a concrete story is far more compelling than the procedural history that opened the first example. By opening with Maria Gonzalez and the agency, the examples using hooks immediately ground the dispute in human experience, rather than doctrine. The judge is not just reading about an appeal; the lawyers are asking the judge to understand what happened to a human being or an organization, not just a litigant.

This kind of narrative hook also subtly invites empathy. Most readers—judges included—have experienced or witnessed the emotional fall-

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[56] *See* Narko, *supra* note 20, at 42–43.

[57] Cathren Koehlert-Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers About Beginning a Persuasive Legal Narrative Before a Court*, 86 Miss. L.J. 315, 318–19 (2017); Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 Ind. L. Rev. 397 (2016); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 305, 306 (2010).

[58] *See* Kolinsky, *supra* note 47, at 39–40 (advocating for the use of hooks in appellate brief-writing).

out of job insecurity, corporate indifference, or unexpected life disruption. Judges have also likely had to uphold policies and procedures in their own chambers. By anchoring the legal dispute in the parties' lived reality, the lawyer allows the judge to see the case not just as a question of law, but as a story about fairness, vulnerability, and dignity.

Adding a hook does not mean the brief must become sentimental or manipulative. Effective legal storytelling operates within ethical bounds, presenting facts truthfully but in a way that resonates. By introducing characters early—and doing so with clarity, restraint, and specificity—you can make your arguments more memorable and your clients more relatable. A judge who reads a brief that starts with a good hook is more likely to read it with care and curiosity, setting the stage for persuasion that builds from empathy as well as logic.

Hooks work because they prime judges to care. Hooks raise the stakes. Hooks orient the facts around a human-interest story. In legal writing, hooks must be accurate and restrained—but they can still be vivid. The goal is not to sensationalize but to humanize.

B. Use a narrative arc

Rather than listing facts chronologically or categorically, lawyers can present them as a narrative with a clear beginning, middle, and end.[59] The classic three-part structure—setup, conflict, resolution—maps perfectly onto many fact sections.

Three-part structures are satisfying because readers expect them.[60] From childhood stories to classic speeches, we are conditioned to expect a beginning, middle, and end. This structure creates a sense of balance and completeness: The beginning orients the reader, the middle develops tension or complexity, and the end delivers closure. Psychologically, this rhythm mirrors the arc of real-life experiences, giving the narrative a feeling of inevitability and coherence. In legal writing, using a three-part structure helps guide the judge through the narrative smoothly, making the brief not only more persuasive, but also more cognitively digestible.

For example, in a tort case, a compelling three-part structure for the fact section of an appellate brief might begin with a setup that introduces the plaintiff's ordinary life—the plaintiff's routine, responsibilities, and relationships. This part is not just background; it creates context and contrast. The judge begins to see the plaintiff as a relatable person with a rhythm and stability that the law should protect.

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[59] Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D.L. Rev. 239, 250–52 (2012).
[60] Foley & Robbins, *supra* note 1, at 475–78.

Next comes the conflict: the sudden, jarring event that disrupts that routine—a car crash, a fall on an icy sidewalk, or a defective product. This is the turning point in the narrative, where the facts give rise to legal issues and where the judge begins to sense the stakes.

Finally, the resolution details the aftermath—the physical, emotional, and financial consequences of the harm—and the plaintiff's search for justice through the legal system. This final part frames the lawsuit itself as a natural and necessary response to a serious wrong.

This three-part structure does more than simply organize facts chronologically. It gives the judge a reason to care. It mirrors the structure of a story the judge already knows: people are living their lives, something bad happens, and now they need help. That progression builds narrative momentum and encourages the judge to keep turning the pages to see what happens next. It also preemptively answers the key questions that a judge will instinctively ask: Who is this about? What happened? Why should I care? What should be done about it?

By presenting facts in a way that anticipates those questions and answers them naturally as the story unfolds, the brief guides the judge's understanding without straying into argument in the fact section of the brief. The judge is not just absorbing a list of facts; the lawyer is bringing the judge into a human story—one where the law becomes the mechanism for resolution. The result is a more persuasive brief because the law makes more sense when it is grounded in the lived experiences of the people it is meant to serve.

C. Consider characters and voice

Word choice matters.[61] Even in the most formal legal briefs, the way the writer describes parties can subtly influence how a judge perceives them. Rather than defaulting to sterile legal labels like "plaintiff" and "defendant," use proper names where possible, especially in the fact section. This simple shift invites the judge to see the parties as individuals rather than abstractions.

Even more powerful than the simple use of names is the use of short, precise descriptors that introduce the character's identity and context. For example: "Angela Martin, a single mother and Army veteran, timely filed her claim." In just a few words, the judge now knows who Angela Martin is, sees her as responsible, and may even feel a flicker of admiration or sympathy. That kind of characterization does not cross any ethical lines—it simply provides context that makes the narrative more engaging and the parties more memorable.

[61] *Id.* at 466.

Characters also serve a deeper function: They provide continuity and emotional anchor points. Readers—judges included—need narrative coherence. When briefs refer to people by name and develop their personality through describing action, choice, and consequence, judges can follow the story more intuitively.

The case becomes more than a sequence of transactions or a tangle of legal claims—it becomes a story about people or entities navigating the world. When judges remember the parties as people or entities, they are more likely to remain engaged and receptive.

Effective legal writing does not sacrifice accuracy for emotion but rather embraces the reality that even the most complex disputes are, at their core, about the interplay of characters. Word choice and voice are the tools that bring those characters to life.

D. Focus on conflict resolution

Judges have a natural desire to justly resolve conflict.[62] Your writing should feed this desire by showing the judge not only what the law is, but how it functions as a tool to solve human problems. Even in the argument section, where many lawyers default to dry recitation of legal rules, narrative structure can and should guide presentation.

Legal reasoning, like storytelling, thrives on tension and resolution. Lawyers can frame each legal issue in a brief as a mini conflict: A problem arises, legal precedent offers guidance, and the current case presents a new variation the court must resolve. This structure invites the judge to actively participate in reaching a just conclusion.

Instead of bluntly stating, "The standard is X," begin your argument with the conflict that necessitates a rule. For example, rather than starting with, "The Fourth Amendment requires reasonableness for seizures," you might begin with: "When government officials seize property in the interest of public welfare, courts must decide whether the deprivation was constitutionally permissible."

This approach mirrors the way judges often think—starting with a factual dilemma and moving toward a principled resolution. Once the judge is invested in the problem, you introduce the legal standard, explain the precedent, and then walk the judge through how that framework applies to the facts at hand.

This technique not only keeps the judge engaged; it also reinforces that legal rules are not abstract formulas but context-dependent principles. You demonstrate that the law is not static but responsive. You also position the judge as the one who brings closure to the narrative, making

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[62] *Id.* at 472.

the judge more invested in the outcome.

A well-structured legal argument does not just recite rules and apply them mechanically; it dramatizes the role of the law in bringing order to conflict. That, at its core, is the persuasive power of narrative—even in the heart of legal analysis.

E. Deploy visual aids

Lawyers today must navigate fresh challenges in persuasion amid a culture increasingly dominated by visual media.[63] Today's readers are "occularcentric," processing a significant amount of information through the visual medium.[64] Visual aids are now commonplace at trial, in part, because lawyers can use them effectively to persuade.[65] Visual aids are powerful.[66] Yet, we often forget about visual persuasion when we write.[67]

Exhibits to a brief can unleash the persuasive power of the story in that brief. Exhibits are not just evidence; they are narrative aids. A timeline exhibit, for instance, can visually convey a sequence of events more clearly than paragraphs of text. Photographs, maps, and charts can all reinforce the story. Even well-formatted tables or bulleted lists can guide the reader through dense information.

Including key visuals directly in the body of your brief—if court rules allow—can significantly enhance your persuasive impact. Judges, like all readers, process visual information more quickly and intuitively than dense blocks of text. Cutting and pasting a key exhibit, such as a photograph, timeline, map, or excerpted email, into the brief allows the judge to immediately see the evidence in context. This eliminates the need to flip back and forth to an appendix and reduces the cognitive burden of trying to imagine or reconstruct the exhibit from a description alone.

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[63] Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdis. L.J. 237 (2010).

[64] *Id.* at 240; M. Ethan Katsch, Law in a Digital World 153–55 (1995).

[65] Jewel, *supra* note 63, at 241.

[66] James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 Legal Writing 87, 91 (2008). *See also* Lenora Ledwon, *Understanding Visual Metaphors: What Graphic Novels Can Teach Lawyers About Visual Storytelling*, 63 Drake L. Rev. 193, 195–96 (2015) ("Effective legal storytelling requires not only facility with words, but also facility with images."); Clay Calvert, E*very Picture Tells a Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 Colum. J.L. & Arts 349, 350 (2010) (arguing that photographs have greater impact than written words).

[67] *See* Jewel, *supra* note 63, at 246 (noting that technological limitations may have limited the use of visual aids in briefs during the late 1990s and early 2000s).

When used thoughtfully, visuals can crystallize a point that might otherwise require paragraphs of explanation. A floorplan can show exactly why a witness's line of sight matters. A screenshot can prove what the defendant knew and when. A chart can highlight discrepancies in a timeline. Embedding the image at the right moment in the narrative makes your point clearer, faster, and more memorable. It also signals to the judge that this piece of evidence is central—not buried—and worth careful attention.

Integrating visuals directly into the argument section of a brief brings the story of your case to life. It reinforces key themes, provides immediate clarity, and makes the brief more readable and compelling. Just be sure to follow all applicable formatting and filing rules to ensure the visuals are admissible, legible, and properly referenced in the record.

Good storytelling in exhibits means choosing visuals that highlight turning points, clarify relationships, or underscore themes. Poor visuals confuse or clutter the brief. Effective legal writers curate exhibits not only for admissibility but also for narrative power.

IV. Common legal writing pitfalls

Despite the clear persuasive advantages of storytelling, many legal briefs fail to employ even basic narrative techniques. Instead, they follow rigid formats, open with uninspired boilerplate language, and present facts and arguments in ways that are flat, abstract, and hard to follow. This part of the article explores several recurring problems in legal writing that rob briefs of their persuasive power and how you can remedy the problem using simple storytelling techniques.

A. Boilerplate openings

Boilerplate language in legal writing—especially at the outset of a brief—is not merely uninspired; it is strategically unsound. The opening of a brief is prime real estate, where the principle of primacy dictates that the first impression lingers longest in the reader's mind. Starting with generic formulations like "This is an appeal from the order of the lower court" squanders the opportunity to set the narrative tone and frame the stakes of the case. Judges inundated with filings may skim over such rote introductions without engaging. A brief that opens with compelling, case-specific language is far more likely to capture attention, activate empathy, and orient the reader to the client's position.

Boilerplate language also impedes storytelling, which is the foundation of persuasive legal writing. Every effective brief tells a story—about injustice, error, conflict, or redemption—and that story should begin immediately. Generic procedural recitations delay the narrative arc and leave the judge uninvested. A well-crafted opening, in contrast, draws the judge into the factual and emotional terrain of the case, building the foundation for the legal arguments that follow. When a brief begins with boilerplate language, it fails to signal what is at stake or why the court should care, which undermines both engagement and persuasion.

Moreover, boilerplate language often obscures, rather than illuminates, the unique aspects of the case. A court should not have to sift through standardized language to figure out what makes this matter different from the last 20 appeals filed in that court.

Legal writing should be tailored and precise, and every sentence should advance the client's cause. When you rely on templates or stock phrasing, you forfeit the opportunity to distinguish your case on its merits. Worse, you risk appearing disengaged or careless, traits that can erode the judge's confidence in the rest of the brief. To persuade effectively, make everything you include in the brief tell your client's story, beginning from the first line.

B. Laundry lists

Often, fact sections include disjointed bullet points or dry timelines. Long lists or extended chronologies in legal briefs often hinder rather than help persuasion. Good advocacy, and good storytelling, is as much in what you omit from your brief as what you include.

Although you may feel compelled to be exhaustive, piling on fact after fact or date after date burdens the reader's working memory. Cognitive science tells us that readers can typically retain only a handful of items at once.[68] When presented with a sprawling list, readers will likely forget the early items by the time they reach the end—especially if the list lacks a clear organizing principle or emotional resonance. What is left is a muddled impression of complexity, not clarity.

Even more critically, long lists interrupt the flow of narrative. Legal persuasion depends on storytelling, and stories require structure not scattershot detail. Lists isolate facts instead of linking them through cause and consequence or motivation and result. A judge trying to follow a list as a coherent story is forced to do the work the brief writer should have done: filtering, organizing, and prioritizing.

A timeline of disconnected dates, for instance, may accurately reflect what happened, but it does little to convey why it matters. If the dates are irrelevant, they are just clutter. They occupy space in the judge's

[68] Kim MacInnis Munsinger & Harry L. Munsinger, *Seven Psychological Principles You Can Use to Become a More Effective Lawyer*, 62 TEX. B.J. 894, 895 (1999) (citing George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCH. REV. 81 (1956)).

memory that could be filled with details that matter. The judge may become frustrated once it becomes clear that this detail was unimportant.

Moreover, lists often create a false equivalence between minor and major facts. When every fact is presented with the same weight and structure, as facts are in lists, each fact becomes just another bullet point or timestamp. The truly important details can get lost in the noise.

Persuasive briefs do not just convey information; they frame it. Good lawyers guide the judge's attention, emphasizing what matters most and suppressing the facts that do not matter at all. Long, undifferentiated lists signal that the lawyer has not made choices about what to emphasize—leaving the judge to guess.

Instead of using lists as a default, you should distill the key facts and integrate them into a clear, purposeful narrative that supports the legal argument and drives the story forward. Lists and chronologies can be effective, but these techniques should be used thoughtfully and not as a default.

C. Passive voice

Passive voice is endemic in legal writing.[69] It obscures agency and dulls impact. Passive voice weakens the storytelling power of a brief by obscuring the actor in a sentence, often making it unclear who did what to whom. In litigation, where responsibility, causation, and credibility are central themes, that lack of clarity is a critical flaw. A phrase like "mistakes were made" leaves the judge asking, "By whom?" In contrast, active voice assigns clear agency. "The officer falsified the report" tells the judge exactly who acted (and what they did) in terms that are vivid, concrete, and persuasive.

From a storytelling perspective, passive voice is particularly problematic because it suppresses characters. A judge is more likely to engage with a brief's narrative when the judge understands who the key players are and what motivates them. Stories depend on characters making choices, confronting obstacles, and experiencing consequences. But when passive voice suppresses those characters, it drains the narrative of tension and makes it harder for the judge to identify with anyone involved. Without clearly drawn characters, the story becomes abstract and emotionally disengaging, making it less likely to persuade.

Moreover, passive voice disrupts the rhythm and flow of a compelling

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[69] Jacob M. Carpenter, *The Problems, and Positives, of Passives: Exploring Why Controlling Passive Voice and Nominalizations Is About More Than Preference and Style*, 19 J. ALWD 95, 97 (2022); Mark Mathewson, *Law Students, Beware*, 8 Scribes J. Legal Writing 141, 142 (2002).

brief. Passive voice tends to make sentences longer, clunkier, and less direct than their active counterparts. That verbal clutter can bog down even strong arguments and make the brief harder to follow.

More importantly, passive voice deprives you of the opportunity to highlight injustices, emphasize misconduct, or showcase your client's actions in a favorable light. In advocacy, where framing matters deeply, you should aim to control the narrative with precision and intentionality. That means choosing active voice to tell your client's story.

D. Omitting the human element

Legal standards often float in a vacuum unless they are grounded in facts. Failing to weave facts and law together in a legal brief undermines both clarity and persuasion. Law without context is abstract and bloodless; facts without legal relevance are just noise.

When lawyers separate their factual narrative from their legal argument—dumping a list of facts in one section and citing legal principles in another—they force the judge to do the hard work of synthesis. Judges should not have to flip back and forth between sections or guess how a particular fact supports a particular element of a claim or defense. A persuasive brief integrates law and fact seamlessly, so every factual assertion is linked to a legal consequence and every legal principle is grounded in the real-world story of the case.

This failure to integrate law and fact also weakens the storytelling power of the brief. Narrative drives good advocacy, and compelling stories depend on stakes. But in legal writing, the law defines the stakes. The law dictates what must be proven, what defenses are available, and what standards apply. If the law is divorced from the facts, the story loses structure and momentum. Your fact section's narrative flow comes to an abrupt halt when the brief transitions to a dry recitation of legal precedent.

Conversely, when the law is embedded within the story—when the brief shows how each character's actions meet or miss a legal threshold—the narrative becomes focused, urgent, and persuasive. The judge understands not just what happened, but why it matters. There is no dry argument section because the same grabby facts from the fact section are woven into the legal section. The writer continues telling the story in the argument section of the brief.

Finally, separating facts and law often results in missed opportunities to frame the case favorably. A lawyer who discusses the law in a vacuum may overlook how to tailor that doctrine to the unique features of a case. A lawyer who recites facts without legal framing may fail to emphasize those facts that support the lawyer's strongest legal theories. Integrating law and fact allows you to control the narrative, guiding the judge through both the story and the analysis in a cohesive, logical arc. In doing so, the brief becomes not just a recitation of content, but a persuasive argument with clarity, coherence, and emotional resonance.

E. Decontextualized exhibits

Many briefs relegate exhibits to the appendix without explaining their relevance. Visual aids are storytelling tools, but only when used well. Failing to describe or incorporate exhibits directly into the body of a legal brief is a missed opportunity for persuasion. Judges are busy readers, often reviewing dozens of filings in a short span of time. If a brief merely refers to an exhibit—"See Exhibit C" or "See page 5 of the Appendix"—without explaining the significance of the visual in that exhibit, there is a real risk the judge will not look at the exhibit at all.

Readers easily overlook or forget visuals buried at the back of a brief, especially those without narrative context or explanation. Simply attaching a visual aid is not great advocacy; to persuade, a lawyer must show the reader why the exhibit matters, how it supports the argument, and what it proves within the legal framework of the case.

Even a narrative introduction can make a huge difference in helping your visual aids tell the story. Instead of simply putting "See Exhibit B" at the end of a sentence, consider describing the exhibit in the body of the brief. Write "As shown in Exhibit B, the playground fence sits just 12 feet from the curb, and there is no barrier between the fence and the curb. Children play just feet from heavy traffic with no barrier to protect them." The simple act of describing the exhibit in the text piques the judge's interest and provides the necessary context to bring the exhibit to life. It reintegrates the exhibit into the story, reinforcing both fact and theme.

When exhibits are poorly integrated in the text, the brief loses both clarity and momentum. The best briefs use exhibits the way a good storyteller uses props: not as background clutter, but as focal points that bring the story to life. A photograph, a timestamp, a sentence in an email—all of these can serve as turning points in the narrative, but only if the lawyer draws the judge's attention to them with precision and purpose. By quoting from or visually referencing the exhibit, the lawyer guides the judge's eye and embeds the visual in the logical flow of the argument. Without that integration, the facts may feel unsupported, and the brief may fail to build the evidentiary scaffolding needed to carry the weight of its conclusions.

Moreover, exhibits divorced from the narrative undermine the storytelling function of the brief. Lawyers construct legal stories through both testimony and documents, and well-chosen exhibits can evoke urgency, reveal motive, or expose contradiction. But if lawyers do not describe the exhibit, they have failed to explain its emotional or analytical impact. Without that impact, the exhibit cannot play its full role in the story. The result is a brief that reads like a skeleton; it may have all the necessary parts, but it is lifeless. To persuade, you must not only provide evidence—you must animate it. That means embedding exhibits into the narrative arc, giving them meaning, and showing the judge how each one contributes to the resolution of the legal issues.

V. Drawing the ethical line

Lawyers must constrain persuasive storytelling due to their ethical obligations. In the final section of this article, we turn to where the line is and how to stay squarely on the correct side of it. Lawyers are ethically obligated to act in their clients' interests; under the professional conduct rules, this includes using the tools of persuasion to advocate zealously on their behalf.[70] Although storytelling enhances persuasion, it also increases risk.[71] Storytelling selects, arranges, and emphasizes facts.[72] But when done carelessly—or with intent to mislead—it can run afoul of ethical duties under the Model Rules of Professional Conduct and procedural rules such as Rule 11 of the Federal Rules of Civil Procedure.[73]

Model Rule 3.3 prohibits lawyers from making false statements of fact or law to a tribunal.[74] Rule 4.1 prohibits false statements to others.[75] Rule 8.4 prohibits conduct involving dishonesty or misrepresentation.[76] Storytelling that strays into exaggeration or fabrication may, therefore, violate these rules.[77] Doing so can result in serious consequences, includ-

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[70] Susan Tiefenbrun, *Transnational Narrative: The Failure of the International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy for Restorative Justice*, 12 Tex. Wesleyan L. Rev. 91, 92 (2005).
[71] Nancy A. Wanderer, *Truth, Lies, and Semicolons*, 33 Maine B.J. 40 (2018); Johansen, *supra* note 3, at 65–84 (identifying at least three ethical concerns with legal storytelling); Kaiser, *supra* note 28, at 164–65 ("Legal writers have a professional and ethical obligation to be wholly factual in their written work").
[72] *See* Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961, 961–62 (2006).
[73] Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 Nev. L.J. 1037, 1040 (2020); Whalen-Bridge, *supra* note 19, at 236–37. *See* Fed. R. Civ. P. 11.
[74] Model Rules of Pro. Conduct r. 3.3 (A.B.A. 2023).
[75] Model Rules of Pro. Conduct r. 4.1 (A.B.A. 2023).
[76] Model Rules of Pro. Conduct r. 8.4 (A.B.A. 2023).
[77] *See* Meyer, *supra* note 1, at 230–31 (emphasizing the need to be truthful while storytelling).

ing sanctions, discipline, or even disbarment.

Rule 11 also prohibits filing briefs that are not factually or legally grounded.[78] A story that glosses over inconvenient facts or misstates the record can lead to monetary sanctions or orders striking the brief. For example, a brief that describes a plaintiff as a lifelong model employee while omitting a disciplinary record included in the record is not persuasion—it is misrepresentation.

Lawyers have run afoul of these ethical boundaries in legal writing and have been sanctioned when their unchecked storytelling crossed the line. In *McCurry v. Kenco Logistics Services*, the Seventh Circuit sharply criticized a lawyer for filing an appellate brief that was little more than a rambling, incoherent narrative.[79] The 86-page brief was described by the court as a "monstrosity" filled with "gibberish" and "unsupported assertions."[80] Rather than presenting a cogent legal argument, the brief read more like a grievance-laden screed. It lacked structure, contained numerous irrelevant digressions, and failed to comply with basic appellate requirements, such as clearly stating the issues on appeal or identifying how the district court had allegedly erred. It did not persuade the judges presiding over the appeal.

This brief exemplifies how storytelling, when untethered from legal relevance and factual grounding, becomes not only ineffective but ethically problematic. The lawyer who signed the brief later admitted that the client had drafted much of the content and that he had merely reviewed and filed it with minimal revision.[81] In allowing the client's unchecked narrative—full of emotional accusations and conclusory statements—to dominate the appellate brief, the attorney abandoned his professional responsibility to shape the story into a persuasive, lawful, and accurate argument. The resulting submission was less a brief and more a venting of frustration, and the lack of clarity or coherence rendered it unpersuasive and unsuitable for judicial consideration.

Recognizing the egregious nature of the submission, the Seventh Circuit affirmed the dismissal of the case and issued a show-cause order as to why the attorney should not be sanctioned.[82] The court specifically condemned the brief's failure to meet even minimal standards of legal advocacy.[83] The court ultimately ordered that the lawyer pay the oppos-

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[78] Fed. R. Civ. P. 11.
[79] McCurry v. Kenco Logistics Servs., LLC, 942 F.3d 783 (7th Cir. 2019).
[80] *Id.* at 786, 792, 791.
[81] Norm Tabler, *Annals of the Law: At Last, a Bright Line for Guidance!*, 63 Res Gestae 26, 27 (2020).
[82] *McCurry*, 942 F.3d at 786.
[83] *Id.*

ing party $72,000.[84]

This case illustrates the danger of relinquishing editorial judgment in favor of unchecked narrative. Storytelling can be a powerful tool in legal writing, but only when used with discipline and care. When a lawyer surrenders professional responsibility—either by indulging in rhetorical excess or by allowing a client's unfiltered voice to take over—the result is not just ineffective advocacy, but potential misconduct. The line between persuasive storytelling and unethical misrepresentation is not always bright, but it is essential.

The key distinction between ethical and unethical legal storytelling lies between emphasis and distortion. Ethical advocacy involves highlighting facts that genuinely support your client's position, drawing attention to the parts of the record that advance the client's case without misrepresentation. Unethical advocacy, by contrast, invents, omits, or mischaracterizes.

As you begin to experiment with storytelling in your briefs, you can engage in a simple but powerful form of self-audit. As you write and revise, ask yourself whether your account fairly represents the record or whether it selectively edits the truth. Consider whether you have acknowledged adverse facts and grappled with them honestly or instead buried them out of sight. You should reflect on whether your language subtly implies motives, facts, or emotional valence not supported by the evidence. Finally, you should ask yourself the ultimate question: Would I be comfortable defending this version of events under oath?

These forms of reflection are not rhetorical exercises; they are necessary inquiries for credible advocacy. Storytelling that is ethically grounded enhances your most asset: credibility. This is your most valuable commodity and one you must guard vigilantly.

VI. Conclusion

This article began with a story—and with good reason. Lawyers are storytellers.[85] Storytelling is not a frill in legal writing; it is a foundational technique for effective advocacy.[86] From learning about the cogni-

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[84] Tabler, *supra* note 81, at 27.

[85] Samara D. Anderson, *The Wellbeing Benefits of Storytelling*, 50 Ver. B.J. 18, 22 (2025); Annabelle Wilmott, *Protecting the Right to a Meaningful Defense: Criminal Trial Storytelling*, 111 Cal. L. Rev. 927, 929 (2023); Judith D. Moran, *Families, Law, and Literature: The Story of a Course on Storytelling*, 49 U.S.F. L. Rev. 1, 2–4 (2015); Nancy Levit, *Reshaping the Narrative Debate*, 34 Seattle U. L. Rev. 751, 756 (2011); Eyster, *supra* note 66, at 87.

[86] Chestek, *supra* note 3, at 32 (detailing the results of a study demonstrating that storytelling in legal writing was more likely to persuade a judge).

tive roots of narrative persuasion, practical tools for integrating story into briefs, and cautionary tales about ethical boundaries, you are now better equipped to understand the power of storytelling in legal writing. As this article demonstrates, the line between logic and narrative is not a boundary but a bridge.[87] Storytelling is a tool that lawyers should use alongside analytical argument.[88] Ethical, effective advocacy does not reject storytelling; it refines it. Lawyers must not only tell compelling stories, but tell them with care, conscience, and credibility.

About the Author

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[87] *Id.* at 4–5; Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 Legal Writing 3, 4 (2009).
[88] Kaiser, *supra* note 28 at 182.

Beyond the Text: Footnotes as Strategic Undercurrents in Legal Writing

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I. What is a footnote?

What is a footnote? *Black's Law Dictionary* defines a footnote as a "discrete unit of additional information that appears at the bottom of a page, usu[ally] explaining, commenting on, or citing a source for a specific part of the text."[1] Whether writers utilize footnotes can be wholly personal. The decision stems from a variety of factors. Absent direction from a specified writing system or style guide, authors may ask themselves a variety of questions to figure out how best to implement footnotes in their own writing. Are they writing an empirical article requiring additional cited studies, an article with humorous quips that fit only in the fine text, or a legal brief to the court where omission of a dataset or precedent case could spell disaster?

When setting upon research on this small but mighty writing tool, the variety of opinions was baffling. One article, in *support* of utilizing the legal footnote even discoursed, "One could not think of a less important, less essential thing to write about than the placement of footnotes in legal texts."[2] Alas, I was not dissuaded. The article eventually echoed my own desire to delve into the linguistic controversy and continued eloquently:

> And if this feature, this problem, is symptomatic of writing in general, might we not be entitled to ask if it is also symptomatic of legal writing? And thus emboldened, might we not ask a still more "serious" question—whether this mysterious feature, this disease, this flaw, this problem, is not also symptomatic of a system of law that is and can only be expressed

[1] *Footnote*, Black's Law Dictionary (12th ed. 2024).
[2] J.M. Balkin, *The Footnote*, 83 Nw. U.L. Rev. 275, 281 (1989).

in legal writing?[3]

A. A brief history

The origins of the footnote emerged in medieval times as a logistical solution to overcrowded margins while notetaking. Swift notation of a symbol served as a connector between one portion of the text to additional referenced content, which helped create a more navigable system for the reader and author.[4] The system was not only more legible, but also more practical.

As perfectly summed up by Anthony Graften, "To the inexpert, footnotes look like deep root systems, solid and fixed; to the connoisseur, however, they reveal themselves as anthills, swarming with constructive and combative activity."[5]

1. Evolution: from typewriters to hyperlinks

English printer Richard Jugge introduced footnotes into the modern era, and he is credited as being the first to publish footnotes in *The Bishops' Bible* circa 1568.[6] Jugge employed marginal footnotes to ensure the original Greek text was reflected clearly.[7] Translators used marginal footnotes in biblical works to add supplementary and explanatory material as they often converted these texts from Hebrew, Greek, or Latin.[8]

Before the advent of the "insert footnote" feature in popular word-processing software, the significantly more cumbersome typewriter forced writers to leave extra space for additions, such as footnotes or page numbers. Formatting oversight resulted in reproducing whole pages when the writer needed a last-minute insertion or correction. Organization of a large assortment of source materials is a task that has long plagued authors, historians, polemicists, and historiographers. But it is certainly not limited to those disciplines. In practice, jurists sift through countless cases, statutes, regulations, and codes to refine and articulate a thoughtful but thoroughly supported argument. Mastering the art of the citation—explanatory or otherwise—may use footnotes as well as informative advocacy to persuade or advise the audience. This may necessitate the

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[3] *Id.*

[4] Erik Kwakkel, *The Medieval Origins of the Modern Footnote*, SMARTHISTORY (Aug. 8, 2015), https://smarthistory.org/the-medieval-origins-of-the-modern-footnote/.

[5] ANTHONY GRAFTON, THE FOOTNOTE: A CURIOUS HISTORY 9 (1999).

[6] CHUCK ZERBY, THE DEVIL'S DETAILS: A HISTORY OF FOOTNOTES 39 (2002).

[7] *Rare Bibles: Jugge's N.T. Bible (1552),* THE STYBERG LIBR. (Mar. 8, 2024), https://guides.garrett.edu/rare-bibles/jugge-nt-bible.

[8] Harold Willmington, *Question 87—What Are the Facts Regarding the Bishop's Bible?*, *in* 101 MOST ASKED QUESTIONS 84 (2019).

use of differing citation systems. Many prominent writing styles encourage the use of footnotes, while others, such as American Psychological Association Style or Harvard style, instead encourage the use of reference lists or bibliographies.

2. Artificial intelligence and ghost citations

Intertwining advanced technology and authorship has created numerous unforeseen issues over the past few decades. Technological advancements create newfound legal questions that otherwise would not have existed. While technology has tremendous benefits, the side effects of underdeveloped strategies for countering deceitful practices may create great harm for authors, publishers, and citizens alike. For instance, cyber criminals may conduct ransomware attacks, phishing scams, identity theft, or online fraud by exploiting digital networks. Digital piracy operations may distribute or copy unauthorized publications, content, and material by means of the internet.

Utilizing technology, search engines, and online databases increases the risk for plagiarism and academic piracy. Moreover, artificial intelligence (AI) software has inundated the legal sphere and can even sneak false or "ghost" citations into legal briefs as footnotes or whole case citations.[9]

AI has integrated itself into most everyday technology, such as Google's Gemini or Microsoft's Copilot.[10] The suggestion of quick assistance swiftly blurs the lines of academic dishonesty and even plagiarism.

3. *Signe-de-renvoi*

Signes-de-renvoi, translated to mean "sign of return" is a symbol that marks where the writer should make a correction or insertion. A corresponding symbol, often written in the margin, introduces the corrected text or insertion.[11] They are also called "tie marks" or "tie notes."[12] They were first used in Greek manuscripts as early as the first century.[13] While similar in concept to a footnote, *signes-de-renvois* utilized a less systematic approach by placing handwritten, non-standardized symbols or shapes into the manuscript. Footnotes, on the contrary, use a consistent

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[9] *Artificial Intelligence (AI) and Information Literacy: When AI Gets It Wrong*, Univ. of Md. (Aug. 25, 2025), https://lib.guides.umd.edu/c.php?g=1340355&p=9880574.
[10] Michael Brenner & Alexandra D. Comolli, *Prosecution in the Era of Artificial Intelligence*, 73 DOJ J. Fed. L. & Prac. 125, 126 (2025).
[11] Benjamin Neudorf & Yin Liu, *Signes-de-renvoi*, ArchBook (Feb. 10, 2022), https://drc.usask.ca/projects/archbook/signes_de_renvoi.php.
[12] *Id.*
[13] *Id.*

and standardized system. The use of *signes-de-renvois* faded with the introduction of contemporary printing.

Depending on the text, scribes used *signes-de-renvoi* for more extensive corrections and modified minor discrepancies or omissions with interlinear corrections.[14]

B. Usage in legal writing

Legal texts and scholarship have long included footnotes. Legal commentators were the first to utilize the practice before footnotes appeared in judicial opinions or academic writings. Sir William Blackstone, an English jurist and politician during the 1700s, provided statutory and case citations as footnotes in the publication *Commentaries on the Laws of England*.[15]

Presently, footnotes are in legal briefs, judicial opinions, law review articles, and peer-reviewed journals. The decision to include the simple linguistic tool, however, can be quite contentious.

1. Footnote or foot-not?

The longstanding debate between whether footnotes make legal writing more accessible or more cumbersome is apparent even to date. Some legal scholars describe footnotes as "phony excrescences" as they can take up more of the page's real estate than the substantive text.[16] Judge Abnder Mikva, of the U.S. Court of Appeals for the District of Columbia Circuit references footnotes as "an abomination."[17] Judge Mikva went on to carp, "The use of footnotes in legal writing has not been contained. Instead[,] it has spread like a fungus and has magnified all . . . the shortcomings of legal writing so deftly denounced by Rodell."[18]

Supreme Court Justice Stephen Breyer is well known for his "no footnote" philosophy. Justice Breyer's former law clerk Jenny S. Martinez recollected:

> When I was a law clerk for Breyer, he had a rule that his opinions should have no footnotes (legal citations in the text were

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14 *Id.*

15 Jack L. Landau, *Footnote Folly: A History of Citation Creep in the Law*, Or. State Bar Bull. (Nov. 2006), https://www.osbar.org/publications/bulletin/06nov/footnote.html#:~:text=In%20the%20legal%20profession%2C%20commentators,of%20cases%20in%20long%20footnotes. *See* William Blackstone, Commentaries on the Laws of England (1765).

16 Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985).

17 *Id.*

18 *Id.* at 647 (referencing Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38 (1937)).

> permitted). This was a fairly shocking policy. Most lawyers love footnotes, the perfect place to tuck in random caveats and muddy the waters.[19]

Justice Breyer derived his approach from the belief that the Constitution belongs to the people and that all citizens should be able to understand what the Supreme Court opines.[20]

Late Supreme Court Justice Antonin Scalia did not think placing citations in footnotes would make a brief of opinion more readable, and he stated that the reader's eye would bounce back and forth instead of seamlessly being able to read the legal authority or statements.[21]

An article written by J.M. Balkin sums up the volatile hostility some legal academics feel toward footnotes: "[I]t is a dangerous inconsequentiality, infecting the purity and coherence of legal argument."[22]

Alternatively, some legal scholars feel they are a necessary and helpful tool to balance the cacophony of references, citations, supplemental concepts, or vital background to a source or commentary. Indeed, Judge Edward R. Becker wrote, "the footnotephobes seem to have missed the essential point that judges are professional writers and that well-conceived and well-crafted footnotes are valuable tools of their trade. Because the time seems ripe for a dissenting statement, I write to praise footnotes, rather than to bury them."[23]

2. Famous footnotes

There are several quintessential footnotes in the legal community that signal more than a reference or explanatory notation. For instance, the *Irons* footnote is permitted when "the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full en banc hearing."[24]

The *Irons* footnote is so notable that *Black's Law Dictionary* contains a complete entry.[25] An *Irons* footnote is "[a] footnote in a panel opinion of the U.S. Court of Appeals for the D.C. Circuit announcing that the

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[19] Jenny S. Martinez, *Breyer's Contribution to Our Legal System: Making the Law Practical*, Wash. Post (Jan. 26, 2022), https://www.washingtonpost.com/opinions/2022/01/26/breyer-made-law-practical/.

[20] *Id.*

[21] Nancy A. Wanderer, *Textual Citations v. Footnotes: The Great Debate*, 32 Me. Bar J. 37 (2017).

[22] Balkin, *supra* note 2, at 277.

[23] Edward R. Becker, *In Praise of Footnotes*, 74 Wash. U.L.Q. 1, 2 (1996).

[24] Oakey v. U.S. Airways Pilots Disability Income Plan, 723 F.3d 227, 232 (D.C. Cir. 2013). *See* Irons v. Diamond, 670 F.2d 265 (D.C. Cir. 1981).

[25] *Irons footnote*, Black's Law Dictionary (12th ed. 2024).

panel has sought and received the endorsement of the en banc court."[26]

In addition to *Irons*, Justice Harlan Fiske Stone authored what is called the "most celebrated footnote in constitutional law"—footnote 4.[27] Footnote 4 of *United States v. Carolene Products Company* provides summation of court protections that has been a cornerstone in constitutional law due to its explicit and concrete approach to legislation policy and its relation to democracy.[28]

3. Preservation

One frequently asked question regarding footnotes is whether an argument is preserved if only included in a footnoted citation and not in the substantive argument itself. A quick answer to this question is no.

The Supreme Court has categorized footnoted assertions as only dictum, meaning they do not control the outcome.[29] In *United States v. Quinones,* the Second Circuit detailed that defendants pointed to two footnotes in their brief on appeal, indicating dismissal of death penalty notices was only one of several remedies proposed by defendants at the district court level.[30] Circuit Judge José A. Cabranes reiterated the Supreme Court's "well-settled rule" that when a party mentions an argument only in a footnote, they have not adequately raised or preserved it for appellate review.[31]

II. Types of footnotes

Cross-references that are referred to as "talking footnotes" are the more lengthy and explanative strings of thought cited in a legal work, as opposed to a short and concise citation. Many argue they disrupt the main text and interrupt the eyeline or reading flow of the text. One legal scholar defines them as the "noxious habit of interspersing bibliographic references throughout legal analysis (or what commonly passes as legal analysis)."[32] Caselaw is expansive and only grows with time. That said, the origination of a talking footnote may have only included a few references to the sparce and underdeveloped caselaw of the time. Presently,

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26 *Irons footnote*, BLACK'S LAW DICTIONARY (12th ed. 2024). *See, e.g.*, *Irons*, 670 F.2d at 267–68, n.11.
27 Lewis F. Powell, Jr., *Carolene Products Revisited,* 82 COLUM. L. REV. 1087 (1982).
28 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U.C.R.L.J. 35 (1996).
29 Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 42 (2025).
30 United States v. Quinones, 317 F.3d 86 (2d Cir. 2003).
31 *Id.* at 90.
32 Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES J. LEGAL WRITING 97, 97–98 (1998–2000).

there are databases full of caselaw, and as discussed above, some even supernatural (that is, ghost citations). Contrarily, a footnote might state the meat of the argument in a "highly economical way."[33]

Explanatory footnotes, on the other hand, provide brief and helpful context that may be supplemental in nature but not necessarily required to understand the main point or argument.

III. Endnotes

A feature that writers more often use in academic peer reviewed journals is the endnote. The main difference being that an endnote—as suggested by its name—appears at the end of the full document, rather than at the bottom of a page. While legal scholars lament the use and misuse of lengthy or unneeded footnotes, the endnote has less of opinionated presence in legal scholarship even though it causes the reader to flip back and forth between the referenced citation and the end of the document.[34]

IV. Rules, rules, rules

A. Federal rules

Rule 32 of the Federal Rules of Appellate Procedure explicitly dissuades from using "typographical tricks" to establish a level playing field by eliminating typeface or footnote manipulation to "squeeze more material onto a page."[35]

B. Law journals

A common initiation into the world of intense adherence to a style guide is one's first attempt at authoring a law review article. While undergraduate or graduate studies may have introduced an individual to formatting style systems—the *Publication Manual of the American Psychological Association*, the Modern Language Association's (MLA's) *MLA Handbook*, or *The Chicago Manual of Style*—law reviews carry their own preferences, manuals, and deadlines.[36] The tedium of learning the intricacies of legal writing and analysis, combined with the strict scrutiny of an editorial board, is the pressurized system that serves to develop and often mirror the pressure and responsibilities an attorney will face during

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[33] Balkin, *supra* note 2, at 280.
[34] Douglas E. Abrams, *Those Pesky Footnotes—Part I*, 1 Precedent 19 (2007).
[35] *See* Fed. R. App. P. 32.
[36] *See* Am. Psych. Ass'n, Publication Manual of the American Psychological Association (7th ed. 2020); Mod. Language Ass'n Am., MLA Handbook (9th ed. 2021); U. Chi. Press, The Chicago Manual of Style (18th ed. 2024).

practice.

While this may scare away some academics, some view authorship and inclusion of extensive footnotes as a badge of honor. Members of the *National Law Journal* have reported creating a running scoreboard on the law review article with the most footnotes.[37] Following obtaining a law degree, barred practitioners may not be referencing their alma mater's style system any longer, they will be double-checking court rules and procedures, local rules, and any applicable federal rules to ensure their own brief's adherence.

C. Sanctions

Adherence to any rule in the practice of law is of the utmost importance. Judges James Bredar, a federal judge in Maryland, issued a warning to lawyers who failed to follow local rules and *The Bluebook*, stating specifically that "[f]uture noncompliant filings will be stricken without prior notice."[38] Furthermore, authors can use footnotes to circumvent word limitations, which is discouraged by practitioners and judges alike as discussed and denounced by multiple justices, including Justice Scalia.[39]

About the Author

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[37] Arthur D. Austin, *Footnotes as Product Differentiation,* 40 VAND. L. REV. 1131 (1987).

[38] Debra Cassens Weiss, *Federal Judge Issues Footnote Warning, Threatens to Toss Pleadings Using Wrong Format*, A.B.A.J. (Sept. 1, 2016), https://www.abajournal.com/news/article/federal_judge_issues_footnote_warning_threatens_to_toss_pleadings_using_wro. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025).

[39] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 132 (2008).

Write Like a Winner: Techniques from 20 United States Supreme Court Winning Briefs You Can Use Today

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I. Introduction

When asked about legal writing, Chief Justice Roberts once offered this reflection:

> I'll read good briefs, and I'll understand, that's a good brief. And [I]'ll try to think back at exactly what it was that made it a good brief, and the sentence structure, and how it flowed together. And to a certain extent, your mind internalizes that. That's why I've always said the only way to be a good writer is to be a good reader.[1]

That is undeniably sage advice. But it also raises a few practical questions: What exactly makes a brief "good"? Where can you find briefs worth studying? And realistically, who has time to read enough of them to pick up on the patterns?

That is where this article comes in. It finds, reads, and analyzes good briefs for you. Not just any briefs, but 20 briefs filed by the Department of Justice (Department) that prevailed before the Supreme Court of the United States—referred to throughout this article as the "Winning Briefs." From these briefs, this article identifies six writing techniques that appeared in all of them, even quantifying how often attorneys used each technique. Most notably, it illustrates each technique by providing examples from the briefs themselves, helping you see—and absorb—these

[1] Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John Roberts, Jr.*, 13 Scribes J. Legal Writing 5, 39–40 (2010).

methods in context, just as the Chief Justice recommends.[2]

II. Technique #1: make prolific use of parentheticals

The Winning Briefs averaged **32.7 sentences** with parentheticals. Typical examples include the following:

- "Petitioners' scheme—tricking a victim into handing over money by lying about an essential aspect of what petitioners would provide in return—was classic property fraud, in violation of 18 U.S.C. 1343."[3]
- "Those defendants thereby received a benefit that less serious—possibly much less serious—offenders would have been denied."[4]
- "Petitioner's criminal offense—a violent sexual assault—illustrates that dynamic."[5]

While parentheticals were mainly separated by em dashes, they were also separated by parentheses.

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[2] The Winning Briefs consist of the following: Brief for the United States, Kousisis v. United States, 145 U.S. 1382 (2025) (No. 23-909); Brief for the Petitioners, Garland v. VanDerStok, 145 U.S. 857 (2025) (No. 23-852); Brief for the United States, Delligatti v. United States, 145 U.S. 797 (2025) (No. 23-825); Brief for the United States, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915); Brief for the United States, Diaz v. United States, 602 U.S. 526 (2024) (No. 23-14); Brief for the United States, Brown v. United States, 602 U.S. 101 (2024) (Nos. 22-6389, 22-6640); Brief for the United States, McIntosh v. United States, 601 U.S. 330 (2024) (No. 22-7386); Brief for the United States, Pulsifer v. United States, 601 U.S. 124 (2024) (No. 22-340); Brief for the United States, Samia v. United States, 559 U.S. 635 (2023) (No. 22-196); Brief for the United States, United States v. Hansen, 599 U.S. 762 (2023) (No. 22-179); Brief for the United States, Smith v. United States, 599 U.S. 236 (2023) (No. 21-1576); Brief for the United States, Kemp v. United States, 596 U.S. 528 (2022) (No. 21-5726); Brief for the United States, Denezpi v. United States, 596 U.S. 591 (2022) (No. 20-7622); Brief for the United States, United States v. Palomar-Santiago, 593 U.S. 321 (2021) (No. 20-437); Brief for the Petitioners, Brownback v. King, 592 U.S. 209 (2021) (No. 19-546); Brief for the United States, Gundy v. United States, 588 U.S. 128 (2019) (No. 17-6086); Brief for the United States, Gamble v. United States, 587 U.S. 678 (2019) (No. 17-646); Brief for the United States, Koons v. United States, 584 U.S. 700 (2018) (No. 17-5716); Brief for the United States, Bravo-Fernandez v. United States, 580 U.S. 5 (2016) (No. 15-537); Brief for the United States, Ocasio v. United States, 578 U.S. 282 (2016) (No. 14-361). Even though some quotations from these briefs are more than 50 words, they have been formatted as parts of a bulleted list rather than block quotes for the sake of readability.

[3] Brief for the United States at 8, *Kousisis*, 145 U.S. 1382 (No. 23-909).

[4] Brief for the United States at 24, *Pulsifer*, 601 U.S. 124 (No. 22-340).

[5] Brief for the United States at 44, *Denezpi*, 596 U.S. 591 (No. 20-7622).

- “He suggests that because the Constitution ‘protects the venue right twice over’ (in both the Venue and Vicinage Clauses), the issue has ‘paramount importance.’ ”[6]
- “Subsequently, LeRoux and Vamvakias (who also cooperated with the government) testified that petitioner and a partner murdered Lee.”[7]

Sometimes, the information forming the parenthetical was long.

- “A facial overbreadth challenge—in which a defendant asserts that a statute, constitutionally applied to him, is nevertheless invalid because it would be unconstitutional in a ‘substantial number’ of *other* cases, *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted)—is even more exceptional.”[8]

Other times, it was short.

- “But as Justice Scalia’s concurrence in *Castleman* recognized, force that causes bodily harm—or death—satisfies that requirement as well.”[9]

Sometimes, the parenthetical was placed at the end of a sentence.

- “Engrafting such a distinction onto the elements clause would not only be atextual, but also ahistorical—with calamitous consequences that Congress could not have intended.”[10]

Winning Briefs even included more than one parenthetical in a single sentence.

- “They obtained [Pennsylvania Department of Transportation’s] money or property (approximately $85 million of payments), by means of materially false and fraudulent misrepresentations (about compliance with the [Disadvantaged Business Enterprise] requirement), with an intent to defraud.”[11]

Sometimes, it included both an em dash *and* a parenthetical.

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[6] Brief for the United States at 25, *Smith*, 599 U.S. 236 (No. 21-1576) (citation omitted).
[7] Brief for the United States at 8, *Samia*, 559 U.S. 635 (No. 22-196).
[8] Brief for the United States at 18, *Hansen*, 599 U.S. 762 (No. 22-179).
[9] Brief for the United States at 16, *Delligatti*, 145 U.S. 797 (No. 23-825).
[10] *Id.* at 11.
[11] Brief for the United States at 9, *Kousisis*, 145 U.S. 1382 (No. 23-909).

- “Those two victims—Epeli Vosa and Mana Nailati—were citizens of Fiji (and also, in Vosa’s case, of the United Kingdom).”[12]

Winning briefs also included parentheticals to distinguish and set apart cases.

- “In a trio of decisions between 1847 and 1852—*Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560, 569 (1850); and *Moore v. Illinois*, *supra*—the Court ‘thoroughly considered the question’ and recognized that state and federal crimes are not the ‘same offen[s]e’ under the Double Jeopardy Clause.”[13]

III. Technique #2: start sentences with *but* or *and*

The Winning Briefs started sentences with *but* an average of **18.7 times**, and they started with *and* an average of **16.7 times**. Examples of sentences starting with *but* include the following:

- “But the same could be said about the testimony of petitioner’s expert.”[14]
- “But the impracticality exception belies petitioner’s theory that Rule 32.2(b)(2)(B) imposes a ‘rigid procedure.’ ”[15]

Examples of sentences starting with *and* include the following:

- “And a civil litigant who was deprived of the right to obtain review of the judgment may avoid collateral estoppel on that basis alone.”[16]
- “And they provide no sound textual arguments for their own positions.”[17]

Sometimes, a sentence starting with *and* immediately followed a sentence starting with *but*.

- “But 29 different Justices of this Court joined the majority opinions in *Fox*, *Lanza*, *Abbate*, and *Heath* alone. And most of the Court’s key decisions were either unanimous or drew only one or two dissenting votes.”[18]

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[12] Brief for the United States at 8, *Hansen*, 599 U.S. 762 (No. 22-179).
[13] Brief for the United States at 23, *Gamble*, 587 U.S. 678 (No. 17-646).
[14] Brief for the United States at 28, *Diaz*, 602 U.S. 526 (No. 23-14).
[15] Brief for the United States at 27, *McIntosh*, 601 U.S. 330 (No. 22-7386).
[16] Brief for the United States at 23, *Bravo-Fernandez*, 580 U.S. 5 (No. 15-537).
[17] Brief for the United States at 20, *Brown*, 602 U.S. 101 (Nos. 22-6389, 22-6640).
[18] Brief for the United States at 45, *Gamble*, 587 U.S. 678 (No. 17-646).

Other times, it was the reverse.

- "And even though those convictions have '*not* been set aside,' petitioners' approaches would prevent courts from counting them as [Armed Career Criminal Act (ACCA)] predicates based on subsequent events. But 'Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared.'"[19]

IV. Technique #3: drop in *for example*

The Winning Briefs averaged **7.6 uses** of the phrase *for example*. Attorneys primarily used *for example* as an introductory phrase.

- "For example, the statute requires proof that the defendant knew that the particular noncitizen's entry or residence in the United States would be unlawful, or acted 'in reckless disregard of [that] fact.'"[20]

Other times, attorneys placed it mid-sentence.

- "But it also carves out certain sentences; for example, particular sentences imposed more than a specified time period before the defendant's commission of the instant offense are not counted."[21]

They even used *for example* as a parenthetical.

- "And although the historical record yields relatively few 18th- and 19th-century sensitive places—for example, legislative assemblies, polling places, and courthouses—the Amendment allows modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places."[22]

V. Technique #4: sprinkle in *thus*, *indeed*, and *instead*

A. *Thus*

The Winning Briefs used the adverb *thus* an average of **9.4 times**. Most of the time, *thus* was placed in the middle of a sentence.

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[19] Brief for the United States at 25–26, *Brown*, 602 U.S. 101 (Nos. 22-6389, 22-6640) (citations omitted).
[20] Brief for the United States at 27, *Hansen*, 599 U.S. 762 (No. 22-179).
[21] Brief for the United States at 6, *Pulsifer*, 601 U.S. 124 (No. 22-340).
[22] Brief for the United States at 38, *Rahimi*, 602 U.S. 680 (No. 22-915) (citation modified).

- "The implicit-bracket reading would thus render subparagraph (A) completely useless."[23]
- "The approach that petitioner urges is thus deeply ahistorical, and petitioner makes no meaningful effort to show otherwise."[24]

But attorneys also used *thus* to start sentences.

- "Thus, as the leading treatise confirmed at the time, '[t]he mistake upon which relief may be grounded may be mistake of law as well as of fact.'"[25]
- "Thus, even in a case involving a substantial-assistance departure, the 'sentencing range' remains the same."[26]

B. *Indeed*

The Winning Briefs used the adverb *indeed* an average of **5.1 times**. Unlike *thus*, attorneys almost always used *indeed* to start a sentence.

- "Indeed, the Court found that such a reading would 'deny effect to the regulatory scheme, as criminals could always use straw purchasers to evade the law.'"[27]
- "Indeed, it is petitioner's proposed standard that threatens to be unworkable."[28]

And when put in the middle of a sentence, attorneys typically used *indeed* as a parenthetical.

- "It conflicts with this Court's precedents—indeed, it employs a mode of analysis that this Court has specifically disapproved."[29]
- "Petitioner acknowledges—indeed, embraces—that his 'likely to infer' standard would require a court to take into account not only the confession itself but the 'surrounding context' because the jury 'does not hear evidence in isolation.'"[30]

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[23] Brief for the United States at 20, *Pulsifer*, 601 U.S. 124 (No. 22-340).
[24] Brief for the United States at 8, *Smith*, 599 U.S. 236 (No. 21-1576).
[25] Brief for the United States at 12, *Kemp*, 596 U.S. 528 (No. 21-5726).
[26] Brief for the United States at 27, *Koons*, 584 U.S. 700 (No. 17-5716).
[27] Brief for the Petitioners at 42, *VanDerStok*, 145 U.S. 857 (No. 23-852).
[28] Brief for the United States at 55, *Gundy*, 588 U.S. 128 (No. 17-6086).
[29] Brief for the United States at 10, *Rahimi*, 602 U.S. 680 (No. 22-915).
[30] Brief for the United States at 30, *Samia*, 559 U.S. 635 (No. 22-196).

C. *Instead*

Finally, the Winning Briefs used the adverb *instead* an average of **6.2 times**. Like *thus*, attorneys usually placed *instead* in the middle of a sentence.

- "Petitioner's challenge in this Court instead rests exclusively on the lack of a preliminary order *before* sentencing."[31]

But they used it at the beginning of sentences as well.

- "Instead, the court has reached that result through multiple steps of atextual reasoning."[32]

VI. Technique #5: respond with punchy retorts

The Winning Briefs used a punchy retort—defined for purposes of this article as a response in eight words or less to an opposing argument or adverse ruling—an average of **4.8 times**. Examples of these retorts, placed in context, include the following:

- "As petitioner would have it, the 2011 restyling dramatically amended the Rule so as to eliminate the entire category of testifying experts to whom it had exclusively applied. *That reading is untenable.*"[33]
- "The Fifth Circuit next claimed that Section 922(g)(8) protects only 'identified individuals,' while historical gun laws sought to protect 'society generally.' *That is a false dichotomy.*"[34]
- "And because Rules 60(b)(2) and (3) did not address legal errors, petitioner supposes that the Advisory Committee intended Rule 60(b)(6) to absorb the entire third category. *That supposition is unsupported.*"[35]

Examples of other retorts, standing alone, include the following:

- "That belief was incorrect."[36]
- "That argument lacks merit."[37]

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[31] Brief for the United States at 36, *McIntosh*, 601 U.S. 330 (No. 22-7386).
[32] Brief for the United States at 18, *Palomar-Santiago*, 593 U.S. 321 (No. 20-437).
[33] Brief for the United States at 26, *Diaz*, 602 U.S. 526 (No. 23-14) (emphasis added).
[34] Brief for the United States at 43, *Rahimi*, 602 U.S. 680 (No. 22-915) (citation modified).
[35] Brief for the United States at 30, *Kemp*, 596 U.S. 528 (No. 21-5726) (citation modified).
[36] Brief for the United States at 52, *Koons*, 584 U.S. 700 (No. 17-5716).
[37] Brief for the United States at 25, *Bravo-Fernandez*, 580 U.S. 5 (No. 15-537).

- “Congress did not permit that result.”[38]
- “Those claims cannot both be correct.”[39]
- “But nothing like that occurred here.”[40]
- “That argument is doubly flawed.”[41]
- “Petitioner misreads the statute.”[42]
- “That suggestion is unsound.”[43]
- “That formulation is incomplete at best.”[44]
- “That submission is fundamentally mistaken.”[45]
- “Respondent has failed to make that showing.”[46]

VII. Technique #6: never start a sentence with *however*

Now for something the Winning Briefs did **0 times**: start a sentence with *however*. Justice Scalia and Justice Kennedy professed aversions to using *however* at the beginning of a sentence.[47] The Winning Briefs—perhaps paying heed to the justices—always placed it farther down.

- “The court found, however, that petitioners’ scheme satisfied those requirements.”[48]

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[38] Brief for the Petitioners at 28, *Brownback*, 592 U.S. 209 (No. 19-546).
[39] Brief for the United States at 40, *Delligatti*, 145 U.S. 797 (No. 23-825).
[40] Brief for the United States at 29, *Diaz*, 602 U.S. 526 (No. 23-14).
[41] Brief for the Petitioners at 28, *VanDerStok*, 145 U.S. 857 (No. 23-852).
[42] Brief for the United States at 21, *Ocasio*, 578 U.S. 282 (No. 14-361).
[43] Brief for the United States at 28, *Diaz*, 602 U.S. 526 (No. 23-14).
[44] Brief for the United States at 44, *Ocasio*, 578 U.S. 282 (No. 14-361).
[45] Brief for the United States at 33, *Denezpi*, 596 U.S. 591 (No. 20-7622).
[46] Brief for the United States at 49, *Hansen*, 599 U.S. 762 (No. 22-179).
[47] Bryan A. Garner, *Interviews with United States Supreme Court Justices*: *Justice Antonin Scalia*, 13 Scribes J. Legal Writing 51, 60 (2010) (“I never put *However* at the beginning—almost never put *However*. I think *However* belongs after the word that it is intended to set apart: ‘That is not true, however, for such and such,’ rather than ‘However, that is not true.’ ‘It is not true, however.’ I would much rather say it that way. Maybe that’s a peculiar part of my own style, but I don’t think you’ll often find sentences of mine that begin with *However*.”); Bryan A. Garner, *Interviews with United States Supreme Court Justices*: *Justice Anthony M. Kennedy*, 13 Scribes J. Legal Writing 79, 95 (2010) (“I do not think you should begin sentences with *Moreover* or *However*.”).
[48] Brief for the United States at 7, *Kousisis*, 145 U.S. 1382 (No. 23-909).

- “It is undisputed, however, that respondent thereafter fought with the officers and violently resisted arrest, including by biting Detective Allen’s arm.”[49]

VIII. Techniques in action

Although not necessarily representative of typical paragraphs in the Winning Briefs, the five examples below show all six techniques in use.

1. “That makes little sense. And it makes even less sense when the implications of requiring a prior violent offense of exactly two points are taken into account. That would mean that even if petitioner had a prior threepoint violent offense—even, for example, murder—he would still remain eligible for safety-valve relief. In order for his criminal history to be disqualifying under his proposed interpretation, petitioner would need to commit a violent offense serious enough to result in two points but not so serious as to result in three—say, a robbery for which he would be sentenced to ‘at least 60 days’ but not more than ‘one year and one month’ in prison.”[50]
2. “The argument also proves far too much. Over-accommodating that concern, to the detriment of countervailing considerations, would imply that *no* confession of a nontestifying co-defendant could ever be admitted in a joint trial—contrary to what this Court has held. As the Court has observed, ‘all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge.’ But joint trials have long been permissible—and, indeed, recognized as playing a critical role in the fair and efficient administration of justice.”[51]
3. “The Fifth Circuit also noted that ‘a part cannot be both *not yet* a receiver and a receiver at the same time’ and faulted the Rule for treating items that are ‘not yet frames or receivers’ as frames or receivers. But the Rule does no such thing. Instead, it defines the point in the manufacturing process at which an item becomes a ‘frame or receiver’—and thus ceases to be a not-yet frame or receiver. Indeed, although the court acknowledged that the dictionary definitions of

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[49] Brief for the Petitioners at 7, *Brownback*, 592 U.S. 209 (No. 19-546).
[50] Brief for the United States at 23, *Pulsifer*, 601 U.S. 124 (No. 22-340) (citation modified).
[51] Brief for the United States at 42–43, *Samia*, 559 U.S. 635 (No. 22-196) (citation modified).

'frame' and 'receiver' discussed above are the 'set, well-known definitions' of those terms, it failed to explain how those definitions exclude the partially complete frames and receivers covered by the Rule. For example, the court never explained how a receiver missing a single hole necessary to install a fire control component—or including a small piece of plastic that must be removed before its installation—is not 'the basic structure' of a gun."[52]

4. "Those distinctions all remain intact if some legal errors are cognizable under Rule 60(b)(1). Petitioner does not suggest otherwise. Instead, he asserts that permitting claims of legal error under Rule 60(b)(1) undermines Rule 59(e)'s 28-day deadline—and the statutory deadlines to file a notice of appeal in civil cases—by giving parties up to a year to 'repackage' arguments that should have been raised under Rule 59(e) or in an appeal. But as the petitioner recognizes, that possibility exists irrespective of the Court's resolution of the question presented in this case."[53]
5. "This Court has recognized, however, that such a 'contextual implication' approach would make it impossible 'to predict the admissibility of a confession in advance of trial' and would 'obviously lend itself to manipulation by the defense.' Petitioner thus preemptively offers a caveat to his own test. He suggests that the Court 'may wish to limit' the relevant context 'to those aspects of the case that are either knowable in advance of trial or within the prosecution's control.' But that suggestion itself lacks logical foundation or internal coherence. It would inexplicably allow the admission of confessions that are incriminating when linked to evidence, argument, or questioning proffered by any defendant (not just the complaining defendant)—even if they enable the same inferences on which petitioner seeks to rely here."[54]

IX. Conclusion

Though you are free to do so, you do not have to incorporate all these techniques into your writing. You can adopt those that align with your natural style and set aside those that do not. The goal is not to follow a formula, but to write effectively. More importantly, remember

[52] Brief for the Petitioners at 38–39, *VanDerStok*, 145 U.S. 857 (No. 23-852) (citation modified).
[53] Brief for the United States at 38–39, *Kemp*, 596 U.S. 528 (No. 21-5726) (citation modified).
[54] Brief for the United States at 36–37, *Samia*, 559 U.S. 635 (No. 22-196) (citation modified).

that the purpose of legal writing is to persuade, and persuasion depends on clarity. In short, do not rely on these techniques simply because they have been effective elsewhere. Rather, use them only when they make *your* arguments clearer and more compelling.

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Overview of the Plain Writing Act of 2010

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I. Background and passage

President Barack Obama signed the Plain Writing Act of 2010 (PWA) into law on October 13, 2010.[1] Then-Representative Bruce Braley, a Democrat representing the first congressional district of Iowa, sponsored it alongside 10 co-sponsors, 2 Republicans and 8 Democrats.[2] The bill passed in the House of Representatives (House) 386–33 with 11 lawmakers not present or not voting.[3] With minor amendments by the Senate, which the House accepted upon the bill's return to the House, the bill passed in the Senate by unanimous consent.[4] Politicians occasionally expressed interest before the PWA by making government-issued documents easier to understand. For example, "President Nixon declared in the 1970s that federal documents be written in 'layman's terms'," and "Al Gore started an initiative as vice president in the early 1990s called P.L.A.N., or the Plain Language Action Network."[5] Furthermore, "[a] similar bill, H.R.

[1] Plain Writing Act of 2010 (PWA), Pub. L. No. 111-274, 124 Stat. 2861; Press Release, White House Off. of Commc'ns, Statement by the Press Secretary (Oct. 13, 2010).
[2] *H.R. 946 (111th): Plain Writing Act of 2010*, GovTrack, https://www.govtrack.us/congress/bills/111/hr946 (last visited Nov. 25, 2025). Braley was in the House for four terms (from January 2007 to December 2014). In 2014, he unsuccessfully ran for one of the United States Senate seats from Iowa (losing to Joni Ernst) and thereafter retired from politics. During his time in the House, he was the primary sponsor of two bills (including the PWA) that Congress enacted. *Rep. Bruce Braley, Former Representative for Iowa's 1st District*, GovTrack, https://www.govtrack.us/congress/members/bruce_braley/412208 (last visited Nov. 25, 2025).
[3] Michael D. Shear, *Obama Signs Perfectly Plain Law*, N.Y. Times (Oct. 14, 2010), https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2010/10/14/obama-signs-perfectly-plain-law/.
[4] 111 Cong. Rec. S7556 (daily ed. Sep. 27, 2010); Federal Bill Tracking, Plain Writing Act of 2010, H.R. 946, 111th Cong. (2009); Shear, *supra* note 3. *See also* H.R. Rep. No. 111-432, at 6 (2010) (providing explanation of amendments and committee consideration).
[5] Shear, *supra* note 3.

3548, was introduced on September 17, 2007, and referred to the Committee on Oversight and Government Reform."[6] But "H.R. 3548 passed the House on April 14, 2008, by a vote of 376-1."[7] It "was never passed by the Senate" and therefore died in the 110th Congress.[8]

II. Provisions and scope

The stated purpose of the PWA is "to improve the effectiveness and accountability of [f]ederal agencies to the public by promoting clear [g]overnment communication that the public can understand and use."[9] The PWA comprises seven sections and appears in the U.S. Code only as one of the statutory notes to 5 U.S.C. § 301, titled "Departmental Regulations."[10] "Statutory notes are provisions of law that are set out as notes under a Code section rather than as a Code section."[11] The Office of the Law Revision Counsel of the United States House of Representatives determines whether a statutory provision appears in the U.S. Code as a section or a statutory note based on numerous factors.[12] A statutory provision "is the law whether the provision appears in the Code as section text or as a statutory note."[13]

The location in the U.S. Code may seem incongruous given that the PWA defines the "covered document" as "not includ[ing] a regulation."[14] Rather, a "covered document" under the PWA is "any document that—(i) is necessary for obtaining any Federal Government benefit or service or filing taxes; (ii) provides information about any Federal Government benefit or service; or (iii) explains to the public how to comply with a requirement

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[6] H.R. Rep. No. 111-432, at 3. This bill was titled the "Plain Language in Government Communications Act of 2008" and sponsored by Braley. *H.R. 3548 (110th): Plain Language in Government Communications Act of 2008,* GovTrack, https://www.govtrack.us/congress/bills/110/hr3548 (last visited Nov. 25, 2025).

[7] H.R. Rep. No. 111-432, at 3.

[8] *H.R. 3548 (110th)*, *supra* note 6.

[9] PWA § 2. *See also* H.R. Rep. No. 111-432, at 3 ("H.R. 946 improves the transparency and accountability of the federal government by requiring federal agencies to use plain language in many government documents and by requiring agencies to take actions such as training employees how to write in plain language."); *id.* (noting "sporadic efforts over the years to encourage agencies to use plain language in public documents" and stating that "H.R. 946 requires many government documents to be in plain language").

[10] 5 U.S.C. § 301.

[11] *Detailed Guide to the United States Code Content and Features: VI. Statutory Notes*, Off. of the L. Revision Couns., U.S. Code, https://uscode.house.gov/detailed_guide.xhtml#notes_statutory (last visited Nov. 25, 2025).

[12] *Id.*

[13] *Id.* at VI.F.

[14] PWA § 3(2)(C).

the Federal Government administers or enforces."[15] In sections 4 and 5, the PWA sets forth the responsibilities of federal agencies to implement and comply with the PWA.[16] In section 6, however, it provides that "there shall be no judicial review of compliance or noncompliance with any of its provisions" and that it "shall not be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action."[17]

III. Some initial reactions to enactment

Perhaps not many other than those who eagerly sought the enactment of the PWA and those who are responsible for complying with the PWA in drafting "covered documents" are even aware of it.[18] Among those unaware of the PWA until June 2025 was the author of this article. At best, she perhaps had heard of the PWA some time ago and since had—until recently—completely forgotten about its existence. A brief *New York Times* article written at the time of the PWA's enactment seemed skeptical as to what the PWA could or would accomplish.[19] For instance, the first sentence of the article declares, presumably unseriously, "This should clear everything up."[20]

IV. Implementation by the Department of Justice

In "preparation for implementation of plain writing requirements," section 4 of the PWA, "Responsibilities of Federal Agencies," requires that the head of each federal agency shall designate at least one senior official within the agency to oversee that agency's implementation of the PWA within nine months of the PWA's enactment.[21]

On January 31, 2011, the Department of Justice (Department) official responsible for implementation of the PWA sent a message to leaders in the Department's "roughly 40 individual offices, boards, divisions and component agencies" advising them of the PWA and its purpose and requiring that each component "provide a list of documents covered by

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[15] *Id.* at § 3(2)(A)(i)–(iii).
[16] *Id.* at §§ 4–5.
[17] *Id.* at § 6(a)–(b) (citation modified).
[18] *Id.* at § 3(2). The Center for Plain Language advocated for the passage of the PWA and continues to assess agencies' compliance with its requirements. *See Detailed Guide to the United States Code Content and Features*, *supra* note 11.
[19] Shear, *supra* note 3.
[20] *Id.*
[21] PWA § 4.

the Act that are routinely generated by [that] component" no later than March 31, 2011, and that those documents "be rendered in plain language no later than October 13, 2011."[22] A second message followed on April 14, 2011, with information on training, and "a third reminder was sent to the leadership of a few tardy components on June 14, 2011."[23]

"Responses from the components reflect[ed] the wide variety of the Department's missions and functions. Several reported that they do not produce any documents that fall under the Act. Others listed numerous documents that are relevant and are already in compliance with the Act's requirements."[24]

The Department decided that "the best way to ensure ongoing compliance with the requirements of the [PWA] is to leave the responsibility with each component's senior leadership."[25] The Department issued its 18-page *First Annual Compliance Report* on its implementation of the PWA on April 13, 2012.[26]

The Department has continued to issue annual Plain Writing Reports; the most recent (as of August 22, 2025) is the 27-page 2023 Plain Writing Report (2023 PWR) issued in September 2024.[27] The 2023 PWR states that the Department "has continued to rely on each component's leadership to determine which of their public-facing (and internal) documents comply with the Act, or need to be revised, as well as which employees need plain writing training," and that the 2023 PWR "provide[s] a sample of plain writing activities from several [Department] components during the 2023 calendar year."[28]

V. References in litigation

The PWA is mentioned in six unpublished federal court decisions (five district court decisions and one Court of Federal Claims decision) and (not surprisingly) in no state court decisions. The six decisions are the following:

- *Courter v. Elkhart County*;
- *United States v. One (1) Sig Sauer, Model P320, 9mm Semi-Automatic*

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[22] *Initial Plan: Initial Report on Plain Writing Act Implementation*, U.S. Dep't of Just. (Nov. 6, 2020), https://www.justice.gov/archives/open/initial-plan.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] U.S. Dep't of Just., Plain Writing Act of 2010 First Annual Compliance Report (2012).
[27] U.S. Dep't of Just., 2023 Plain Writing Report (2024).
[28] *Id.* at 3.

Pistol Bearing Serial Number 58C008744;

- *Stockstill v. Fresno Dept. of Social Services*;
- *Sylvester v. California*;
- *Randall v. Davis Joint School District*; and
- *Hollowell v. United States*.[29]

In each of these decisions, a pro se litigant unsuccessfully referenced the PWA (that is, relied on it incorrectly or merely included it in a string citation of assorted laws) in attempting to assert a claim or a defense.[30]

VI. The Center for Plain Language

The Center for Plain Language (CPL) is a 501(c)(3) organization that grew out of the Plain Language Action and Information Network (PLAIN), which was called the Plain English Network before re-naming itself in 2000.[31] PLAIN describes itself as "a group of federal employ-

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[29] Courter v. Elkhart Cnty., No. 23-cv-574, 2024 WL 5692180 (N.D. Ind. Oct. 25, 2024); United States v. One (1) Sig Sauer, Model P320, 9 mm Semi-Automatic Pistol Bearing Serial No. 58C008744, No. 18-4802, 2020 WL 7711407 (E.D. Pa. Dec. 28, 2020); Stockstill v. Fresno Dep't of Soc. Servs., No. 19-cv-889, 2020 WL 1274622 (E.D. Cal. Mar. 17, 2020); Sylvester v. California, No. 14-cv-5595, 2015 WL 2265794 (N.D. Cal. May 14, 2015); Randall v. Davis Joint Sch. Dist., No. 12-cv-2689, 2012 WL 6589437 (E.D. Cal. Dec. 17, 2012); Hollowell v. United States, No. 24-711, 2025 WL 1564761 (Fed. Cl. June 3, 2025).

[30] *See*, *e.g.*, *Courter*, 2024 WL 5692180, at *2 (rejecting the plaintiff's contention that a court order violates the PWA, because "[t]he court is not a federal agency"); *One (1) Sig Sauer*, 2020 WL 7711407, at *4 (in rejecting the claimant's argument that the Controlled Substances Act violates the PWA, noting that the PWA "applies only to documents issued by executive agencies, not statutes enacted by Congress"); *Stockstill*, 2020 WL 1274622, at *11 (stating that, if the plaintiff means the PWA in referring to the "Plain Language Act," "the [c]ourt fails to find any connection between this law and [the plaintiff's] allegations," and that the PWA does "not provide . . . a basis for federal question subject-matter jurisdiction over [the plainti 's] claims"); *Sylvester*, 2015 WL 2265794, at *3 (rejecting the argument that "the California rules of court" violate the PWA, because the PWA "only applies to documents drafted by agencies of the federal government," and also noting that the PWA "explicitly states that 'there shall be no judicial review of compliance or noncompliance'" with its provisions); *Randall*, 2012 WL 6589437, at *1 (noting that, in seeking "to halt the implementation of [a school district measure that] had yet to be voted on," the plaintiffs had invoked, *inter alia,* the "Federal Plain Writing Act"); *Hollowell*, 2025 WL 1564761, at *7 (in deciding to dismiss the plaintiff's complaint, noting that the plaintiff lists in his complaint "without further explanation, a variety of congressional acts and concurring resolutions" including "an act that requires federal agencies to communicate with the public using clear language").

[31] *History*, Ctr. for Plain Language, https://centerforplainlanguage.org/about/history/ (last visited Nov. 25, 2025). *See* 26 U.S.C. § 501(c)(3).

ees from different agencies and specialties who support the use of clear communication in government writing" that has been meeting informally since the mid-1990s with the goal of "promot[ing] the use of plain language for all government communications."[32] PLAIN differs from the CPL in that, among other things, PLAIN does not have non-federal members or include non-government communications within its reach.[33]

On its website, the CPL explains that because "some PLAIN members knew we . . . needed a different type of organization that could include folks outside the government to help . . . spread the plain language message."[34] The CPL's goal "was—and still is—to help government agencies and businesses write so clearly that [their intended audience] understands what they are saying the first time they read or hear it."[35] To that end, the CPL "advocated the passage of the PWA targeted at agencies that provide a benefit or service to citizens, such as the U.S. Social Security Administration, Internal Revenue Service, Medicare, and Veterans Affairs."[36] Furthermore, in 2012, the CPL began the Federal Plain Language Report Card to assess agency compliance with the PWA.[37] The U.S. National Archives and Records Administration, a component of the Office of Management and Budget, issued *The Writing Style Guide*, which similarly conveys the view that "[c]lear writing conveys clear thought."[38] In October 2020, the CPL reflected on the PWA's first 10 years, stating that "[w]hile not every agency is an ace at clearly communicating, there has been a significant improvement over the past [10] years" and that the PWA "continues to make a difference in the lives of people seeking information from the federal government."[39]

Since 2012, the CPL has issued a yearly Federal Plain Language Report Card that assesses agency compliance with the PWA.[40] For the 2024

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[32] *Plain Language Basics: Online Workshop*, DIGITAL.GOV (Sept. 10, 2020), https://digital.gov/event/2020/09/10/taking-plain-language-workshop-online (an "official website of the U.S. General Services Administration"); Joanne Locke, *A Short History of the Center for Plain Language*, CTR. FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/a-short-history-of-the-center-for-plain-language/ (last visited Nov. 25, 2025).

[33] Locke, *supra* note 32.

[34] *Id.*

[35] *Id.*

[36] *Id.* (citation modified).

[37] NAT'L ARCHIVES & RECS. ADMIN., NARA WRITING STYLE GUIDE (2024).

[38] *Id.* at 2.

[39] Kathryn Catania, *Happy 10th Anniversary Plain Writing Act*, CTR. FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/happy-10th-anniversary-plain-writing-act/ (last visited Nov. 25, 2025).

[40] *2024 Federal Plain Language Report Card*, CTR. FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/2024-federal-plain-language-report-card/ (last visited Nov.

Federal Plain Language Report Card, the CPL "reviewed 10 high-impact service providers to see how they're making important information clear, accessible, and easy to use for everyone."[41] Thus, the CPL evaluated specific webpages of the following organizations:

- Bureau of Consular Affairs;
- the Centers for Medicare & Medicaid Services (CMS);
- the Employee Benefits Security Administration;
- Federal Student Aid;
- Forest Service;
- Housing and Urban Development (HUD);
- Office of Workers' Compensation Programs;
- Veterans Benefits Administration;
- U.S. Citizenship and Immigration Services; and
- Veterans Health Administration.[42]

Federal Student Aid, HUD, CMS, and the Veterans Benefit Administration received the highest grades.[43]

The CPL also issues ClearMark Awards to "honor outstanding plain language work in English, French, and Spanish" based on "entries submitted by government agencies, nonprofits, universities, and private companies across North America."[44] In 2025, the winner in the government category was the Social Security Administration's "2025 Title II [Cost-of-Living-Adjustment] Notice."[45]

About the Author

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25, 2025). *See* section IV, *supra.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *2025 ClearMark Awards Winners*, Ctr. for Plain Language, https://centerforplainlanguage.org/awards/2025-clearmark-awards/ (last visited Nov. 25, 2025).
45 *Id.*

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You Are Not Hallucinating: Law Schools Should Be Teaching Artificial Intelligence Literacy as a Law Practice Skill

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I. Introduction

As artificial intelligence (AI) continues to reshape industries, the legal profession stands at a pivotal juncture. Law schools must evolve to prepare students not only to understand the law but also to navigate and leverage AI tools that are transforming legal practice. From predictive analytics and contract review to legal research and client interaction, AI is becoming an indispensable asset in the modern lawyer's toolkit. To ensure graduates are equipped for this new landscape, law schools should adopt a multi-faceted approach to AI education.[1]

The advent of [AI] is profoundly transforming the practice of law, particularly in the realm of legal writing. As AI tools become increasingly sophisticated, capable of assisting with research, drafting, and analysis, law schools face the imperative of equipping future lawyers not merely with traditional writing skills, but with the specific competencies required to leverage and critically assess AI in their legal writing endeavors. This demands a revised educational framework that emphasizes understanding AI's capabilities for writing, navigating its ethical pitfalls, fostering practical application, and committing to continuous adaptation.[2]

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[1] Jan Baker, Microsoft Copilot, "Can you write a one-page essay explaining how law schools should teach law students to use artificial intelligence in practice?" (June 12, 2025) (on file with author).
[2] Jan Baker, Google Gemini, "Can you write a one-page essay explaining how law

> As [AI] reshapes the landscape of legal practice, law schools must evolve to equip future lawyers with the skills necessary to navigate and harness these technologies effectively. AI tools, such as legal research platforms powered by machine learning, contract review software, and generative AI systems like ChatGPT, are already transforming how lawyers conduct due diligence, draft documents, and provide client advice. To remain relevant and adequately prepare students for practice, law schools should integrate AI training into the curriculum in a practical, ethics-focused, and interdisciplinary manner.[3]

A generative AI system authored each of the introductory paragraphs included above in response to the following prompt: "Can you write a one-page essay explaining how law schools should teach law students to use artificial intelligence in practice?" In mere seconds, each AI system responded with a complete essay *and* an invitation to ask it for additional editing assistance. The flashing cursor in the prompt box reminded me of a puppy who has just excitedly deposited a retrieved ball at her owner's feet and waits eagerly for another throw to fetch. A simple introduction over which I could have labored for hours was effortless for the machine.

Essay writing is one thing, but what about asking AI platforms to assist with the critical research, writing, and analytical skills needed to practice law? Should it be *that* easy? Like it or not, AI is already a part of law practice. Like the advent of other technological conveniences introduced into the practice of law, AI will change the way lawyers work. The challenge for legal educators, then, is how to teach AI literacy as a lawyering skill to a generation of law students who will undoubtedly rely on it in ways some of us never thought possible.[4]

Be assured, legal educators have different views on how AI instruction should be included in formal legal education and whether it should be included at all. My goal in this article is not to offer an answer to the question of *how* law schools should teach law students to use AI in practice

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schools should teach law students to use artificial intelligence in practice?" (June 12, 2025) (on file with author).

[3] Jan Baker, ChatGPT, "Can you write a one-page essay explaining how law schools should teach law students to use artificial intelligence in practice?" (June 12, 2025) (on file with author).

[4] Harnessing a working definition of artificial intelligence (AI) that encompasses every reference to its many dimensions is a daunting task. For purposes of this article, the reader should think of AI as the "'simulation of human intelligence processes by machines' in various contexts of differing complexity." Jorge A. Iñiguez, *The More You Avoid AI, the More You Violate the Model Rules*, 15 U.C. Irvine L. Rev. 370, 372 (2024) (quoting Lev Craig et al., *What Is AI? Artificial Intelligence Explained*, TechTarget (Oct. 1, 2024), https://perma.cc/TN5X-NQ2W).

but rather to tender some thought-provoking observations from judges, attorneys, law professors, and law students that might help frame the task facing law schools as they prepare practice-ready lawyers in the AI era.

II. Embracing artificial intelligence as friend not foe

To teach law students how to use AI in practice, law schools must first embrace AI as an essential part of effective lawyering. While some law schools and law professors continue to struggle with AI's place in legal pedagogy, some scholars argue that ignoring AI's impact on soon-to-be lawyers and their professional development is irresponsible. In a recent article, Professor Rachelle Holmes Perkins asserted that "*all* law professors have an inescapable AI mandate. To faithfully fulfill their duties, all law professors must achieve competence in, and understand the challenges of, [generative] AI."[5]

Law schools and their faculty who have embraced the mandate for AI education are positioning their graduates to excel in practice. For law students preparing to enter practice in the next year, achieving some level of competency with AI will be essential to their success as young lawyers. For better or worse, AI has already changed some aspects of law practice. Incorporating AI into the law school curriculum ensures students "will develop a deeper understanding of its capabilities and limitations, better preparing them to leverage it effectively in their professional lives outside academia. This hands-on experience aligns with the mission of legal education to equip students for the challenges of modern legal practice."[6]

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[5] Rachelle Holmes Perkins, *AI Now*, 97 Temp. L. Rev. 227, 229 (2025).

> This mandate for the legal academy stems from compelling considerations on three distinct but interconnected dimensions: pedagogy, scholarship, and governance. . . .
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> *No law faculty member is exempt from this mandate.* All law faculty are entrusted with responsibilities that intersect with at least one, if not all three, dimensions. This intersection is not dependent on whether the predominant focus of the law professor is teaching, scholarship, clinics, or administration. Nor is the mandate dependent on the extent to which the individual faculty member does or does not wish to incorporate Gen-AI into his or her own course or scholarship. It derives from the critical and complex role law professors hold in the development of lawyers and architecture of the legal field.

Id. at 229–30 (footnotes omitted) (emphasis in original).

[6] Alexandria Serra, *AI Lawyering Skills Trainers: Transforming Legal Education with Generative AI*, 16 Case W. Rsrv. U., J.L., Tech., & Internet 74, 90 (2025).

Admittedly, the task is not an easy one. Embracing AI as an essential practice skill requires law schools to consider how instruction in technology impacts the traditional law school model that separates doctrinal law from skills instruction. Judges and practitioners already recognize the broader impact AI is having and will continue to have on the legal profession, and they see it as more than a "skills" proficiency. Rather,

> [t]o fully embrace the transformative potential of generative AI in the legal profession, it is essential to look beyond narrow, task-oriented applications and envision the broader, long-term impact. Generative AI is not just another tool to draft briefs faster or churn out judicial orders on demand. Instead, it represents a fundamental paradigm shift, offering legal professionals the opportunity to enhance their thinking, workflows, and overall effectiveness.[7]

Law students also already recognize the reality that AI will be a part of their professional lives. One recent J.D. candidate put it aptly: "The legal field might seem an unlikely partner for the revolutionary promises of AI. The law is known for its emphasis on its rich history and firm reliance on custom and tradition. Nevertheless, recent years have seen a melding of the old with the new at an unprecedented pace."[8] To equip law students to practice law, law schools must embrace AI as friend not foe, and they must do it now.

III. The call for best (or at least basic) practices for artificial intelligence instruction

Accepting AI as friend not foe invites the query of how, exactly, law schools should go about the task of teaching their students to use it. As conversation about AI has started to spring up at academic and professional conferences, an informal list of best practices has started to emerge. When it comes to AI, however, the best practices of today might be obsolete by tomorrow. Nevertheless, acknowledging the need for some practical guidance is a critical first step toward incorporating AI into legal education.

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[7] Ralph Artigliere & Ralph C. Losey, *The Future Is Now: Why Trial Lawyers and Judges Should Embrace Generative AI Now and How to Do It Safely and Productively*, 48 Am. J. Trial Advoc. 323, 325–36 (2025).

[8] James H. Curlin IV, *ChatGPT Didn't Write This . . . or Did It? The Emergence of Generative AI in the Legal Field and Lessons from* Mata v. Avianca, 78 Ark. L. Rev. 123, 128 (2025) (footnotes omitted).

As a starting point, law schools should be intentional about establishing school-wide AI policies or, at a minimum, encouraging their faculty to establish AI policies for their specific courses. In a recent article discussing AI policy development, Professors Nachman Gutowski and Jeremy Hurley suggested that

> [a]s with any new and disruptive technology, challenges also emerge. From a legal and educational standpoint, these include, but are in no way limited to, overreliance, academic integrity, and assessment validity. Prudent policies are needed to maximize benefits and prevent potential issues. [Generative AI] promises to modernize legal pedagogy and better prepare students for technology-integrated practice if its use is guided appropriately.[9]

Acquainting law students with AI policies will prepare them to enter practice, where a growing number of courts and legal service providers are establishing their own rules for the use of AI tools.[10] Establishing policies to assist students as they learn about AI will enable them to evaluate its proper use, its effectiveness, and its accuracy as it applies to their specific cases.

When it comes to establishing best practices, some rules seem so simple that they should not have to be made into a policy. For example, practices many of us learned as first-year law students in the dark ages when electronic legal research was just dawning apply to the use of AI tools: construct your query (or prompt) with care, verify the results your prompt returns, engage in your own analysis of the law as it applies to your facts, and update your findings as you move through your case.[11] But other ethical considerations, such as client expectations and confi-

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[9] Nachman N. Gutowski & Jeremy W. Hurley, *Forging Ahead or Proceeding with Caution; Developing Policy for Generative Artificial Intelligence in Legal Education*, 63 U. Louisville L. Rev. 581, 587 (2025) (footnotes omitted). Professors Gutowski and Hurley also noted that as AI "models continue 'learning' and improving, their educational and professional applications will also expand. Purposeful and deliberate policy creation and implementation will be foundational to ensuring proper oversight and maintenance of academic standards as these technologies become more prevalent learning aids." *Id.*

[10] Samantha E. Dorey & James C. Truxaw, *Duty to Disclose the Use of AI in Legal Research and Writing: "Was This Drafted Using Artificial Intelligence (AI)?"*, 67 Orange Cnty. Law. 32, 33–34 (2025). *See* Nate Raymond, *[U.S.] Judicial Panel Advances Proposal to Regulate AI-Generated Evidence*, Reuters (May 2, 2025), https://www.reuters.com/legal/government/us-judicial-panel-advances-proposal-regulate-ai-generated-evidence-2025-05-02/.

[11] *See* Justice Michael B. Hyman, *Generative AI & Legal Writing*, 113 Ill. B.J. 49 (2025).

dentiality, might not readily occur to law students learning to navigate client matters early in their law school careers.[12]

Having an AI policy in place and employing best practices when teaching students to use it also has the potential for other added benefits when it comes to legal education. Teaching AI use as a professional skill offers law professors the opportunity to teach students how to engage in critical thinking, analysis, and reflection.[13] Professor Camesha Little suggests that

> [b]y fostering open dialogue and integrating AI as a tool for critical reflection, instructors can turn a potential challenge into a valuable learning opportunity.
>
> Beyond overcoming the AI barrier, the broader application of reflective thinking and writing practices remains essential. The legal education field can directly address its goals to support students' emotional intelligence and professional identity development, as well as foster a sense of belonging and inclusion by integrating a diverse array of legal skills using reflective practices. Any skill legal educators instruct can be reflected upon through video, writing, or thinking exercises to help students identify the impact of their experiences on their personal and professional growth. These reflections can help students explore how their assumptions have been challenged, how their beliefs and values have evolved, and the strategies they have employed to maintain their well-being throughout their legal education journey. This holistic approach to assessment and reflection not only provides a richer understanding of student development but also equips graduates with powerful tools to navigate the complexities of the legal profession.[14]

IV. Safeguarding the profession

Associating and teaching good policies regarding the use of AI as a practice tool is critical to ensuring that law students adhere to ethical rules when it comes to employing AI in practice. In recent months, disheartening stories of sanctions being levied against attorneys or notices of judges withdrawing opinions based on work product that included unverified AI material have made major headlines.[15] As these events illustrate,

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[12] Perkins, *supra* note 5, at 251.

[13] Camesha Little, *Think, Reflect, Refine: Shaping the Modern Lawyer*, 28 U.D.C.L. Rev. 30, 65–66 (2025).

[14] *Id.* at 65–66.

[15] *See* Debra Cassens Weiss, *Who—or What—Is to Blame for 2 Federal Judges' Error-Filled Withdrawn Opinions?*, A.B.A.J. (Aug. 7, 2025), https://www.abajournal.com/

AI applications have the potential to trigger a host of considerations related to ethical duties. Two attorneys writing about AI disclosures identified many of those considerations, offering a timely and straightforward discussion of how lawyers should think about AI in context of the duties that govern the profession:

> To comply with her Duty of Confidentiality, an attorney using AI needs to ensure that all client information input into AI systems is anonymized and that the AI platform complies with stringent security protocols to safeguard against unauthorized access or disclosure. To comply with her Duty of Competence & Diligence, an attorney using AI needs to understand the technology's capabilities, limitations, and terms of use. She must also critically assess AI-generated outputs for accuracy and bias, ensuring that they align with client interests and legal standards. Additionally, she should validate and supplement AI[-]generated content with traditional legal analysis. To satisfy her Duty to Comply with the Law, an attorney using AI needs to ensure strict adherence to all relevant laws and regulations governing AI use. To comply with her Duty of Supervision, an attorney using AI needs to ensure that clear policies are established regarding the appropriate and ethical use of AI within the firm. To comply with her Duty of Communication, an attorney should consider disclosing her intention to use AI to her client. Finally, to maintain her Duty of Candor to the Tribunal, an attorney must thoroughly review all generative AI outputs for accuracy and correct any errors or misleading information. She must also check jurisdictional rules for any requirements regarding *disclosure* of AI use to ensure compliance and transparency.[16]

Given the magnitude of ethical concerns AI brings to bear on the legal profession, law schools should be intentional about instructing students in responsible use of AI tools and incorporating that instruction formally as part of professional-responsibility pedagogy.[17]

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web/article/who-or-what-is-to-blame-for-2-federal-judges-error-filled-withdrawn-opinions; Mike Scarcella, *Two [U.S.] Judges Withdraw Rulings After Attorneys Question Accuracy*, Reuters (July 29, 2025), https://www.reuters.com/legal/government/two-us-judges-withdraw-rulings-after-attorneys-question-accuracy-2025-07-29/; Sara Merken, *AI "Hallucinations" in Court Papers Spell Trouble for Lawyers*, Reuters (Feb. 18, 2025), https://www.reuters.com/technology/artificial-intelligence/ai-hallucinations-court-papers-spell-trouble-lawyers-2025-02-18/.

[16] Dorey & Truxaw, *supra* note 10, at 33.

[17] Perkins, *supra* note 5, at 251. Though outside the scope of this article, another part

V. Conclusion

AI is already impacting law practice, and no one can predict how widespread its application will be within the next weeks, months, or years. Law schools are responsible for educating and preparing practice-ready lawyers. That responsibility must include formal instruction on AI and its best and highest use in the legal profession.[18]

About the Author

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of the conversation regarding instruction in the ethical use of AI that merits attention is the potential for law students' misuse of AI in law school courses, including prohibited use on graded assessments. *Id.* at 251–52. Law schools will need to determine how to address instances of misuse and how to establish reasonable methods of assessment that adequately evaluate students' ability to find, read, analyze, and apply applicable law. Those fundamental lawyering skills cannot be deputized to AI. *See id.*

[18] *Id.* at 253–54.

The Life of an Appeal

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I. Introduction

Appeals, like most things in life, are governed by rules and guided by norms. Appeals are governed by the Federal Rules of Appellate Procedure (FRAPs) and the circuit courts' Local Rules (LRs) and Internal Operating Procedures (IOPs). To fulfill our mission to seek justice with dignity, courtesy, and truthfulness, Department of Justice (Department) attorneys are—of course—also governed by many norms and principles. Important as those norms and principles are, this step-by-step journey through the life of an appeal follows the guideposts provided by the FRAPs. I invite you to walk with me to see where those rules lead.[1]

II. Initiating the appeal

A. Notice of appeal

The seed of an appeal is planted by filing a notice of appeal in the district court. In general, parties must file such notices within 14 days after the entry of a final judgment for criminal cases and within 30 days after entry of a final judgment for civil cases.[2] The deadlines are 60 days when the government is appealing a civil case and 30 days when the government is appealing a criminal case.[3] The party filing the notice of appeal is known as the appellant. The responding party is the appellee.

If a would-be appellant files a notice of appeal before a final judgment issues, the court treats the notice as "filed" on the day the district court ultimately entered the judgment.[4] Only the district court can extend the

[1] This article does not discuss interlocutory appeals. *See, e.g.*, 28 U.S.C. § 1292; 18 U.S.C. § 3731 (interlocutory appeals in criminal cases); Fed. R. App. P. 5; U.S. Dep't of Just., Justice Manual 2-2.000 (providing Department-specific guidance and requirements regarding interlocutory appeals). Nor does it discuss appeals seeking review of agency orders. *See, e.g.*, Fed. R. App. P. 15–20.

[2] Fed. R. App. P. 4(a)(1)(A). The court determines timeliness of notices for incarcerated persons based on when they deposit the notice in the institution's mail system. *Id.* at 4(c)(1).

[3] *Id.* at 4(a)(1)(B), (b)(1)(B).

[4] *Id.* at 4(a)(2), (b)(2).

time to file a notice of appeal for excusable neglect or good cause.

1. Noticing criminal appeals

If a defendant files a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, a motion for a new trial under Rule 33, or a motion for arrest of judgment under Rule 34, the time to file an appeal runs from the entry of the order determining the last of those motions.[5] A notice of appeal filed after the entry of judgment but before the district court decides the last of these motions is deemed filed on the day the court decides the last of the motions or the day it enters the judgment of conviction—whichever occurs last.[6]

2. Noticing civil appeals

If a civil litigant files one of the following motions in district court within the time allowed by the rules, the time to file an appeal runs from the entry of the order determining the last of the motions:

- for judgment under Federal Rule of Civil Procedure 50(b);
- to amend or make additional factual findings under Rule 52(b);
- for attorney's fees under Rule 54, if the district court extends the time to appeal under Rule 58;
- to alter or amend the judgment under Rule 59;
- for a new trial under Rule 59; or
- for relief under Rule 60 (if the motion is filed no more than 28 days after the judgment is entered).[7]

A notice of appeal filed after the entry of judgment but before the last of the motions listed above is decided is deemed filed on the day that the last of the motions is entered.[8]

B. Paying filing fees

After the appeal is noticed, the appellant pays all required fees.[9] The government generally does not have to pay filing fees. An appellant who

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[5] If a motion for new trial is based on newly discovered evidence, this timing applies only if the motion is made no later than 14 days after the entry of judgment. Fed. R. App. P. 4(b)(3)(A)(ii); Fed. R. Crim. P. 29, 33, 34.

[6] *Id.* at 4(b)(3)(B).

[7] Fed. R. Civ. P. 50(b) (judgment); *id.* at 52(b) (amend or make additional factual findings); *id.* at 54 (attorney's fees); *id.* at 58 (if district court extends time to appeal); *id.* at 59 (alter or amend judgment or new trial); *id.* at 60 (relief).

[8] Fed. R. App. P. 4(a)(4)(B).

[9] *Id.* at 3(e).

cannot afford to pay the fee must file a motion for *in forma pauperis* (IFP) status in the district court (unless the district court already permitted the party to proceed IFP in that court and has not revoked that status).[10] If the district court revoked IFP status, the aspiring IFP appellant must timely move for the appellate court to grant IFP status.[11] This is relevant to Department lawyers as the circuit court sometimes dismisses appeals because a non-IFP litigant has not paid the filing fee.

C. The court's internal processes

After noticing an appeal, the clerk's office dockets the appeal. The internal machinations are unique to each circuit. Importantly, this process produces an appellate case number, which the parties use to access the electronic docket.[12]

After docketing the appeal, the court also performs a preliminary jurisdictional review to determine whether the circuit court has jurisdiction. For example, appeals courts must dismiss appeals without a final order from the district court due to lack of jurisdiction.[13] In cases in which it is obvious that the circuit court lacks jurisdiction, the court will assign the case to a panel of judges who review the basis for jurisdiction and, where appropriate, enter an order dismissing the appeal. Where it appears that the court has jurisdiction over the appeal, counsel enters their appearances, typically using the form found on the circuit court's website.[14]

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[10] *See* 28 U.S.C. § 1915; Fed. R. App. P. 24.
[11] Fed. R. App. P. 24(a)(5).
[12] *Id.* at 12(a).
[13] *See, e.g.*, Williams v. City of Yazoo, 41 F.4th 416, 421 (5th Cir. 2022) ("Lacking a final order, we have no jurisdiction . . . ."); United States v. Jackson, 30 F.3d 572, 574 (5th Cir. 1994) ("[A]ppellate review of a dismissal without prejudice must await final judgment after re-indictment."); United States v. Fuller, 15 F.3d 646, 649 n.2 (7th Cir. 1994) ("It is well settled, however, that this [appellate] court has no jurisdiction to review the decision of a magistrate judge on direct appeal—we have jurisdiction only over final decisions of district courts, and the decision of a magistrate judge becomes final and therefore appealable only when adopted by the district court. 18 U.S.C. § 1291 [sic].") *See* 28 U.S.C. § 1291. Interlocutory appeals, which involve special rules conferring appellate jurisdiction in limited circumstances, are not discussed in this article. *See* note 1, *supra*.
[14] *See* Fed. R. App. P. 12(b).

D. Ordering transcripts and producing the record on appeal

Within 14 days after filing the notice of appeal, the appellant must order transcripts from any proceeding relevant to the appeal.[15] Circuit courts typically have a transcript order form for such purposes. The appellant also arranges to pay the court reporter for any transcripts ordered.[16] Under the FRAPs, court reporters are expected to produce transcripts within 30 days, though the appellant can arrange for a faster turnaround.[17] The appellee can move to supplement the record with additional transcripts.[18]

After the clerk prepares and uploads the transcripts to the district court docket, the district court's clerk's office produces the electronic record on appeal, which includes the original papers and exhibits filed in the district court; the transcripts of proceedings, if any; and a certified copy of the docket entries prepared by the district clerk.[19] The clerk's office generally does not transmit physical evidence (including CDs, DVDs, and thumb drives) to the appellate court.[20] Counsel can review this material at the clerk's office.

When the district court transfers the record on appeal to the circuit court, the circuit court's clerk's office notifies the parties that the record on appeal is available.[21] If something material to the appeal is omitted from the record on appeal, either party may move to supplement the record with that material.[22] The process of initiating an appeal can be seen in Figure 1.[23]

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[15] *Id.* at 10(b).
[16] *See id.* at 10(b)(4).
[17] *Id.* at 11(b)(1).
[18] *See id.* at 10(e)(2).
[19] *Id.* at 10(a), 11.
[20] *Id.* at 11(a)(2) ("Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals.").
[21] *Id.* at 12(c).
[22] *See id.* at 10(e)(2).
[23] All figures were created by the author to help readers visualize portions of the appellate process.

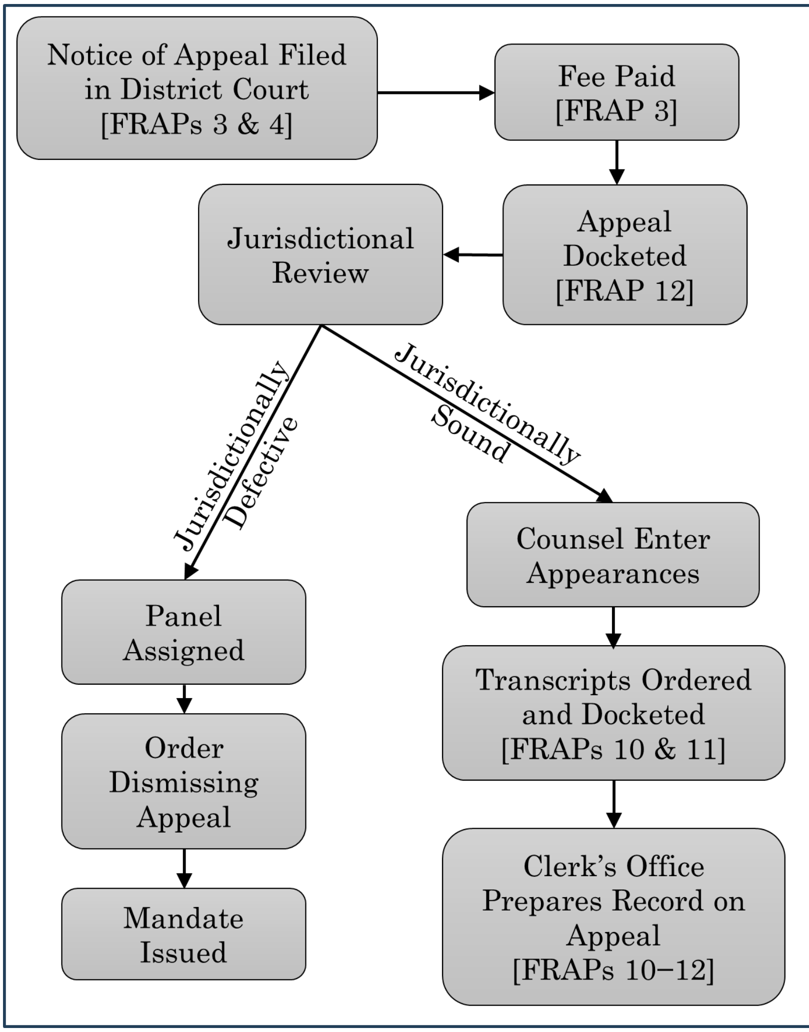

Figure 1: Initiating the appeal

III. Briefing the appeal

A. Briefing schedule

Once the record on appeal is available, the clerk's office notifies the parties of the briefing schedule. Some jurisdictions rely on counsel to propose a briefing schedule.[24] Generally, an appellant's principal brief is due 40 days after the record on appeal is produced.[25] The appellee's brief is due 30 days after the opening brief is filed, and the appellant's reply is

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[24] *See, e.g.*, *Local Rule 31.2. Briefing Schedule; Regular and Expedited Appeals Calendars*, U.S. Ct. of Appeals for the Second Cir. (June 13, 2019), https://www.ca2.uscourts.gov/clerk/case_filing/rules/title7/local_rule_31_2.html.

[25] Fed. R. App. P. 31(a)(1).

due 21 days after that.[26]

In a case involving a cross-appeal, the appellant (that is, the first party to file a notice of appeal) files its principal brief first.[27] The appellee then files a combined principal brief and response brief.[28] Thereafter, the appellant files a reply brief combined with its response to the appellee's principal brief.[29] The appellee may then file a reply to the appellant's response to the cross-appeal.[30]

B. Form of the briefs

The FRAPs provide several requirements for briefs—from critical (for example, content that must be included) to incidental (for example, length limitations, type-face constraints, and line-spacing requirements).[31] Circuit courts often have their own LRs for these matters, and many appellate counsels use templates to ensure their briefs have the required content, certifications, and signatures and that they satisfy all style and length limitations.

C. Record excerpts

Principal briefs are accompanied by record excerpts (sometimes called appendices). Record excerpts are the subset of the record-on-appeal material that is most critical to the reader.[32] This includes the judgment, order, or decision the court is reviewing and any relevant portions of the record on appeal.[33] The appellant files the record excerpts when filing the principal brief.[34]

D. Supplemental briefs

Occasionally, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed—or not adequately addressed—in the principal briefs. Courts can order such briefing before or after oral argument. The FRAPs also permit letters citing to "pertinent and significant" supplemental authority that comes to a party's

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[26] *Id.* at 31(a)(1).
[27] *Id.* at 28.1(b), (c)(1).
[28] *Id.* at 28.1(c)(2).
[29] *Id.* at 28.1(c)(3).
[30] *Id.* at 28.1(c)(4).
[31] *See id.* at 28(a) (appeals); *id.* at 28.1 (cross appeals); *id.* at 29 (amici); *id.* at 32 (cover, style, signature, length limitations).
[32] *Id.* at 30.
[33] *Id.* at 30(a)(1).
[34] *Id.* at 30(a)(3).

attention after its brief is filed.[35] The opposing party may respond to such letters promptly.[36]

E. Amici briefs

Rarely, non-litigants seek to interpose in appeals to assist the court in cases where they have an interest. FRAP 29 provides criteria for participation as amicus (for example, that the amicus has a sufficient "interest" in the case and that its brief is "desirable" and discusses matters that are "relevant to the disposition of the case").[37]

FRAP 29 requires most litigants to obtain content from all parties or leave of the court to participate as amici.[38] The government, however, may file a friend-of-the-court brief without consent or court permission.[39] The solicitor general determines whether the government will participate as amicus.[40]

The normal practice of the Department is to freely grant its consent to the filing of amicus briefs, even where a party might reasonably contend that the amicus brief does not make a positive contribution to the proper resolution of an appeal.[41] Such consent can be conditioned on compliance with the timeliness and length requirements of FRAP 29 and on compliance with any LR or existing order relating to briefing schedules, page lengths, or similar matters.[42]

F. Intervenor briefs

Occasionally, intervenors, well, intervene in the proceedings. Intervenors are organizations or persons who want to participate in the appeal because they believe the appeal—or its outcome—may affect their rights or duties. Unless a statute allows one to intervene as of right, a would-be intervenor must move for leave to intervene before filing a brief.[43] Figure 2 shows the process of briefing the appeal.[44]

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[35] *Id.* at 28(j) (limiting letters to 350 words).
[36] *Id.*
[37] *Id.* at 29(a)(3).
[38] *Id.* at 29(a)(2).
[39] *Id.*
[40] *See* U.S. Dep't of Just., Justice Manual 2-2.123 ("The authorization of the Solicitor General is required for the filing of any amicus brief in all federal or state appellate courts. *See* 28 C.F.R. 0.20(c).").
[41] *See* U.S. Dep't of Just., Justice Manual 2-2.125.
[42] *Id.*
[43] Fed. R. App. P. 15(d). *See, e.g.*, 28 U.S.C. § 2403 (permitting government to intervening in cases questioning "the constitutionality of any Act of Congress affecting the public interest").
[44] Dashed lines show cross-appeal filings.

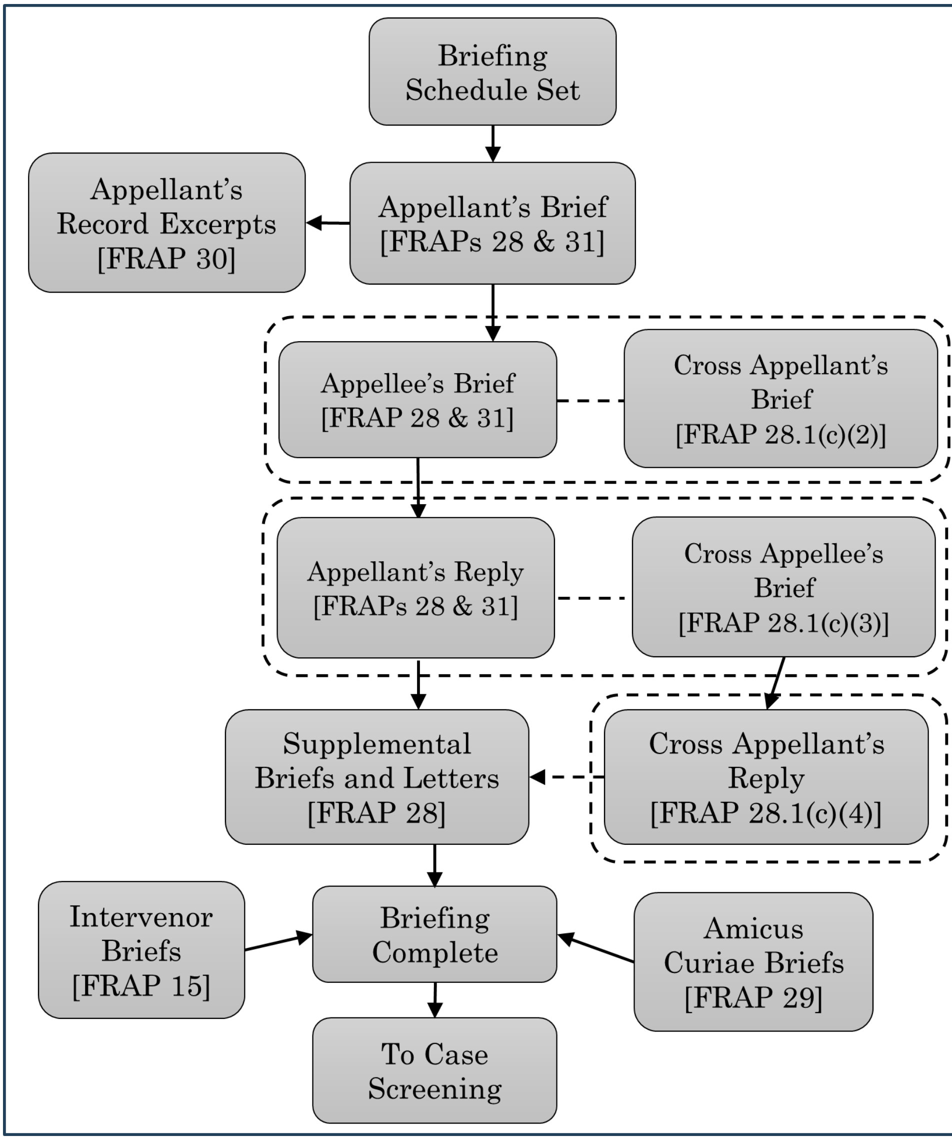

Figure 2: Briefing the appeal

IV. Motions

Any party making a request of the court must file it as a motion.[45] Though motions can be substantive (for example, for summary affirmance, to enforce an appellate waiver, for voluntary dismissal, or for reconsideration), they are often procedural (for example, for additional time to file a brief, to supplement the record on appeal, to exceed the length limitations, to suspend briefing pending a ruling on a dispositive motion, to view restricted documents, or to file under seal).

[45] *See* Fed. R. App. P. 27(a).

As with briefs, the form of the motion is governed by the FRAPs and often by LRs as well.[46] When parties have counsel, courts require that each motion contain a certification to do the following: (1) confirm counsel for all parties conferred as to the relief sought; and (2) note whether any party opposes the requested relief.

A party must file its response to a motion within 10 days, and a reply to the response is due within 7 days.[47] Because the court can rule on a procedural motion without waiting for a response, a party should file any opposition promptly—without reliance on the 10-day filing deadline.[48]

Though practice varies by circuit, the clerk or the clerk's designee acting under the clerk's authority determine certain routine and procedural motions.[49] Other procedural motions are referred to a single judge.[50]

If a party requests reconsideration, the court may resubmit a clerk's order to a judge for determination.[51] Similarly, a party can request that a three-judge panel reconsider a single-judge order.[52] Motions are generally decided without oral argument.[53] Figure 3 shows the process for motions.[54]

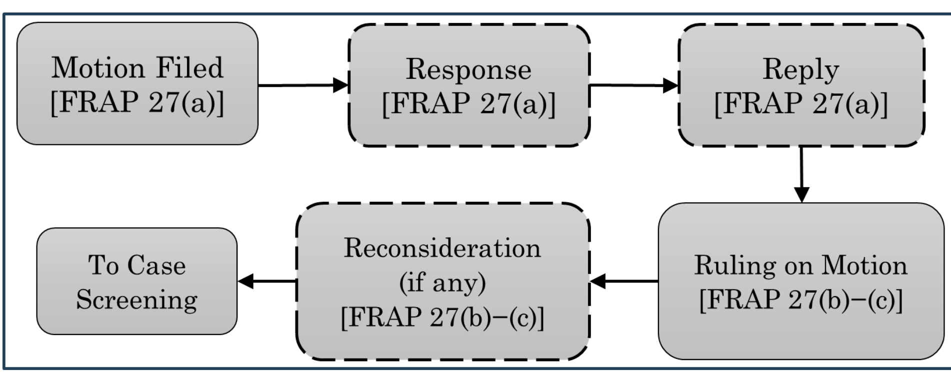

Figure 3: Motions

V. The court's deliberative processes

Ultimately, the court issues one of the following: (1) an opinion pursuant to which a final judgment is entered; or (2) a summary order and

46 *Id.* at 27(d).
47 *Id.* at 27(a)(3)–(4).
48 *See id.* at 27(b).
49 *Id.*
50 *Id.* at 27(c).
51 *Id.* at 27(b).
52 *Id.* at 27(c).
53 *Id.* at 27(e).
54 Dashed lines show optional steps.

judgment disposing of the appeal. Figure 4 shows the court's deliberative processes.[55]

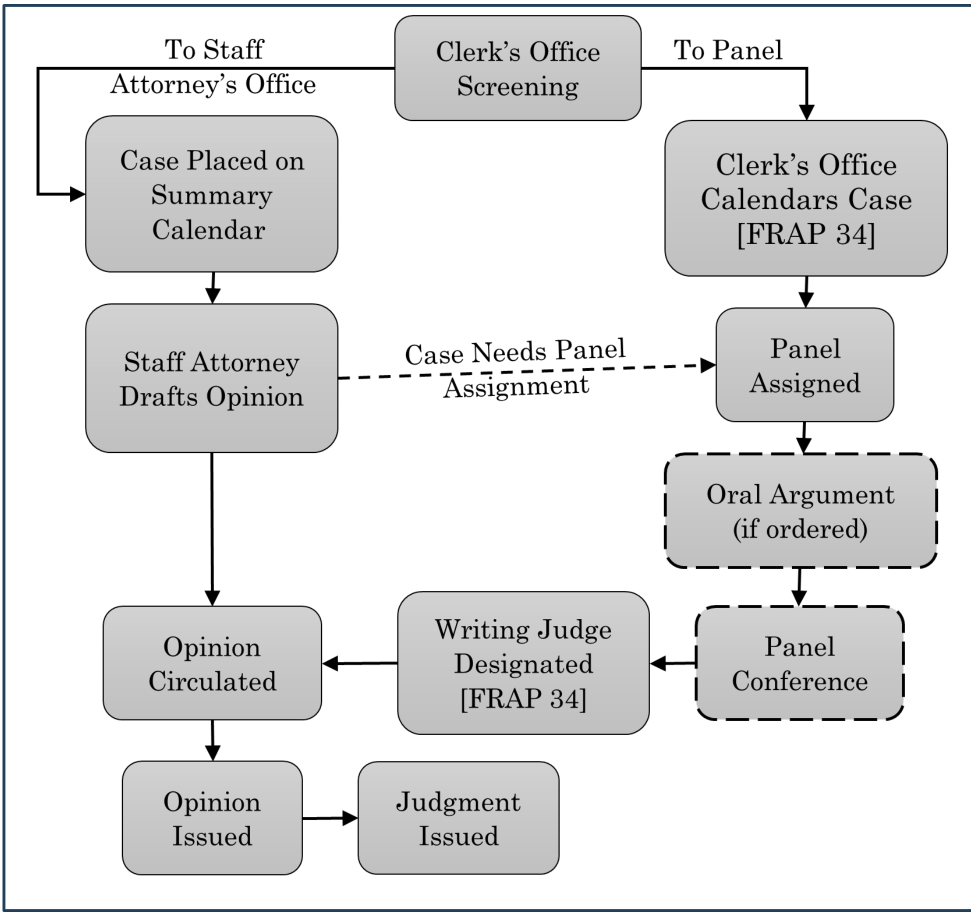

Figure 4: The court's deliberative process

A. Screening, panel assignment, and issuance of the opinion

After briefing is complete, the court (typically with the aid of its clerk's office) screens the case to determine whether it should place the case on the summary calendar—where a staff attorney often drafts a proposed order for the court's consideration—or send it to a panel for resolution.

Cases sent to the staff attorney's office (sometimes called "screeners") involve routine matters where the legal principles are well-established and readily applied to the facts of a case. A staff attorney then drafts a proposed opinion for an assigned judge to consider. After the judge edits the opinion, the judge circulates it to the other two judges assigned to

[55] Dashed lines show optional steps.

the case for consideration. Once the panel agrees on the opinion's text, it issues the opinion unpublished, and often, per curiam. If a screener involves legal matters or a set of facts that do not lend themselves to resolution through this process, a judge can kick the case to the alternate track, which involves more intense review by a panel of three judges.

Cases assigned to three-judge panels are typically not best resolved through the screener process. In general, this means the law clerks of the judges assigned to the case (rather than the court's staff attorneys) assist the judge. While some of these cases require oral argument, many do not. Some circuits hear argument more often than others. Recent statistics show that, on average, cases are decided after argument less than 25% of the time.[56] Where a panel decides that oral argument is warranted, it will notify the parties, who then designate lawyers to present argument. Argument is brief—often 10 to 20 minutes per side. The names of the judges assigned to the case are typically noticed a week or two before argument. The court may allocate more time for more complicated cases, or those with multiple defendants.

Ultimately, the panel must produce an opinion. To avoid disposition on the merits, some circuit courts—principally for civil appeals—take advantage of the FRAPs permitting them to direct the parties to "conference" to simplify the issues or settle the case.[57] This often occurs after the three-judge panel meets in conference following oral argument. During the conference, the judges discuss the cases assigned to the panel (even those where no argument was heard), vote on the appropriate outcome for each, and decide which judge will author each opinion. If the court's practice is not to conference, the senior judge on the panel may assign a writing judge who drafts and circulates a proposed opinion for the remaining judges to consider. The net result is an opinion. After (or simultaneously with) issuance of the opinion, the clerk's office issues a final judgment.[58]

VI. Rehearing

Occasionally, a party applies for a rehearing of the court's opinion or summary order. There are two kinds of rehearing. A petition for a

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56 U.S. Cts., U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2024: Table B-10 (2024) (showing that Third Circuit decided less than 14% of cases following argument, the D.C. Circuit decided nearly 50% of cases following argument, and other circuits fell between these extremes).
57 Fed. R. App. P. 33.
58 *Id.* at 36.

panel rehearing requests that the judges who originally heard the case reconsider their decision. And a petition for a rehearing en banc requests that all active judges rehear the case.

Rehearing en banc is disfavored but is allowed when the panel's opinion does one of the following: (1) conflicts with a decision of the court, a published, sister-circuit case, or a Supreme Court of the United States (Supreme Court) opinion; or (2) involves a question of "exceptional importance."[59] Courts grant rehearing en banc when a majority of the active judges in the circuit (and not recused) vote in favor of rehearing.[60] Such a vote can occur in response not only to a party's petition for rehearing en banc, but also at the request of an active judge.[61]

A party must file a petition for rehearing within 14 days after the decision determining the case is filed.[62] The government has 45 days to seek rehearing.[63]

As with motions and briefs, the form of the petition for rehearing is governed by the FRAPs and often by LRs as well.[64] Unlike motions and briefs, the FRAPs do not permit responses and oral argument.[65] Figure 5 shows the process of rehearing.[66]

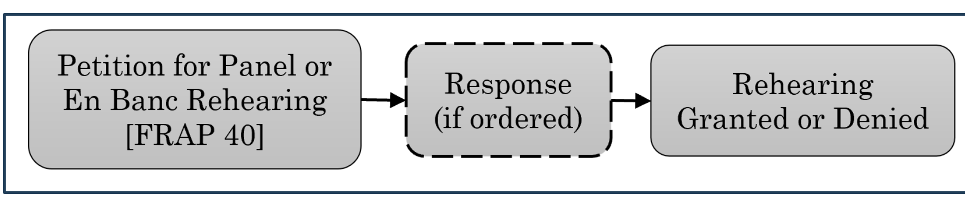

Figure 5: Rehearing

VII. Issuance of the mandate

The mandate is the order or judgment that terminates the case with *mandate* inscribed on the document. There is no separate filing. The issuance of the mandate ends the circuit court's jurisdiction over a case and transfers jurisdiction back to the district court.[67]

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59 *See id.* at 40(a), (b)(2), (c).
60 *Id.* at 40(c).
61 *Id.*
62 *Id.* at 40(d) (clock runs from any amendment to the decision).
63 *Id.* at 40(d)(1) (also allotting 45 days to government employees sued in their individual capacities for acts done as part of their official duties).
64 *Id.* at 40(d).
65 *Id.* at 40(d)(4)–(5) (permitting responses only where the court orders them).
66 Dashed lines show optional steps.
67 *Id.* at 41(c) ("The mandate is effective when issued.").

Where an appeal ends with the disposition of a motion, the mandate ordinarily issues immediately. Where a court opinion resolves an appeal, the mandate generally issues 21 days after the entry of the judgment.[68]

Generally, the timely filing of a petition for rehearing or a motion for panel reconsideration will stay the issuance of the mandate until disposition of the petition or motion unless the court orders otherwise. If the petition or motion is denied, the mandate issues seven days after the court enters its order denying the petition or motion, unless the time is shortened or extended by order.[69]

A party seeking Supreme Court review of a circuit court judgment or order must file a petition for a writ of certiorari with the Supreme Court within 90 days from the date of the entry of judgment or denial of the petition for rehearing. A party seeking such review can move to stay issuance of the mandate.[70] If granted, such a stay remains in place until the Supreme Court's final disposition of the case.[71] When the mandate issues, the appeal ends—unless a litigant can convince the court to recall the mandate.[72] Figure 6 shows the process of the issuance of the mandate.[73]

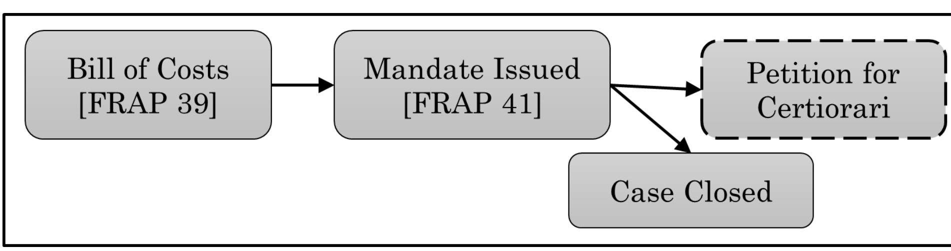

Figure 6: Issuance of the mandate

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[68] *Id.* at 41(b) (mandate issues "7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later"); *id.* at 40(d) (time to petition for rehearing).

[69] *Id.* at 41(b).

[70] *E.g.*, *id.* at 41(d) (setting parameters for stay).

[71] *Id.* at 41(d)(2).

[72] *See, e.g.*, U.S. Cts., Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit 38 (2024) (Rule 41.2 states, "Once issued a mandate will not be recalled except to prevent injustice."); U.S. Ct. of Appeals, Eighth Cir., Internal Operating Procedures 25 (2024) (Rule IV.F states, "Once issued, a mandate will be recalled only to prevent injustice."); U.S. Cts., Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 17 (2023) (Rule 10.8.2 states, "[I]t is the practice of this court not to grant a motion for stay of the mandate or to recall the mandate unless the failure to grant a stay affects a substantive right of the applicant.").

[73] Dashed lines show optional steps.

VIII. Concluding thoughts

We conclude our journey by acknowledging that—though an appeal's path is often similar across circuits—LRs and IOPs greatly shape the path's landscape. Similarly, a circuit's case volume and internal processes can alter the appeal's length. Recent statistics show that, on average, courts decide cases after argument in approximately 10 months, with 1 circuit (Eighth) resolving cases within 6 months and 3 circuits (Second, Third, and Ninth) taking more than 1 year.[74] No matter the path, each appeal presents an occasion to navigate around a new set of facts and grow one's advocacy. Enjoy the journey.

About the Author

Jennifer Case is Deputy Appellate Chief in the United States Attorney's Office (USAO) for the Southern District of Mississippi. Before her work in the USAO, she was trial counsel in the Civil Division's Environmental Torts Section. Before joining the Department, she clerked for three federal judges, including judges on the Fifth and Eleventh Circuits.

Ms. Case gratefully acknowledges that this article would not have been written without Gaines Cleveland's (Appellate Chief, Southern District of Mississippi) encouragement and editorial support.

[74] *See* U.S. Cts., U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2024: Table B-4A (2024).

Beginning Boldly: Drafting Effective Introductions and Statements of Facts

Peter M. Mansfield
Chief, Civil Division
Eastern District of Louisiana

I. Introduction

Primacy and recency. Most lawyers know the concept; everyone has experienced it. In his groundbreaking studies of human memory over a century ago, German psychologist Hermann Ebbinghaus described the phenomenon as the serial position effect.[1] It works like this: When subjects are presented batches of information, they tend to remember the first and last things at far higher rates than the things that came between.

Recent input is ready for quick recall in our short-term, working memories, but why does primary information stick at greater rates than the second-most-recent piece of data? Follow-up studies hypothesized that listeners (or, for purposes of this article, readers) receive primary information in isolation—free from competing detail fighting for our limited attention.[2] This leads to an increased opportunity for long-term retention.[3] Think about how the first brushstroke on a white, unblemished canvas craves attention. Viewers watching the artist in real-time will likely remember the hue of that initial flash of color.

If primary information tends to sink into human memories because of its relative isolation, this normally means the quality of our starts will help or hinder the effectiveness of everything that follows.

Despite this reality, most lawyers probably labor over the guts of their memorandum or brief—that is, the legal analysis—substantially longer

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[1] Hermann Ebbinghaus, Memory: A Contribution to Experimental Psychology (Henry A. Ruger trans., Columbia Univ. 1913).
[2] Jessica L. Bregant, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. Ill. L. Rev. 1213, 1231 (2009) (citing Geoff Ward & Lydia Tan, *The Effect of the Length of To-Be-Remembered Lists and Intervening Lists on Free Recall: A Reexamination Using Overt Rehearsal*, 30 J. Experimental Psych.: Learning, Memory, & Cognition 1196 (2004)).
[3] Bregant, *supra* note 2.

than the introduction or statement of facts. That is understandable. After all, we are lawyers. But as this article explains, a compelling introduction and statement of facts using simple but proven strategies will increase the likelihood of persuading the court to see the issues as you see them. The inverse is also true. A boilerplate, throat-clearing introduction (or none) followed with a boring, overlong, over particularized statement of facts runs the risk of creating justified resentment in the judicial reader.[4]

The genesis of this article was a webinar I taught for the Department of Justice (Department) as one installment in a four-part series on legal writing for civil Assistant United States Attorneys (AUSAs).[5] To be sure, one could find advice on writing effective introductions and statements of facts in scholarship on legal writing and the art of persuading judges, but there was not a single resource devoted to the subject that synthesized the best from those authorities. Attempting to fill that perceived void with something useful, I volunteered to tackle the subject without really knowing what the result would look or sound like.

As I mentioned at the outset of that webinar years ago, I do not consider myself an expert in legal writing, nor do I think—after 22 years of practicing law, including 20 with the Department—I am a finished product as a legal writer. On the contrary, I consider myself nothing more than a professional nonfiction writer (like all litigators), striving to improve the most indispensable skill of our common calling.[6] So if you

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[4] Philip J. Katauskas, *Good Beginnings, Good Endings*, Pa. Law. 41, 43 (2007); William Zinsser, On Writing Well: The Classic Guide to Writing Nonfiction 12 (6th ed. Turtleback Books 2001) ("Faced with such obstacles, readers are at first tenacious. . . . But they won't do that for long. The writer is making them work too hard, and they will look for one who is better at the craft.").

[5] Because the original webinar was directed to civil Assistant United States Attorneys, most non-court-opinion examples in this article come from civil cases I handled. But the general methods and advice described are equally applicable to both civil and criminal cases, as are all cited authorities.

[6] *See generally* Brandon J. Harrison, *The Lawyer as Professional Writer*, 62 Ark. L. Rev. 725 (2009) ("Lawyers are professional writers."); Steven D. Stark, Writing to Win: The Legal Writer 23 (Rev. ed. 2012) ("[W]e lawyers don't usually think of ourselves as professional writers. Once we do, it helps to approach writing as other seasoned experts do . . . ."); Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 185 (2d ed. 2003) ("Appellate lawyers are professional writers. Whether they write well or poorly, they write for a very discriminating audience, an audience of professional readers of legal text."); Bryan A. Garner, Legal Writing in Plain English: A Text with Exercises 165 (2d ed. 2013) ("Every practicing lawyer is, by the very nature of the job, a professional writer."). Even before the pandemic, the trend of declining trial and live-argument rates in federal courts was well established. *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 La. L. Rev. 119 (2020); Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial:*

find anything of value in what follows, it is likely because someone smarter said it earlier and better. On that point, I have done my best to cite all sources and authorities that informed my prior slides, outline, and oral presentation. Any errors or omissions that remain are mine.

The first part of the article addresses introductions, including the limited rule-based guidance from courts; the objectives; and three proven strategies to draft introductions as concisely, but comprehensively, as possible.

The second part of the article covers statements of facts, including instructions from the federal rules, the importance and difficulty of drafting them effectively, the bright-line "musts" for every persuasive statement of facts, the recommended tone and techniques to achieve what readers expect, and a few miscellaneous recommendations that can turn a good statement of facts into a great one.

II. Effective introductions

A. Guidance from the rules

Most local rules of various federal district courts require a memorandum of law in support of, or in opposition to, a contested motion.[7] Despite imposing this requirement, local rules are often vague about which elements should appear in these memoranda. For example, Eastern District of Louisiana Civil Rule 7.4 states that a memorandum should contain a "concise statement of reasons supporting the motion and citations of authorities."[8] The Northern District of Ohio's local rule on motions requires a summary of the argument only if the memorandum exceeds 15 pages.[9] Some district judges have issued standing orders governing the contents of memoranda of law submitted in their respective sections of court.[10] According to a recent study, 76% of active federal district-court

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Implications for the Future of Law Practice, 30 Regent U. L. Rev. 287 (2018); Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475, 479, n.18 (2016) (addressing decline of oral argument in trial courts); David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119, 120 (2012) (referring to a "drastic reduction in the frequency of oral argument" in the federal courts of appeals).

[7] *See, e.g.*, E.D. La. Civ. R. 7.4.

[8] *Id.*

[9] N.D. Ohio Civ. R. 7.1(f).

[10] *See*, *e.g.*, J. Nicholas Ranjan, *Judge Ranjan's Brief-Writing Preferences*, W. Dist. Penn., https://www.pawd.uscourts.gov/sites/pawd/files/Ranjan_writing_tips.pdf (last visited Dec. 19, 2025) ("The introduction is a critical part of your brief. Your introduction should be 1–2 pages and be a clear roadmap of the entire brief, laying out your main points in a succinct fashion. Don't waste space in your introduction

judges have standing orders in civil cases.[11] Of those federal district-court judges, more than half have standing orders governing motion formatting and page limits.[12] In contrast to the variety of acceptable formats in district-court memoranda, Federal Rule of Appellate Procedure 28(a) lists 10 mandatory elements for an appellant's brief in the order in which they should appear.[13]

When discussing various techniques for drafting introductions to a memorandum of law in district court, this article is referring to what should be the first paragraph on the first page of the memorandum, immediately under the case's caption and the filing's title.[14] In appellate briefs, Rule 28(a)(7) requires a summary of the argument, which is likely the best home for this article's drafting advice on introductions, though it necessarily must follow the six mandatory items in Rule 28(a)(1)–(6).[15]

Perhaps because the summary of the argument is not one of the first few items in the brief under Rule 28(a)'s mandatory sequence, many appellate advocates at the Department and in private practice include a preliminary statement or introduction under a separate heading at the outset of the brief—often before the jurisdictional statement or statement of the issues.[16] While this mirrors the preferred location of an introduction in a district-court memorandum, there are five reasons to resist joining this trend in the circuit courts.

1. Rule 28(a) is specific about its requirements in a brief, and a freestanding introduction is not one of them.[17] The *expressio unius*

with throat-clearing formalities . . . ."); Andrew S. Hanen, *Civil Procedures*, S.D. Tex., https://www.txs.uscourts.gov/sites/txs/files/Civil%20Procedures%20%287-2020%29.pdf (last visited Dec. 19, 2025) ("All briefs and memoranda must contain . . . [a] Summary of the Argument: a short summary divided under appropriate headings and succinctly setting forth separate points."); Michael H. Watson, *Standing Orders for Civil Cases*, S.D. Ohio, https://www.ohsd.uscourts.gov/sites/ohsd/files//Judge%20Watson%20Civil%20Standing%20Orders%20Final.pdf (last visited Dec. 19, 2025) ("Unless otherwise directed by the Court, no briefs or memoranda in any action need contain a . . . summary of the argument.").

11 *See* J. Campbell Barker, *Standing Orders: A Survey of Individual Judges' Regulation of Practice in All Future Cases Before Them*, 102 Wash. U. L. Rev. 277, 291 (2024).

12 *Id.* at 301.

13 Fed. R. App. P. 28(a).

14 Stark, *supra* note 6, at 15; *id.* at 171 ("All filings should have a first-page, introductory summary, whether the rules require one or not."); Garner, *supra* note 6, at 73 ("Virtually all analytical or persuasive writing should have a summary on page one—a true summary that encapsulates the upshot of the message.").

15 Fed. R. App. P. 28(a)(1)–(7).

16 *Id.* at 28(a)(4), (5).

17 *Id.* at 28(a).

canon should apply.[18]

2. If your brief's required summary of the argument does what it should do, a freestanding introduction is likely a redundancy.[19]
3. Redundancies in your writing add unnecessary length to your brief and cut into your word count.[20]
4. Including a freestanding introduction early in the brief subordinates the issue statement and maybe the jurisdictional statement, depending on where you place it. This could upset your readers' legitimate, Rule 28-based expectations, thereby starting you on the wrong foot with your audience.[21]
5. While there is not much authoritative commentary on the subject, there is some criticism of the practice. Both Justice Antonin Scalia and Bryan Garner "see little need for a separate introduction" in appellate briefs, "especially one that precedes the Statement of Facts and Proceedings below."[22] Their reason tracks what is stated above: "Repetition bores, and boredom invites skimming."[23]

But if you remain unconvinced, or if your firm or client requires it, the advice below applies equally to effective introductions in district- and appellate-court submissions.

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[18] *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.").

[19] FED. R. APP. P. 28(a)(7) (requiring "a succinct, clear, and accurate statement of the arguments made in the body of the brief"); David Mills, *Writing the Holistic Brief: Making It More Than the Sum of Its Parts*, FED. LAW. 58 (2013).

> Many of us have learned that an introduction is a terrific section to add at the front of your brief (even if the court's rules do not specifically call for it), right after the table of contents and authorities. But let me suggest that you not do what most lawyers do, which is to write a three- to five-page summary of the argument. That's too long, and it's also going to be repeated in the aptly named "Summary of the Argument" after the fact section.

Id.

[20] FED. R. APP. P. 32(a)(7)(B)(i) (setting a 13,000-word limit on principal briefs); Ross Guberman, *Judges Speaking Softly: What They Long for When They Read*, 44 LITIG. 48, 50 (2018) ("[Y]ou'll rarely if ever hear judges complain that . . . briefs are too short.").

[21] FED. R. APP. P. 28.

[22] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 91 (2008).

[23] *Id.* at 92.

B. Objectives

An effective introduction accounts for your reader's impatience, work volume, and potential disinterest.[24] It is harsh but true. Ask yourself: Is your audience reading your memorandum or brief because they want to or because they must? Certainly, they are paid to do so as a job duty.[25] But that is only part of the answer.

The audience's job is to resolve a disputed issue, and they are reading your submission to help them do so. In that regard, Texas appellate attorney David Coale has an interesting analogy: Legal writing is like the operator's manual to a car.[26] You never pick it up for pleasure or out of boredom. You only pick it up when you have a problem, and you suspect

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[24] Stark, *supra* note 6, at 21 ("In school, we get the impression that our readers will carefully savor each sentence we write. This is hardly true, especially in the electronic age."); Aldisert, *supra* note 6, at 184 ("Readers of appellate briefs tend to be very busy. As a result, they have highly selective reading habits. . . . In reading a summary, judges are impatient. They want to know up front what the case is about."); *id.* at 20 ("[U]nlike most literature of scholarly persuasion, appellate briefs are not read at a leisurely pace and their contents savored and digested in a contemplative environment. Rather, briefs must compete with other demands on an appellate judge."); Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts 425 (2d ed. 2004) ("Visualize the reader. Assume an intelligent, impatient reader who knows nothing about your case—assume neither an idiot nor a genius."); Zinsser, *supra* note 4, at 9 ("The reader is someone with an attention span of about 30 seconds—a person assailed by many forces competing for attention."); *id.* at 55 ("Readers want to know—very soon—what's in it for them."); Guberman, *supra* note 20, at 49; Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, Writing and Analysis in the Law 287 (4th ed. 1999) ("The primary audience for . . . memoranda is a trial judge, who is an extremely busy person . . . ."); Sarah E. Ricks & Jane L. Istvan, *Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs*, 38 U. Tol. L. Rev. 1113, 1114 (2007) ("The [10] most common ways to write a bad brief that the authors have identified are all rooted in a failure to recognize that, like lawyers, judges also have a high volume practice."); Julie A. Oseid, *"Liven Their Life Up Just A Little Bit": Good Pacing Persuades Judges*, 24 Legal Writing 239, 245 (2020) ("[L]awyers should acknowledge one obvious downside about a judge's job: [R]eading briefs can be boring."); Garner, *supra* note 6, at 72 ("Talk to judges, and they'll tell you that they generally read briefs without the remotest hint of pleasure.").

[25] Robert E. Bacharach, Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word 1 (2020) ("Legal writers need not hook a reader's interest because legal writing is typically read out of obligation."); Aldisert, *supra* note 6, at 19 ("Briefs are written for one audience and one audience only—judges and their law clerks. They have the most limited readership of any professional writing.").

[26] David Coale, *Why You Should Write Legal Briefs Like Car Manuals*, 600 Camp (July 14, 2024), https://600camp.com/wp-content/uploads/2024/07/brief-and-car-manuals-2024-1.pdf.

the solution might be contained within its pages. As a reader, what approach do you take to the pages of the manual? Patience or impatience? Languor or haste? What do you expect from its language? Brevity or wordiness? Clarity or opacity? Relevancy or immateriality? Simplicity or technical jargon?[27]

To account for the obvious answers to each question, an effective introduction must pass the 60-second test.[28] That is, if your readers stop after the introduction (which should not take longer than a minute to read), would they know the following: (1) who filed the submission; (2) what relief it seeks; and (3) why the filer is entitled to win?[29]

Think of it this way: If you and your opponent were on a high-rise elevator ride with the judge, and you were given no more than 60 seconds each to summarize your respective position, what would you say?[30] If you had to quickly explain your issue to a non-lawyer, how could you simplify it?[31] Whatever analogy works for you, think hard about what

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[27] ALDISERT, *supra* note 6, at 28 ("[T]he written brief can be an effective instrument of persuasion only if it is concise, clear, accurate, and logical."); ZINSSER, *supra* note 4, at 7 ("Clutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon.").

[28] STARK, *supra* note 6, at 22 ("If you don't get the point quickly and convincingly, chances are your readers won't be hanging around until you do."); Mark Cooney, *Make Your Case in A Minute (with Some Help from Aristotle)*, 100 MICH. B.J. 48, 48 (2022) ("There's no suspense in good legal writing. If we force readers to wander and bide, then we've wasted precious time—and a precious opportunity."); ALDISERT, *supra* note 6, at 186 ("Judges crave an immediate sense of overview.").

[29] BACHARACH, *supra* note 25, at 17 ("The introduction should clearly and concisely tell readers what they must know to follow the logical progression of the argument."); ALDISERT, *supra* note 6, at 183 ("The summary is critical because it gives the reader a concise preview of the argument. The summary should be crafted to allow the judge to construct a practical outline of a memorandum."); SHAPO, WALTER, & FAJANS, *supra* note 24, at 290 ("An [i]ntroduction is designed to provide a context for the motion and to provide the court with basic information about the case. The [i]ntroduction should at least identify the kind of case, the parties, the nature of the motion, the relief sought, and the reason."); ZINSSER, *supra* note 4, at 56 ("[T]he lead . . . must provide hard details that tell the reader why the piece was written and why he ought to read it.").

[30] Robert E. Shapiro, *First Impressions*, 47 LITIG. 17 (2020); Jon Barnes, *Intro to Intros: How to Write the Winning Preliminary Statement*, ARIZ. ATT'Y 28 (2022); STARK, *supra* note 6, at 15 ("If the judge or reader stopped me on the street and said, 'I only have about a half a minute, so who are you, what do you want, and why?' . . . Those first few sentences should be the first paragraph of any document."); IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS 100 (1987) ("Pretend you have the judge's undivided attention on the matter for only 30 seconds. In that time, say what you want the judge to know.").

[31] ZINSSER, *supra* note 4, at 12 ("Writers must therefore constantly ask: [W]hat am I trying to say? . . . Is it clear to someone encountering the subject for the first time?").

you would say in one of those contexts. Your written introduction should sound similar.[32]

C. When to write it

Given its prominent place in your memorandum or brief, should you write your introduction first? If you have taken care to outline your argument in advance, you should have sufficient information to write an effective summary-style introduction.

Or should you wait to write the introduction last since your final argument might deviate from your original outline as it gets tweaked and reordered in the drafting process?[33] This makes sense too, since it is common to completely rework or even abandon parts of an argument that will not write up satisfactorily despite drafting research and outlining.

I recommend a middle ground. Write a rough-draft introduction first as an anchor and touchstone for the facts and legal argument you will draft later in the process.[34] Then return to that rough-draft introduction for final editing after you finish refining the facts and argument to ensure consistency from the first to last pages of your submission.[35]

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[32] Stark, *supra* note 6, at 15; Guberman, *supra* note 20, at 51.

[33] Jacob M. Carpenter, *Identifying Inefficiencies: Exploring Ways to Write Briefs More Quickly Within the Time Demands of Legal Practice*, 18 Wyo. L. Rev. 409, 471 (2018) ("Though the Introduction section would be the first section after the Caption, save writing the Introduction for later if you are not yet comfortable with what you want to say in it.").

[34] Garner, *supra* note 6, at 73 ("By highlighting the issues and conclusions on page one, you'll end up . . . ensuring that you carry through with them when you get to the middle . . . ."); Stark, *supra* note 6, at 21.

> Forcing yourself to condense your material to your conclusion and then explain further is a good grounding mechanism. It puts you in a mode of explication where you don't lose the proverbial forest for the trees, but you also don't leave out key facts a first-time reader needs to understand the matter.

Id.

[35] Stuart Segrest & Matthew Cochenour, *Appellate Brief Writing: A Primer*, 45(4) Mont. Law. 12 (2020).

> You may want to write the introduction before drafting the rest of the brief, then return to it when done to see if you encapsulate the argument made in the brief. This will not only help you perfect the introduction but will also highlight whether your arguments in the body of the brief are on target.

Id.; Stephen v. Armstrong, *How to Edit Effectively and Efficiently*, Prac. Law. 45, 50 (1991).

> A draft's [introduction] will need work, probably a lot of work. When you wrote [it], you did not know enough about what was going to follow. As a result, the opening paragraphs probably do not contain enough

D. Formats

The following are three simple formats for an effective introduction: (1) the traditional logical syllogism; (2) the enthymeme; and (3) the list of reasons. Whatever method you choose, do not forget the 60-second test and your reader's impatience.[36] Some nominally labeled "introductions" run on for several paragraphs or even pages, replete with citations to exhibits, the record, and law. That is not an introduction. It is a full argument. Follow Ross Guberman's advice: "[N]o matter what you're filing, you'll usually want your introduction to run no more than just a paragraph."[37] Fortunately, the following three methods, if executed correctly, seldom tempt writers to make a paragraph break.

1. Logical syllogism

The logical syllogism—the basis of all logical thought in its most rigorous form—is a formal, time-tested means of demonstration that is effective because of its simplicity.[38] Despite this simplicity, it can carry a good bit of legal and factual freight through a straightforward roadmap of your argument, all while supplying the indispensable "why" of the ultimate relief sought.[39]

The traditional logical syllogism consists of three parts:

> information to serve either as a good summary of your analysis or as a roadmap to its structure.

Id.; ALDISERT, *supra* note 6, at 184 (the critical opening paragraph is "the *first* thing you write and *last* thing you rewrite"); ALTERMAN, *supra* note 30, at 100 ("Rewrite [the introduction] several times more than the rest of your brief.").

[36] *See* subsection II.B, *supra*.

[37] ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 9 (2011); STARK, *supra* note 6, at 15 ("In legal writing, we should always lead with our conclusions or a summary" as the "first paragraph of any document."); *id.* at 44 ("If a brief hasn't gotten to the main point in a paragraph or two, the mind begins to wander."); Cooney, *supra* note 28, at 49 (Asserting that in an introduction, "[t]he raw citation can wait. Remember, this is just an overview of the substance to follow. It isn't the substance.").

[38] GARNER, *supra* note 24, at 85–89; SCALIA & GARNER, *supra* NOTE 22, AT 41–43. *Cf.* GARNER, *supra* note 24, at 110 ("[A]ny old mediocre mind can make things complex; your quest is for simplicity."); GARNER, *supra* note 6, at 171–72 ("Writers fear simplicity because they don't want to be considered simple-minded. In fact, though, there's no better way to strike your reader as an intelligent, sensible writer than to simplify."); ZINSSER, *supra* note 4, at 12 ("Thinking clearly is a conscious act that writers must force on themselves, as if they were working on any other project that requires logic: making a shopping list or doing an algebra problem.").

[39] Cooney, *supra* note 28, at 49 ("[T]he syllogism produces an almost irresistible logical momentum."); ALDISERT, *supra* note 6, at 21 (legal writing "is nothing more nor less than an expanded categorical syllogism containing premises (propositions)").

1. the major premise is a controlling rule of law;[40]
2. the minor premise is drawn from the specific facts of your case relevant to the major premise;[41] and
3. the conclusion is the necessary result of the combined truth of the major and minor premises.[42]

Here is the classic example.

- Major premise: All men are mortal. (An objective rule of general applicability.)
- Minor premise: Socrates is a man. (A fact that is specific to the individual subject of our analysis.)
- Conclusion: Socrates is mortal. (Since the major and minor premises are true, the conclusion is also true by logical necessity.)[43]

Ideally, the syllogistic form will cleanly convert into three sentences in your introduction. Consider this three-sentence syllogistic introduction from a memorandum in support of a motion to dismiss a case filed under the Federal Tort Claims Act (FTCA).

> Plaintiff, Jim Smith, sued the United States under the FTCA, which requires pre-suit exhaustion of administrative remedies for a district court to have subject-matter jurisdiction over the claim. 28 U.S.C. § 2675(a). It is uncontested that Smith did not exhaust his administrative remedies before filing this action. The [c]ourt, therefore, lacks subject-matter jurisdiction and should dismiss Smith's case under Fed. R. Civ. P. 12(b)(1).[44]

Notice the contextual scene setter (the case was filed under the FTCA) that immediately precedes the major premise (the FTCA requires pre-suit exhaustion). Nonetheless, in just 67 words (which can probably be read in less than 25 seconds), the court learned the following: (1) the identities of the parties and movant (Smith and the United States); (2) the nature of the action (tort claim); (3) the jurisdictionally controlling

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[40] Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 36 (1997) ("The major premise must usually have the hallmark of legal authority, constitution text, statute, or case[]law."); Scalia & Garner, *supra* note 22, at 42 ("Legal argument generally has three sources of major premises: a text, precedent (caselaw), and policy." (citation modified)).
[41] Garner, *supra* note 6, at 86–87.
[42] *Id.*
[43] *Id.* at 87; Aldisert, *supra* note 6, at 223.
[44] All examples are based on introductions and statements of facts that were drafted by the author for prior cases.

rule of law (statutorily mandated exhaustion); (4) just enough facts to apply the controlling rule (Smith did not exhaust); and (5) the relief sought by operation of the conclusion (dismissal for lack of jurisdiction).

If you are skeptical about whether a one-paragraph syllogistic introduction could work on a more complex legal dispute, Judge Aldisert's *Logic for Lawyers* offers several examples of syllogistic reasoning underlying classic Supreme Court cases.[45] Consider the holding of *Youngstown Sheet & Tube Co. v. Sawyer*.

- Major premise: The President's power to act must stem from an act of Congress or the Constitution.
- Minor premise: No act of Congress or clause in the Constitution gives the President power to seize steel mills.
- Conclusion: The President has no power to issue the seizure order.[46]

Regardless of the issue's complexity or simplicity, "it's possible for every legal argument to be framed as a syllogism."[47]

While the syllogism contains some rigid elements, it is malleable enough to allow for some variation. For instance, some are positive (Socrates example), while others (*Youngstown*) are negative (that is, only S is P; this case is not S; therefore, this case also cannot be P).[48]

In certain cases, it might make sense to flip the order of your premises, placing the minor premise in the first position.[49] In the prior FTCA example, the contextual scene-setting phrase (the case was filed under the FTCA) could be fairly characterized as a prefatory minor premise. Consider this example from an employment case:

> Plaintiff, Jane Smith, filed suit against the United States Postal Service (USPS) and two USPS supervisors, Jim Anderson and Bart Kent, alleging disability discrimination in Smith's federal employment. The Rehabilitation Act is the only waiver

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[45] ALDISERT, *supra* note 40, at 111–29.

[46] ALDISERT, *supra* note 40, at 243; STARK, *supra* note 6, at 18 (noting "lawyers' reluctance to commit themselves to those first few sentences" in an effective introduction and explaining that "even though it seems difficult at first, anything can be condensed to such a summary").

[47] GARNER, *supra* note 24, at 88; Cooney, *supra* note 28, at 48 (arguing that the syllogism "can produce a quick but meaningful overview of almost any legal argument"); ALDISERT, *supra* note 6, at 220 (canons of logic are "critical tools of argument" and "implements of persuasion," which "form the imprimatur that gives legitimacy and respect" to your reasoning).

[48] SCALIA & GARNER, *supra* note 22, at 41.

[49] GARNER, *supra* note 24, at 88.

> of sovereign immunity that creates subject-matter jurisdiction for a claim of disability discrimination in federal employment. Moreover, the only proper defendant in an action under the Rehabilitation Act is the head of the USPS, Postmaster Louis DeJoy. For these reasons, the Court should grant this motion and dismiss Smith's claims against USPS supervisors Anderson and Kent for lack of subject-matter jurisdiction. (96 words).

Here, our scene-setting opening sentence functions as the minor premise, providing sufficient case-specific factual grist for the major-premise mill in the following two sentences, which are blackletter statutory law.

2. Enthymeme

Do not let the funny Greek word scare you off. You have probably written and read enthymemes without realizing it. An enthymeme is the skinnier sibling of the traditional three-part syllogism. An enthymeme assumes and omits the major premise of the syllogistic form because it is generally understood and uncontested.[50] "[E]nthymemes are used for efficiency's sake. If a premise or conclusion is obvious, then the writer can save her precious words to make less obvious points."[51]

Garner explains it this way:

> Although you generally want a major premise stating the law, that's true only if the judge needs to be reminded about the law. You don't need a major premise that says, "The First Amendment of the U.S. Constitution protects freedom of speech." Everybody knows that, and you shouldn't waste any of your precious 75 words on something that basic.[52]

But remember, the enthymeme is only an effective introductory technique if both the assumed and stated propositions are correct.[53] So if your legal premise is contested or requires extensive briefing in the body, it is a poor candidate for omission in the introduction.[54]

Much like Garner's First Amendment example, summary-judgment standards under Federal Rule of Civil Procedure 56 are well established.[55] So an introduction to a memorandum in opposition to a motion for sum-

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[50] Aldisert, *supra* note 40, at 94–95.

[51] Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt. L. Rev. 1, 7–8 (2007).

[52] Garner, *supra* note 24, at 89.

[53] Aldisert, *supra* note 40, at 94.

[54] Garner, *supra* note 24, at 89 (asserting that in most cases "the legal premise needs an explicit statement" as a "helpful reminder").

[55] Fed. R. Civ. P. 56.

mary judgment might state the following: "Plaintiff moves for summary judgment on her negligence claim, but the court should deny the motion because of genuinely disputed facts *a*, *b*, and *c*." In that example, the assumed or omitted major premise is that Rule 56 requires the court to deny summary judgment if there are genuine disputes over material facts.[56] But federal judges surely know that, so the enthymeme provides a punchier preface to the piece.

Similarly, the first sentence of a memorandum in support of a motion in limine to exclude evidence in a Title VII case might read like this: "Plaintiff seeks to introduce other acts of alleged discrimination, but the court should exclude the evidence because it is irrelevant, or if minimally relevant, is unfairly prejudicial." Here, we assume that an experienced district-court judge understands that Federal Rules of Evidence 401–403 prohibit admitting irrelevant or unfairly prejudicial evidence.[57]

In these examples, the enthymeme reduces three or more introductory sentences to one sentence without sacrificing the persuasive force of the formal logic. In the quest for brevity, efficiency, simplicity, and clarity, the enthymeme is a critical weapon in the arsenal of the legal writer preparing to draft a forceful introduction.

3. The list of reasons

Another alternative to the traditional syllogism is the numbered list of reasons why you win. This method is attractive if you are addressing a pure issue of law with no minor premises in play, a multi-factor legal standard, alternative means to achieve the same end, or if your full syllogisms run over the 60-second test.

If the enthymeme is the skinnier sibling of the syllogism, the list of reasons is the sensible first cousin. They are all related because each alternative technique omits, in the interest of space, certain information that you would expect to find in the full three-part syllogism. And the introductory list is sensible because it is nearly impossible for your opponent and the court to ignore when dissecting your argument.[58] Guberman recommends the following: "[N]othing helps a brief hold together better than a list of legal, factual, or common-sense reasons that you should prevail."[59]

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56 *Id.*

57 Fed. R. Evid. 401–403.

58 Garner, *supra* note 24, at 388 ("Lists are easy to read and remember. And not only do they help the reader; they help you think more clearly as a writer.").

59 Guberman, *supra* note 37, at 9. *See also id.* ("The top advocates love numbered lists . . . in the introduction."); Segrest & Cochenour, *supra* note 35, at 15 ("Developing the theme through your introduction and a list of reasons provides a roadmap of the

This example comes from a civil case in which the defendant attacked the court's subject-matter jurisdiction on two independent bases.

> Plaintiff, Lansen, Inc., filed an amended complaint alleging a single cause of action under the [FTCA] based on pre-receivership oversight activity by the Federal Deposit Insurance Corporation in its corporate capacity (FDIC-C). The Court lacks subject-matter jurisdiction over Lansen's FTCA claim for two reasons. First, there is no tort duty that applies to an analogous private person acting as the FDIC-C in like circumstances under Louisiana law. 28 U.S.C. §§ 1346(b)(1), 2674. Second, the FTCA's discretionary-function exception insulates the FDIC-C's actions from judicial review. 28 U.S.C. § 2680(a). For these reasons, either of which is independently sufficient, the Court should grant this motion and dismiss Lansen's FTCA claim under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. (123 words).

While the state-law-duty and discretionary-function defenses are susceptible to clean three-part syllogisms, doing so would have lengthened what was already a loaded introductory paragraph of over 120 words.

But notice the influence of formal logic even in the list format. The first, scene-setting sentence gives some case-specific (that is, minor-premise-like) information about the parties, statute invoked, and alleged tortious conduct. The two jurisdictional reasons for dismissal (sentences three and four) are basically enthymemes that omit major premises about subject-matter jurisdiction and the waiver of sovereign immunity under the FTCA.

In this example, also from a civil tort case, there are again two jurisdictional defenses, but each applies to a separate legal count or claim.

> Plaintiff, Ann Paul, filed suit against the United States under the [FTCA] alleging that vibrations from a construction project at the Kawanee Bridge in Metairie damaged her nearby home. Paul also alleged that the Army Corps negligently hired and supervised its construction contractor and selected insufficient safety standards to prevent property damage. The FTCA's independent contractor exception bars the first allegation, and the discretionary-function exception bars the remainder. For these reasons, the Court should dismiss Paul's claims against the United States for lack of subject matter jurisdiction under the FTCA. (92 words).

Because the specific allegations of each count drive the respective juris-

arguments you intend to make and a framework for your argument.").

dictional defenses, each count warranted its own scene-setting, minor-premise-like sentence. To save space and reading time, the two jurisdictional defenses are listed in a single sentence without citation.

The downside of the list technique is that it requires the reader to trust that you will prove the legitimacy of your omitted major premises and streamlined minor premises. In that regard, it is less than a full outline of your argument to follow. It is more like headings only. But, if crafted carefully and correctly, the list-of-reasons introduction will provide the essential who, what, and, most important, why of everything that follows.[60]

III. Statements of facts

Writing is difficult.[61] Writing well is exceedingly difficult.[62] And writing a compelling statement of facts might be the most difficult aspect of legal writing.[63] Think about it. Your legal argument in the American common-law system is precedent based.[64] You need to find the applicable law and quote it to the court. Restating what others have already written is not just tolerated in legal writing; it is required.

But the statement of facts is different. Legal precedents will not help your drafting process. Nor will your form documents, even if they were winners. You need to start from scratch each time with the unique universe of evidence applicable to your case. On top of the anxiety-inducing emptiness of the blank page underneath the "statement of facts" or "factual background" heading, there is also pressure to tell a story—a story

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[60] Veda R. Charrow & Myra K. Erhardt, Clear and Effective Legal Writing 190 (1986) ("Lists are the perfect way to synthesize information into the most usable format.").

[61] Zinsser, *supra* note 4, at 3 ("What was it like to be a writer? . . . I then said that writing wasn't easy and wasn't fun. It was hard and lonely, and the words seldom just flowed.").

[62] *Id.* at 12 ("Good writing doesn't come naturally, though many people seem to think it does . . . . If you find that writing is hard, it's because it *is* hard.") (emphasis in original).

[63] Garner, *supra* note 24, at 366 ("Many brief-writers . . . seem least comfortable with the factual statement."); Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, 74 Fla. B.J. 107, 108 (2000) ("[T]he statement of facts . . . to many appellate practitioners is the most important and challenging part of the brief."); Mayer Brown LLP, Federal Appellate Practice 347 (Phillip Allen Lacovara ed., 2d ed. 2013) ("Drafting an effective fact section is one of the most challenging aspects of preparing an appellate brief.").

[64] Stark, *supra* note 6, at 87 ("[A]nything you tell the court about the law has probably been said hundreds of times. . . . Under the system of precedent, we must use stale arguments that have been used before. Novelty is a loser.").

that is both interesting and persuasive.[65]

Here are some ways to do it.

A. Guidance from the rules

As with introductions, district courts' local rules do not say much about statements of facts in legal memoranda if you are filing something other than a summary-judgment motion.[66] That does not mean you should consider a statement of facts optional for other kinds of motions or memos, except, perhaps, for a reply. A replying party should have already included a relevant statement of facts in the initial memorandum in support of the motion.[67]

"No matter how short or trivial the facts are, it is your job to set them out for the court separately from your legal arguments."[68] Even if you agree with your opponent's factual recitation, "you should always give the court your version, if only because the judge may have a question about the facts while reading your brief. You do not want judges looking at the other side's filing when they should be looking at yours."[69] And if your district judge has already written a statement of facts in resolving a prior motion, consider using some or all of that. Even if it is not a compelling narrative, you know the court will not question its reliability.

In appellate briefs, Rule 28(a)(6) requires "a concise statement of the

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[65] *Id.* at 23 ("[A] certain amount of apprehension comes with the territory" for writers. "Sometimes, however, that anxiety can be paralyzing."); *id.* at 95 ("Though storytelling is an art rarely taught in law school, it is an essential skill for a legal writer."); ZINSSER, *supra* note 4, at 62 ("[N]arrative is the oldest and most compelling method of holding someone's attention; everybody wants to be told a story. Always look for ways to convey your information in narrative form.").

[66] *See* E.D. LA. CIV. R. 7.4; N.D. OHIO CIV. R. 7.1(f). *See also* E.D. LA. CIV. R. 56.1 ("Every motion for summary judgment must be accompanied by a separate and concise statement of the material facts which the moving party contends present no genuine issue."); *id.* at 56.2 (requiring a statement of contested material facts when opposing a motion for summary judgment). Do not forget to check if your district court's section has a standing order addressing required formatting and elements for a memorandum in support of a motion. *See, e.g.*, Judge Jason Pulliam, *Standing Order in Civil Cases Assigned to Judge Jason Pulliam* 2, W. DIST. TEX. (Oct. 19, 2022), https://www.txwd.uscourts.gov/wp-content/uploads/2023/01/Standing-Order-In-Civil-Cases-Assigned-to-Judge-Jason-Pulliam101922.pdf ("The facts set forth in any motion shall be stated in separately numbered paragraphs with citation to a particular pleading or other part of the record supporting the party's statement.").

[67] *See* Peter M. Mansfield, *The Art of the Effective Reply*, 19 J. APP. PRAC. & PROCESS 261, 265–66 (2018) ("[U]nless rules of court require otherwise, there is typically no need for reply briefs to restate a detailed factual background or statement of the case.").

[68] STARK, *supra* note 6, at 117.

[69] *Id.*

case setting out the facts relevant to the issues submitted for review [and] describing the relevant procedural history . . . ."[70] While the statement of facts and procedural history appear under the "statement of the case" heading, they are two different things, so treat them as such under separate subheadings.[71] Typically, everything that preceded the complaint or charging instrument should fall under the statement of facts subheading, whereas everything occurring afterwards in district court is procedural history.[72]

B. Importance and difficulty

Drafters must reasonably expect their judicial audience will closely read the statement of facts.[73] As Stark explains: "Judges and other legal readers are far more dependent on your rendering of the facts than they are on your version of the law."[74] Judges already consider themselves experts in the law and understand that a persuasive piece of advocacy, by definition, is not objective. "[T]hey're going to take your [legal] interpretations with about [15] grains of salt."[75] But the facts of a case will always be new to the court and best known to you.[76] "Give judges the facts in a case and they can make up their minds. Give them the law and they still need to know the facts."[77]

Stark outlines several other convincing reasons not to treat your statement of facts as an afterthought in the writing process. Primacy is one.

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[70] Fed. R. App. P. 28(a)(6).

[71] Stark, *supra* note 6, at 118.

[72] *Id.* (facts are "the story that gave rise to the cause of action" and procedural history is "the story of what happened . . . after this became a legal matter"); Kelly A. Zusman, Appellate Advocacy Handbook 24 (2017) ("The 'merits facts' tell the story of the events leading up to the case's initiation in federal court. The 'procedural facts' section tends to begin with a civil complaint or a criminal indictment, and ends with the entry of a final, appealable judgment.").

[73] Aldisert, *supra* note 6, at 163 ("The statement of facts is as important as any portion of the brief."); Michael R. Fontham & Michael Vitiello, Persuasive Written and Oral Advocacy in Trial and Appellate Courts 36 (2002) ("Many judges and experienced lawyers believe that the statement of facts is the most important part of persuasive legal writing.").

[74] Stark, *supra* note 6, at 91; Girvan Peck, Writing Persuasive Briefs 111 (1984) (Advocates are "the master of the facts, and the judges do not have the time to be.")

[75] Stark, *supra* note 6, at 91.

[76] *Id.*

[77] *Id. See also id.* at 87 ("In the overwhelming number of cases, once judges have read your facts, their minds are made up because they know from experience what rules to apply."); Peck, *supra* note 74, at 110 ("As the judges absorb the facts, they will call to mind, without prompting, the principles that should decide the case; all they need is a confirmation in the form of suitable authorities.").

"[F]acts come at the beginning of a brief or argument, and . . . first impressions are strong."[78] Also, "most arguments commonly made in our culture are factually based."[79] This is undeniable. Cable news networks devote hours of daily programming to the fact-debate format.[80] Finally, "facts are a way to appeal to a judge's or reader's feelings."[81] You will need sound reasoning and legal authorities too, of course, but "courts want to do substantial justice, and they are sensitive to the equities."[82]

The inverse is also true. In the toughest cases, the cold facts—those "stubborn things" as John Adams called them in defending British officers charged in the Boston massacre—can temper and neutralize the overly emotional rhetoric of your opponent.[83]

In an effective statement of facts, you "must do the preliminary work for the reader, assemble the information, make sense of it, select the essential, discard the irrelevant, and put the rest together so it forms a developing dramatic narrative."[84] In that one sentence, Judge Aldisert is expecting six related, but conceptually distinct, things in a statement of facts, which draw on your skills as a historian, storyteller, and professional persuader.[85]

That is a tall order even if your statement of facts functions in a standalone vacuum. But it does not. Rather, as just one piece of the persuasive-writing pie, it must fit and foreshadow your following legal arguments too.[86] "Lawyers can't write their facts unless they know their

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78 STARK, *supra* note 6, at 90.

79 *Id.*

80 *See, e.g.*, PARDON THE INTERRUPTION (ESPN 2001–present); CROSSFIRE (CNN 1982–2005, 2013–2014); THE FIVE (Fox 2011–present).

81 STARK, *supra* note 6, at 90–91.

82 *Id.* (citation modified); PECK, *supra* note 74, at 113 ("The judges are rightly concerned with where the equities lie. Furthermore, the equitable facts are interesting."); MAYER BROWN, *supra* note 63, at 347 ("[I]n most cases, not only juries but . . . judges as well will find a way to rule for the side they think is 'right' in some existential or Gestalt sense").

83 *Adams' Argument for the Defense: 3–4 December 1770*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016 (last visited Dec. 22, 2025) ("Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence . . . ."); STARK, *supra* note 6, at 142 ("Even if the other side's facts seem particularly moving or compelling, your job is not to knock down your opponent's story but to tell your own.").

84 ALDISERT, *supra* note 6, at 165 (citation modified).

85 *Id.*

86 SCALIA & GARNER, *supra* note 22, at 9; STARK, *supra* note 6, at 116 ("Because the narrative in litigation is based on a record and focused on specific legal issues, however, a writer constructs it differently from the usual story."); *id.* at 141 ("[G]ive judges only the facts that are pertinent to the motion or issue at hand."); ALDISERT,

arguments, because without the arguments, they don't know what story to tell."[87] For that reason, you need at least an outline of your argument and an appreciation of what is in the record before you consider how to craft a compelling narrative from the facts relevant to the issues.[88]

C. Bright-line rules

There are a few bright-line dos and don'ts for writing statements of facts nearly everyone agrees upon.[89]

First, include a citation to record evidence for every stated fact.[90] The Federal Rules of Appellate Procedure, many local rules of court, and Federal Rule of Civil Procedure 56(c)(1)(A) require it.[91] And it is an indispensable element of persuasive legal writing in other contexts as well.[92]

Second, do not make legal arguments in your statement of facts. Be wary of using words with specific legal definitions and implications, such as *negligent*, *discriminatory*, *reckless*, *last clear chance*, *breached*, *bad faith*, *harassed*, *assumed risk*, *pretextual*, and so on.[93]

Third, every fact relied upon in the legal argument should appear first

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supra note 6, at 163 ("[L]imit the narrative only to those facts that are germane to the issues before the court.").

[87] STARK, *supra* note 6, at 116.

[88] *Id.*; ALDISERT, *supra* note 6, at 163 ("Never put the fact-writing cart before the issue-stating horse."); PECK, *supra* note 74, at 111–12 ("The advocate's purpose is to fit the facts, if he fairly can, to the specific statutes and cases that will win. . . . [H]e keys his selection of facts to his intended argument.").

[89] ZUSMAN, *supra* note 72, at 22–24; STARK, *supra* note 6, at 113–42; ALDISERT, *supra* note 6, at 163–81; SCALIA & GARNER, *supra* note 22, at 93–96.

[90] Place these necessary record citations in the body, not in footnotes, for the reasons explained in the *Department of Justice Journal of Federal Law and Practice* a few years ago. *See* Peter M. Mansfield, *Citational Footnotes: Should Garner Win the Battle Against the in-Line Tradition?*, 67 DOJ J. FED. L. & PRAC. 97 (2019).

[91] FED. R. APP. P. 28(a)(6), (e); 5th Cir. R. 28.2.2 ("Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record . . . where the matter is found."); FED. R. CIV. P. 56(c)(1)(A).

[92] STARK, *supra* note 6, at 116–17 ("When you've finished your draft, look at the record and make sure there is support for every fact you've used. . . . Any assertions that can't be supported by the record should be cut."); Ricks & Istvan, *supra* note 24, at 1120 ("Make sure the record you are creating for the trial court includes the facts you want to assert in the brief. Whether in a trial brief or on appeal, cite to your record and provide helpful quotes to let the judge know that you are not distorting the record."); MAYER BROWN, *supra* note 63, at 349 ("[J]udges will be more comfortable disregarding any assertion for which the brief fails to furnish explicit support in the record. In any case, you will enhance the credibility of your statement if a citation follows every significant factual statement.").

[93] STARK, *supra* note 6, at 131.

in the statement of facts.[94]

Fourth, do not omit material, adverse facts (though you should try to mitigate their impact).[95]

Fifth, do not include extraneous, immaterial facts.[96] Consider Russian author Anton Chekhov's advice: If you say in the first chapter that there is a revolver on the mantel, it absolutely must go off by the second or third chapter.[97] If not, the audience is distracted by something immaterial.[98] Film critic Roger Ebert developed a similar concept into a "law of economy of characters" for movie scripts:

> Movie budgets make it impossible for any film to contain unnecessary characters. Therefore, all characters in a movie are necessary to the story—even those who do not seem to be. Sophisticated viewers can use this law to deduce the identity of a person being kept secret by the movie's plot. This "mystery" person is always the only character in the movie who seems otherwise extraneous.[99]

Since you are not writing a mystery, nor have the luxury of multi-hour narrative exposition with a captive audience, you must eliminate the unfired Chekovian guns and unnecessary characters or dialogue from your statement of facts. Using these common-sense guideposts, "[y]ou should be able to go over every detail in your facts and justify how each relates to a larger legal point you're trying to establish."[100]

The most commonly occurring irrelevancies appearing in statements of facts are what Garner terms "overparticularizations"—those tedious

94 *Id.* at 141 ("It is repetitive to state many facts twice, first in the fact section and then in the argument. It's necessary, however, because a judge won't take factual assertions as true if they're made for the first time in the argument section."); ALDISERT, *supra* note 6, at 169 (explaining that adherence to this bright-line rule "provide[s] the appellate court with an objective account of what occurred before the twist of advocacy is added to the cold facts").

95 STARK, *supra* note 6, at 126 ("Better the court should hear bad news from you than from your adversary. It's even worse if judges discover the news of their own and think you were trying to cover it up."); ALDISERT, *supra* note 6, at 168 ("Both the good and bad should appear" in a statement of facts); *id.* at 169 ("Including adverse facts fosters a sense of trustworthiness."); SCALIA & GARNER, *supra* note 22, at 95 ("A fair statement of facts includes relevant facts adverse to your case.").

96 *See* STARK, *supra* note 6, at 87, 91; PECK, *supra* note 74, at 110.

97 STARK, *supra* note 6, at 135.

98 *Id.*

99 ROGER EBERT, EBERT'S BIGGER LITTLE MOVIE GLOSSARY 66–67 (1999).

100 STARK, *supra* note 6, at 135; BACHARACH, *supra* note 25, at 31 ("When drafting a factual summary, tell readers only what they need to know to understand the analysis that will follow.").

details that do not directly bear on the issue.[101] Zinsser would call them a species of written "clutter" that clouds and chokes clarity.[102] "The tendency to recite dates ad nauseam is perhaps the most common type of overparticularization."[103] Use relative times to keep the focus on the action and not the hour, day, month, or year it occurred.[104] In addition to dates and times, find and excise extraneous street addresses, dollar amounts, quantities, and pleading titles.[105]

And do not forget what you are asking the court to do for you. The relevancy of your facts will turn on the type of filing you are drafting.[106] Discovery motions are different from dispositive motions, jurisdictional arguments are different from merits-based arguments, appeals after a merits trial are different from appeals from a pretrial dismissal, and so on. Again, you need to know your legal issue before you can decide what is factually relevant to it.[107]

Your most relevant facts are not always the most interesting ones in your case. As Judge Aldisert explains, "In a murder case, for example, the installation of a stained-glass window on the fiftieth floor of a building may be interesting, but what matters is that the victim was thrown out of the window."[108] A "merely decorative" fact like the stained glass in the window, interesting though it may be, should be cut.[109]

Finally, and most importantly, never misstate any facts. If this occurs, it is likely a result of inadvertence, mistake, or haste, rather than intentional obfuscation. Thus, the solution is rigorous editing and record-cite checking of not just the argument, but also the statement of facts.[110] And

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[101] Garner, *supra* note 24, at 180; Garner, *supra* note 6, at 78.

[102] Zinsser, *supra* note 4, at 12–16.

[103] *Id.* at 387 (citation modified); Guberman, *supra* note 20, at 58 ("Few things are duller than a paragraph stuffed with dates.").

[104] Garner, *supra* note 6, at 79; Scalia & Garner, *supra* note 22, at 96 ("[I]f you spell out every date, you confuse the reader and bog down the story."); Guberman, *supra* note 20, at 51 ("[J]udges object to *needless* dates. . . . Sometimes a word or phrase will do the trick."); *id.* at 58 ("[E]ven when the actual date matters, replacing it with a time signal . . . can help turn your fact section into the kind of story that people enjoy reading. Even better, such time signals can make your story more persuasive.").

[105] Ross Guberman, Point Taken: How to Write Like the World's Best Judges 77 (2015).

[106] Stark, *supra* note 6, at 141 ("[G]ive judges only the facts that are pertinent to motion or issue at hand."); Fontham & Vitiello, *supra* note 73, at 37–38.

[107] Stark, *supra* note 6, at 116.

[108] Aldisert, *supra* note 6, at 164.

[109] *Id.*; Scalia & Garner, *supra* note 22, at 94 ("Be careful . . . about introducing sympathetic facts that are legally irrelevant.").

[110] Aldisert, *supra* note 6, at 171 ("[E]very reference at the end of each sentence should be verified against the transcripts and appendix to make certain that the cited

if you catch a post-filing mistake, correct it immediately with a supplemental memorandum (with leave of court if required) or a Federal Rule of Appellate Procedure 28(j) letter.[111] Your credibility is more important than the risk of annoying the court with an extra filing that could have been avoided in the exercise of greater diligence.

D. Tone and techniques

An effective statement of facts is persuasive without being argumentative.[112] Staying on the safe side of that line requires the right tone. Strive for an objective tone of a neutral third-party or an omniscient eye in the sky observing the relevant events.[113] Try to make the finished product read like a good writer of historic nonfiction.[114]

But sounding objective is not the same as being objective.[115] After all, you are writing a party's memorandum or brief, not the court's opinion. "Writing a statement of facts that is necessarily neutral in form but persuasive in effect takes considerable skill; it is a delicate, and difficult, task for even the most experienced brief writer."[116]

Even within the context of an objective, neutral tone, there are opportunities to subtly advance your substantive legal argument in your factual recitation through the selection and ordering of the facts you present, the emphasis or lack thereof you give them in the context of your larger story,

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pages say what the writer says they do.").

[111] Fed. R. App. P. 28(j).

[112] Scalia & Garner, *supra* note 22, at 94; Shapo, Walter, & Fajans, *supra* note 24, at 317 ("The Statement of the Case should be written to appear neutral—even if it is not."); Fontham & Vitiello, *supra* note 73, at 38 ("In drafting a statement of facts, you need to achieve the right mix of fairness and subtle advocacy.").

[113] Aldisert, *supra* note 6, at 170 ("[T]he writer should present the historical facts as if a camera had begun to film them at the first operative point and had continued to run until the last event concluded."); Margaret Oertling Cupples, *Appellate Briefing: Some Thoughts on Writing Briefs That Can Clear a Path Through the Jungle*, 30 Miss. C. L. Rev. 1, 8 (2011) ("As appellate counsel, you serve your client best by providing a statement of facts that appears objective and that is presented in an understated way.").

[114] Guberman, *supra* note 20, at 50; Peck, *supra* note 74, at 115 ("The statement should be as simple, clear, and memorable as a narrative in any well-written book of nonfiction.").

[115] Fontham & Vitiello, *supra* note 73, at 38–39 ("[Y]ou are not trying to be objective, but instead to state the facts with the appearance of objectivity."); Ursula Bentele, Appellate Advocacy: Principles and Practice 475 (4th ed. 2004) ("[A] statement of facts need not be entirely neutral. Rather, you should present the facts in a light most favorable to your client.").

[116] Carroll, *supra* note 63, at 108; Bentele, *supra* note 115, at 482 ("[T]he line between being argumentative and persuasive is a fine one, and the inexperienced briefwriter is probably well advised to err on the side of caution.").

the use of punchy active voice or obscuring passive, and the direct quotation of cited record evidence.[117]

The first few sentences of your statement of facts should function like a panoramic photograph or beginning of a film—orienting the reader to the parties, time, place, and subject matter of the case.[118] Here are a few examples.[119]

- Moore owns and operates Quicky Save, a gas station and small grocery store in Kenner, Louisiana. The U.S. Department of Agriculture's Food and Nutrition Service authorized Quicky Save to participate in the Supplemental Nutrition Assistance Program.
- Barry owned property in the Ninth Ward of New Orleans. The property consisted of a home and a garage to the right of the home. Barry's property severely flooded during Hurricane Katrina.
- This case stems from the Army Corps' execution of the Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2701–2708, on a 15,000 acre tract of land in Hammond, Louisiana that was used as a bombing and gunnery range during World War II.
- This case arises out of the U.S. Navy's provision of emergency disaster assistance in the form of urban search and rescues in the New Orleans area in the aftermath of Hurricane Katrina.

Most examples reference the relevant interests of both the plaintiff and the defendant, who were already previewed to the court in the introduction.[120] A few of these examples mention significant events—World War II or Hurricane Katrina—that occupy a fixed, well-known time for most readers. And each example provides a setting rooted in the geographic footprint of the federal district court where the case was filed, which will be known to the judicial reader.

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[117] Scalia & Garner, *supra* note 22, at 94; Shapo, Walter, & Fajans, *supra* note 24, at 315–16; Fontham & Vitiello, *supra* note 73, at 39–40; Peck, *supra* note 74, at 119.

[118] Guberman, *supra* note 20, at 44 ("In the brief-writing world, you probably can't start your fact section with a scene-setting shot that would win you an Oscar. But you can still create a similar bird's-eye-view effect."); Fontham & Vitiello, *supra* note 73, at 38 (noting that the beginning of the fact statement "should introduce the court to the parties, the nature of the matter before the court, and the procedural posture or history" with a "thematic overview"); Zusman, *supra* note 72, at 29 (noting that a "panoramic overview" is a "popular and effective way to begin a fact section").

[119] These four examples are based on opening sentences from fact sections drafted by the author for prior cases.

[120] *See* section I, *supra*.

After setting the scene, nearly every notable authority (with one exception) proposes a clean narrative line of chronological events.[121] Stark disagrees.[122] He recommends writers lead with their strongest, best fact, regardless of sequence, then fill in other details after that.[123] Consider this the legal-writing equivalent of ESPN's highlight reel or top 10 plays of the day.[124]

The advantage of this technique is placement of your most important facts in the primary spot: right up front.[125] The disadvantage is that readers may not understand the significance of the primary event, or the context in which it occurred, when plucked out of sequence. Further, as even Stark concedes, "judges still choose to tell their stories from the beginning because they're trying to tell an 'objective' story," and "a few judges say that they prefer having the facts set out chronologically because it makes it easier for them to write their opinions."[126]

Since your statement of facts should have an overall objective tone, a clean chronological listing of events is a means to help you achieve that end.[127] While it is true, as Stark argues, that the brief writer's task "is not to help judges write opinions but to win your cases," it helps the winning cause to submit a memorandum or brief that supplies an ample amount of usable material, both factual and argumentative, for the even-

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[121] Scalia & Garner, *supra* note 22, at 95 ("A narrative must be basically chronological."); Garner, *supra* note 24, at 365 ("State the facts powerfully—in chronological order."); Garner, *supra* note 6, at 16 (same); Bacharach, *supra* note 25, at 32 ("Sequential organization of facts is helpful when it eases the reader's burden."); Shapo, Walter, & Fajans, *supra* note 24, at 313 ("To sustain your reader's interest, you want to develop the facts in a coherent and sympathetic narrative. Usually a chronological order works best."); Fontham & Vitiello, *supra* note 73, at 40 ("Usually a narrative—a chronological presentation in 'story' fashion—is the most interesting approach and the easiest for the reader to follow."); Aldisert, *supra* note 6, at 170 ("[T]he event that produced the litigation should be described chronologically from beginning to end."); Alterman, *supra* note 30, at 101 ("Usually the statement of facts should be chronological."); Peck, *supra* note 74, at 117 ("Whenever the narrative can be stated in chronological order it should be, for this is the natural way to tell any story, and the easiest to understand."); Bentele, *supra* note 115, at 477 ("Usually . . . both the narrative of the underlying incident and the description of the proceedings are organized chronologically because this order tends to be the clearest for the reader in most cases."); Mayer Brown, *supra* note 63, at 348 ("Usually, a straightforward chronological approach is best.").

[122] Stark, *supra* note 6, at 119.

[123] *Id.* at 119–22.

[124] *Id.* at 120.

[125] *See* Ebbinghaus, *supra* note 1. *See also* Stark, *supra* note 6, at 119 ("[S]tart with an important event that leaves a strong impression.").

[126] Stark, *supra* note 6, at 120, 122.

[127] *See* subsection III.D, *supra*.

tual opinion.[128] Unless it makes more sense for your type of case to make categorical groupings of events, stick with the chronological sequence for your typical fact-driven issues.[129]

Even if you do not place your best fact upfront and out of sequence as Stark advises, do take time to at least identify it in your drafting process, then find ways to amplify it throughout your submission, from the minor premise of the introduction, through the statement of facts, legal argument, preemptive rebuttal, and conclusion.

Because your statement of facts should have a neutral, objective tone, do not describe your subjective assessment of the events in this section. Rather, just show your objective facts, let them speak for themselves, and give readers a clear and persuasive story so they draw the desired conclusions on their own.[130] As Garner explains, the writer must earn those conclusions by showing the supporting facts first.[131]

A few examples illustrate this writing principle more vividly than the pedantic explanation. Stark tells the story of a criminal case concerning

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[128] STARK, *supra* note 6, at 122; Joi T. Montiel, *Your Appellate Brief: An Obstacle Course for the Court or A Clear Pathway to Your Conclusion*, 73 ALA. LAW. 344 (2012) ("If you have written a truly effective brief, the court's opinion will look much like your brief."); Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 ARIZ. ST. L.J. 1077, 1079 (2013) ("As a clerk, I found the best briefs were the ones that were written almost like judicial opinions; the court could practically cut and paste the accurate, concise, and non-argumentative legal and factual discussions into the opinion." (citing Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. APP. PRAC. & PROCESS 401, 411 (2010))); Peter Friedman, *What Is A Judicial Author?*, 62 MERCER L. REV. 519, 520 (2011). *See also id.* at 529 ("Anecdotal evidence shows, and further inquiry is likely to show that, in producing their opinions, judges habitually cut and paste without attribution from lawyers' briefs as freely as lawyers do in producing their briefs."); Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 800–01 (2008) ("[P]racticing attorneys are aware that it is a common practice for judges to borrow from the writing of attorneys and law clerks . . . .").

[129] FONTHAM & VITIELLO, *supra* note 73, at 40 ("In complex cases a topical presentation, which breaks out components of the facts and reviews each separately, may be the most comprehensible."); SHAPO, WALTER, & FAJANS, *supra* note 24, at 313 ("If there are many issues and the Statement of Facts is somewhat lengthy, you may want to use topical organization instead of a simple chronological organization."); BACHARACH, *supra* note 25, at 32 ("[W]riters can organize the fact section based on either chronology or subject matter."); ALTERMAN, *supra* note 30, at 101 ("[I]t is sometimes better to collect all facts on a side issue in one place.").

[130] GARNER, *supra* note 24, at 397–98; STARK, *supra* note 6, at 132–33; FONTHAM & VITIELLO, *supra* note 73, at 39 ("You should eliminate gratuitous opinions and . . . rhetoric, letting the facts themselves lead the reader to an opinion concerning the appropriate decision.").

[131] GARNER, *supra* note 24, at 397.

a string of burglaries with a defense of mental competency at issue in a contested motion. "In the first sentence of the fact section, [defense counsel] wrote, 'On the morning of the burglaries in question, my client tried to eat a live cat for breakfast.' "[132]

Guberman shares another helpful example from nonfiction writer James Stewart, who attempted to capture the excesses of a Wall Street trader, Ivan Boesky, reported to have inspired Michael Douglas's Gordon Gekko character in *Wall Street*.[133] Stewart wanted to convey that the character was a conspicuous consumer, living a life of imperiousness and extravagance. Instead of just telling the readers as much, he showed the details of the following anecdote:

> When the . . . waiter came to take their order, Boesky said he hadn't decided and that the others should make their selections. Then Boesky ordered: "I'll have every entrée." The waiter's pen stopped in midair. "Bring me each of those entrées . . . ."
>
> When the food arrived, the waiter wheeled a table next to them. On it were the eight featured dishes of the day. Boesky looked them over carefully, circled the table, took one bite of each. He selected one and sent the rest back.[134]

Undoubtedly, most readers could draw Stewart's desired conclusion from the details of this interesting story.

Make your best facts work for you. "[A]mplify the facts that suggest your desired outcome by placing them prominently in the narrative."[135] But do not overplay your hand. "If you describe a situation compellingly once in the facts, repeating them in this section only lessens the impact."[136] Instead of mere repetition, mine your record evidence to develop your important points.[137] Look for quotable witness testimony, real-life descriptions, and critical statements in documents that inject vivid imagery into your narrative.[138]

The opposite of amplification is diminution, and that is what should occur to your bad facts.[139] To be clear, diminution does not mean dele-

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[132] Stark, *supra* note 6, at 132.
[133] Guberman, *supra* note 20, at 49–50.
[134] *Id.* at 57–58 (quoting James B. Stewart, Follow the Story: How to Write Successful Nonfiction 233–35 (1998)).
[135] Scalia & Garner, *supra* note 22, at 94; Fontham & Vitiello, *supra* note 73, at 39 ("plan an organization that positions prominently the strong factual points").
[136] Stark, *supra* note 6, at 136.
[137] Fontham & Vitiello, *supra* note 73, at 40.
[138] *Id.*; Peck, *supra* note 74, at 119.
[139] Scalia & Garner, *supra* note 22, at 94.

tion. While you cannot omit harmful, but material, facts, you can and should de-emphasize them using some organizational and grammatical devices.[140] As Stark explains, "It's not your job to lay out the unfavorable facts in a way that draws attention. (That's your adversary's job.) If the unfavorable facts are in the fact section and they are accurate, you've met your professional responsibility."[141]

You may sandwich unfavorable information in the middle of a paragraph between favorable topics and concluding sentences.[142] And while you should linger a bit on the details of your helpful facts, unhelpful facts should get a more cursory, passing reference.[143] Consider sentence structure too. The location of harmful information in dependent clauses necessarily subordinates it to better information incorporated into the independent portion of the sentence.[144] Similarly, selective use of the passive voice deemphasizes the event's causative connection to a specific actor, which can be helpful when that actor is your client.[145]

If you are not using passive voice and colorless verbs for strategic diminution, populate your statement of facts with active voice and vivid verbs. "The difference between an active-verb style and a passive-verb style—in clarity and vigor—is the difference between life and death for a writer."[146] Zinsser further explains, "Verbs are the most important of all your tools. They push the sentence forward and give it momentum.

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140 *See* subsection III.C, *supra*; FONTHAM & VITIELLO, *supra* note 73, at 39.

141 STARK, *supra* note 6, at 129.

142 *Id.* at 127 ("[T]ake the bad fact and put it in a clause in the middle of a long sentence or even paragraph, where the reader is more apt to disregard it.").

143 *Id.* at 128 ("[Y]ou might apply Novacain to a situation by giving it little detail. . . . With no color, there's little to attract our attention."); SHAPO, WALTER, & FAJANS, *supra* note 24, at 317 ("[U]se colorless verbs and few adjectives or adverbs for facts you wish to de-emphasize."); FONTHAM & VITIELLO, *supra* note 73, at 39–40.

144 SHAPO, WALTER, & FAJANS, *supra* note 24, at 316 ("Because a subordinate clause depends on the independent clause for meaning, a reader's attention focuses on the independent clause."); Guberman, *supra* note 20, at 68 ("subordinat[ing] the bad fact to its more favorable context" is a "classic bad-fact strategy").

145 STARK, *supra* note 6, at 35 ("[I]if you're a lawyer representing the 'who' who did the 'what' to the 'whom,' the passive voice is your friend."); SHAPO, WALTER, & FAJANS, *supra* note 24, at 316 ("Passive voice will create a distance between your client and the activity described in the sentence."); BACHARACH, *supra* note 25, at 92 ("Using the passive voice allows you to downplay (even conceal) someone's role."); Guberman, *supra* note 20, at 68 ("passive constructions" tend "to dilute the impact"); ZINSSER, *supra* note 4, at 68 (in passive voice "[n]obody ever quite knows what is being perpetrated by whom and on whom"); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 32 (5th ed. 2005) ("[Y]ou can use [passive voice] when you want to muddy the waters. For example, if you do not want to state outright that your client knocked out the plaintiff's teeth, you can say: 'The plaintiff's teeth were knocked out.'").

146 ZINSSER, *supra* note 4, at 68.

Active verbs push hard . . . ."[147]

In addition to pacing, active voice helps writers omit needless words and helps readers remember what is written.[148] It also "better reflects a chronologically ordered sequence," so the chronology of your sentences will harmonize with the chronology of your overall fact pattern.[149]

E. Other recommendations

These final points are more shoulds than musts, but they can elevate a solid, do-no-harm statement of facts into an interesting, persuasive one.

First, keep most, not all, sentences short.[150] Stark recommends nothing longer than 25 words; Guberman says to average 27-word sentences; Wydick favors a 25-word average; and Garner wants a 20-word average.[151] The key word there is "average."[152] "You should vary your sentence length to give your prose some rhythm."[153] Try calculating the difference between the longest and shortest sentences in a brief.[154] If your difference is less than 10 words, you are probably over-reliant on one type of sentence. After a lengthy, freight-train sentence, try a short one. Or try a short

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[147] *Id. See also* WYDICK, *supra* note 145, at 23 ("At its core, the law is not abstract. It is part of a real world full of people who live and move and do things to other people. . . . To express this life and motion a writer must use verbs—action words.").

[148] BACHARACH, *supra* note 25, at 91

[149] GARNER, *supra* note 6, at 36. *See* SCALIA & GARNER, *supra* note 22, at 95; GARNER, *supra* note 24, at 365; GARNER, *supra* note 6, at 16; BACHARACH, *supra* note 25, at 32; SHAPO, WALTER, & FAJANS, *supra* note 24, at 313; FONTHAM & VITIELLO, *supra* note 73, at 40; ALDISERT, *supra* note 6, at 170; ALTERMAN, *supra* note 30, at 101; PECK, *supra* note 74, at 117; BENTELE, *supra* note 115, at 477; MAYER BROWN, *supra* note 63, at 348.

[150] ZINSSER, *supra* note 4, at 72 ("There is no minimum length for a sentence that's acceptable in the eyes of God. Among good writers it is the short sentence that predominates . . . ."); GARNER, *supra* note 24, at 133 ("[T]he best way to keep your sentences simple is to keep them short."); STARK, *supra* note 6, at 47 ("While an occasional long, well-constructed sentence does have its place, shorter is better."); Guberman, *supra* note 20, at 50 ("[Y]ou'll rarely if ever hear judges complaint that sentences . . . are too short.").

[151] STARK, *supra* note 6, at 46–47; GUBERMAN, *supra* note 37, at 67; WYDICK, *supra* note 145, at 36; GARNER, *supra* note 6, at 27.

[152] Microsoft Word will helpfully calculate the average length of your sentences. Select the "Review" section, click on "Editor," then click on "Document Stats" under "Insights." *See* Veronica J. Finkelstein & Nicole E. Crossey, *Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief*, 67 DOJ J. FED. L. & PRAC. 85, 89–90 (2019).

[153] GARNER, *supra* note 24, at 133; WYDICK, *supra* note 145, at 36 ("You need variety in sentence length as well as sentence construction . . . .").

[154] Patrick J. Barry, *Shot Selection*, 19 J. APP. PRAC. & PROCESS 157, 160 (2018).

sentence to lead off or end a paragraph.[155]

In this example from a Fifth Circuit opinion, notice how the punchy two-worder juxtaposes the preceding sentences of descending length.

> National Oilwell Varco (NOV) alleges that it purchased roughly 300 industrial-strength air conditioners from manufacturer Technicool Systems for use on specialty oil-and-gas rigs around the world. According to NOV, the total cost exceeded $3 million. The units were marketed as "desert-proof." They weren't.[156]

Here is another example with a two-word sentence, some mixed-length sentences preceding it, and a low, nine-word average:

> Austin Moon was a young motorcyclist. He liked to ride fast. So fast, in fact, he twice eluded police officers at triple-digit speeds. On officers' third attempt to stop Moon, a Criminal District Attorney Investigator named Jonathan Meachum caused Moon to crash. Moon died.[157]

Paragraphs should be short too, around the 150-word mark.[158] The following paragraphs from the factual background of a recent Fifth Circuit opinion are under 40 words:

> Jennifer Virden is a small business owner in Austin who decided to run for city council in the 2020 election cycle. She narrowly lost that race. She then ran for mayor in the 2022 election cycle.
>
> The city of Austin allows candidates for city office to raise funds only "during an authorized campaign period." Austin, Tex. City Code § 2-2-7(G). Before the authorized period, candidates can neither solicit nor receive contributions to their campaigns.
>
> Originally, this blackout period lasted until six months before a general election. That six-month window was approved by Austin voters in 1997 as part of a series of campaign finance regulations.[159]

"As with sentence length, you need variety in paragraph length: some slender ones and some fairly ample ones."[160] As Zinsser similarly cautions,

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[155] *Id.* at 163–66.
[156] In re Technicool Sys., Inc., 896 F.3d 382, 384 (5th Cir. 2018) (Willett, J.).
[157] Morrow v. Meachum, 917 F.3d 870, 872 (5th Cir. 2019) (Oldham, J.).
[158] Zinsser, *supra* note 4, at 80 ("Keep your paragraphs short. . . . Short paragraphs put air around what you write and make it look inviting . . . ."); Garner, *supra* note 6, at 88.
[159] Virden v. City of Austin, Texas, 127 F.4th 960, 963 (5th Cir. 2025) (Ho., J.).
[160] Garner, *supra* note 6, at 88.

"don't go berserk" with all short paragraphs.[161] "A succession of tiny paragraphs is as annoying as a paragraph that's too long."[162]

Your argument section is not the exclusive home for headings, so use descriptive (not argumentative) ones in your fact section too.[163] There are many advantages of doing so. Headings serve as organizational guideposts for readers, break up information into digestible chunks, and aid recall.[164] They are also useful "to draw the reader's attention to facts, to facilitate comparisons, and to highlight disputes."[165]

Do not hesitate to reproduce pictures, graphics, exhibit excerpts, or other visual aids in the fact section or other appropriate area of your memorandum or brief.[166] There is no rule against it, save the requirement that the materials shown or summarized appear somewhere in the record.[167]

The Fifth Circuit effectively juxtaposed the imagery in Figure 1 in a trademark-infringement suit.[168]

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161 Zinsser, *supra* note 4, at 80.

162 *Id. See also* Susan McCloskey, *So Just What Is Your Style?*, 73 N.Y. St. B.J. 39 (2001) ("Remember that a single-sentence paragraph is a piece of heavy stylistic artillery that is most effective when seldom used.").

163 Stark, *supra* note 6, at 138; William Pannill, *Appeals the Classic Guide*, Litig. 38, 43 (2019) ("Do not use argumentative headings in the statement of facts. Label heads work well in the statement of facts, where you wish to appear objective."); Elizabeth "Heidi" G. Bloch, *Appellate Brief Writing*, 92 The Advocate 23, 24 (2020) ("Use headings and subheadings for the Statement of Facts as well as the Argument."); Zusman, *supra* note 72, at 30 ("Subheadings help organize your fact section, and they serve as an opportunity to highlight some of your best and most compelling facts."); Alterman, *supra* note 30, at 97 ("Separate different elements of the facts . . . with headings."); Guberman, *supra* note 37, at 61 ("Nearly all the top advocates break up their fact sections through headings.").

164 Bacharach, *supra* note 25, at 26–27.

165 Guberman, *supra* note 105, at 77.

166 Guberman, *supra* note 20, at 49. *See generally* Wayne Schiess, *Graphics in Briefs: Why Not?*, 92 The Advocate 8 (2020) ("Sometimes graphics can convey concepts that text cannot. Sometimes using graphics is easier than describing something in the text. Graphics add a persuasive force to the document."); Guberman, *supra* note 37, at 293 ("One of the best ways to add interest and streamline information is to include an image, timelines, table, or chart.").

167 Gaines H. Cleveland, *The Power of the Visual: Incorporating Images into Briefs*, 71 DOJ J. Fed. L. & Prac. 105, 120 (2023); Zusman, *supra* note 72, at 32. *See also* subsection III.C, *supra* (noting the requirement to include a citation to record evidence for every stated fact); Fed. R. App. P. 28(a)(6), (e) (requiring "appropriate references to the record"); 5th Cir. R. 28.2.2 ("Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record . . . where the matter is found."); Fed. R. Civ. P. 56(c)(1)(A) (stating that a party must support assertions by "citing to particular parts of materials in the record").

168 All. for Good Gov't v. Coal. for Better Gov't, 901 F.3d 498, 503–04 (5th Cir. 2018).

Figure 1: Trademark-infringement example

This not only saved the court some ink describing the original and allegedly infringing images, but it also visually established similarities that words could not capture as effectively. As the court said, "pictures are worth a thousand words."[169]

In another case, the court illustrated a complex funding scheme with its own flowchart, which can be seen in Figure 2.[170]

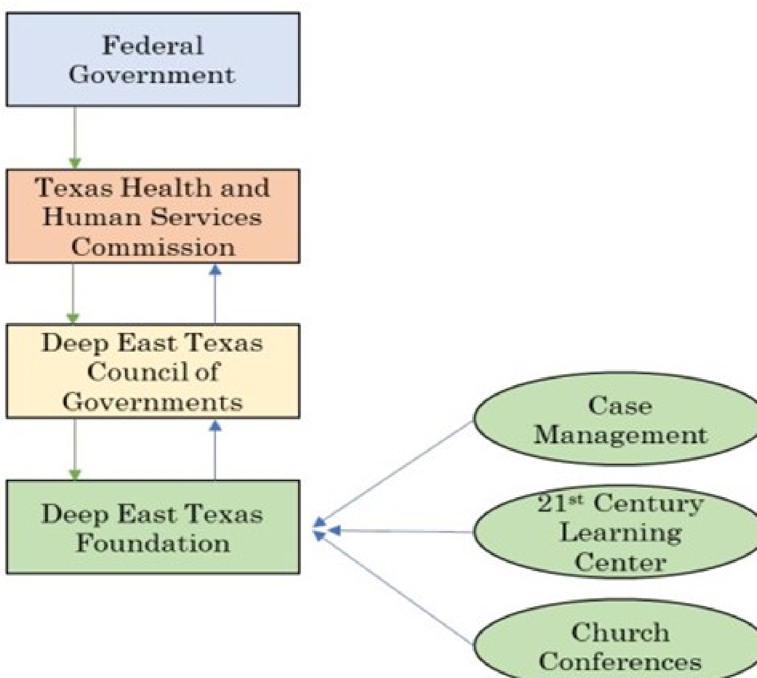

Figure 2: Complex funding scheme flowchart

Here is the bottom line: If judges are using visual aids in opinions and asking for them in briefs, advocates would be foolish to ignore this persuasive weapon in the writer's arsenal.[171]

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169 *Id.* at 503.

170 United States v. Diggles, 928 F.3d 380, 385 (5th Cir. 2019), *on reh'g en banc*, 957 F.3d 551 (5th Cir. 2020).

171 Guberman, *supra* note 20, at 49; ZUSMAN, *supra* note 72, at 30.

IV. Conclusion

No writing project—or any human activity requiring effort—should be undertaken without knowing the end—or the objective—of the work.[172] The titles of the three major sources cited in this article, *Writing to Win*, *The Winning Brief*, and *Winning on Appeal*, leave no mystery about our goal as advocates: to win.[173] No, not win at all costs. But win using the legitimate means at our disposal.

Introductions and statements of facts are two such means and are in your memorandum or brief for important reasons. A pithy preview of your argument, containing the indispensable "why" of your relief, followed by an interesting story that supplies the necessary facts in an objective, but subtly persuasive, narrative will increase the likelihood of getting the court to "yes" by the time you state your conclusion.

Compare some of your prior writing, both winners and losers, to the strategies contained in this article. What, if anything, could have been written differently? Do not be afraid to reconsider your own tried-and-true writing conventions in future projects.[174]

And always adhere to your local rules of court and, if known, the preferences of your judicial reader.

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[172] Aristotle, Nicomachean Ethics bk. one, §§ 1, 1094a (Martin Ostwald, trans. Prentice Hall 1999); Thomas Aquinas, Summa Theologiae pt. I, question 1, art. 1 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947).

[173] NFL, *Top 50 Sound FX — #23: Herm Edwards: You Play to Win the Game! — NFL* (YouTube Nov. 13, 2015), https://www.youtube.com/watch?v=AK7fEjrqabg; Melissa Maerz, *The Charlie Sheen Dictionary: A Totally Gnarly, Bi-Winning Guide to the Actor's Best Quotes*, L.A. Times (March 1, 2011), https://www.latimes.com/archives/blogs/show-tracker/story/2011-03-01/the-charlie-sheen-dictionary-a-totally-gnarly-bi-winning-guide-to-the-actors-best-quotes ("The only thing I'm addicted to right now is winning.").

[174] Adam Grant, Think Again: The Power of Knowing What You Don't Know 2 (2021) ("Intelligence is traditionally viewed as the ability to think and learn. Yet in a turbulent world, there's another set of cognitive skills that might matter more: the ability to rethink and unlearn.").

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Subject-Matter-Jurisdiction Dismissals, Prejudice, Leave to Amend, and Finality

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I. Introduction

Federal appellate courts generally require that any dismissal for lack of subject-matter jurisdiction be without prejudice. But courts will sometimes dismiss a complaint for lack of subject-matter jurisdiction "with prejudice," intending merely to prevent further amendment. Faced with an erroneous order dismissing "with prejudice" for lack of subject-matter jurisdiction, appellate courts will partially reverse, or modify on appeal, the district court's order. This can result in an emboldened plaintiff and unnecessary further litigation in the district court.

This article first establishes the general rule that a dismissal for lack of subject-matter jurisdiction should be without prejudice, explains the rationale for that rule, and briefly addresses the specific circumstance when the merits of a claim are intertwined with the court's jurisdiction. Second, it distinguishes between dismissals without prejudice and dismissals without leave to amend. Third, it discusses the implications of both variants of subject-matter-jurisdiction dismissal orders for finality on appeal. Finally, it concludes by recommending that defendants moving to dismiss a case for lack of subject-matter jurisdiction should nearly always seek dismissal without prejudice and, when appropriate, also without leave to amend.

II. Dismissals for lack of subject-matter jurisdiction must be without prejudice

A. The general rule

Despite frequent usage in federal court, the terms "dismissal with prejudice" and "dismissal without prejudice" are not expressly defined in the Federal Rules of Civil Procedure. Rule 41(a)(1)(B) indirectly defines a dismissal "without prejudice" as a dismissal that does not "operate[] as an adjudication on the merits."[1] This implicit definition tracks the United States Supreme Court's statement in *Semtek* that "'[w]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits.'"[2] The *Semtek* court explains that the "primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim."[3] Similarly, *Black's Law Dictionary* defines a dismissal with prejudice as a "dismissal, usu[ally] after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim."[4] And it defines a dismissal without prejudice as a "dismissal that does not bar the plaintiff from refiling the lawsuit within the limitations period."[5]

Thus, in general, a dismissal "with prejudice" is an adjudication on the merits, likely with claim preclusive effect. But a dismissal "without prejudice" is not an adjudication on the merits, generally leaving a plaintiff free to refile a new action based on the same underlying claim.[6]

Courts that lack subject-matter jurisdiction lack the power to adjudicate a claim on the merits.[7] Consequently, all federal courts of appeal generally require any dismissal for lack of subject-matter jurisdiction to be without prejudice.[8]

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[1] Fed. R. Civ. P. 41(a)(1)(B). ("Unless [a] notice or stipulation [of voluntarily dismissal] states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.").

[2] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001).

[3] *Id.*

[4] *Dismissal*, Black's Law Dictionary (12th ed. 2024).

[5] *Id.*

[6] *See, e.g.*, MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 935 F.3d 573, 581–82 (7th Cir. 2019) (following a dismissal without prejudice for lack of standing, plaintiffs might plausibly "try their luck in state court" where standing requirements may differ, or, believing they may satisfy standing based on a different exemplar claim, "they can present these claims against the same defendant in a new federal suit").

[7] *See, e.g.*, In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 668 F.3d 281, 286 (5th Cir. 2012) ("Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. Under Rule 12(b)(1), a claim is 'properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate' the claim." (citations omitted)); Flynn v. FCA US LLC, 39 F.4th 946, 954 (7th Cir. 2022) ("[T]he judge dismissed the case for lack of subject-matter jurisdiction based on the plaintiffs' failure to establish Article III standing, but her order reflects a dismissal with prejudice. That's a contradiction: [A] dismissal with prejudice is a merits disposition, but the failure of subject-matter jurisdiction precludes consideration of the merits.").

[8] In re Evenflo Co., 54 F.4th 28, 42 (1st Cir. 2022); Marsalisi v. New York City

B. Subject-matter-jurisdiction dismissals can be intertwined with the merits.

Sometimes a court's determination whether it has subject-matter jurisdiction is intertwined with the merits of a plaintiff's claim. This may implicate whether a "with prejudice" dismissal is appropriate or permissible. This is especially true in cases where the United States' sovereign immunity deprives the court of subject-matter jurisdiction. Indeed, under the Federal Tort Claims Act (FTCA), all elements of a meritorious claim are also jurisdictional, including the requirement that the United States, if a private person, would be liable to the claimant under state law.[9]

In *Brownback v. King*, the Supreme Court addressed this issue as it relates to the FTCA's "judgment bar" provision in 28 U.S.C. § 2676.[10] The judgment bar provides that "the judgment in an action under section 1346(b)" shall bar "any action by the claimant" involving the same subject matter against the federal employee whose act gave rise to the claim.[11]

In *Brownback*, the district court dismissed the plaintiff's claim because the United States was not liable under local law, as the FTCA requires.[12] But this raised the question of whether—if the United States enjoyed sovereign immunity for this reason, and if the court, therefore, lacked subject-matter jurisdiction—the district court's dismissal could trigger the judgment bar. The Supreme Court concluded that it did.[13] The Supreme Court explained that, because the jurisdictional elements entirely overlapped with the merits, the district court had necessarily

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Dist. Council of Carpenters & Joiners of Am., No. 22-1097, 2023 WL 176958, at *3 (2d Cir. Jan. 13, 2023); Aldossari v. Ripp, 49 F.4th 236, 262 (3d Cir. 2022); S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC, 713 F.3d 175, 185 (4th Cir. 2013); Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd., 818 F.3d 193, 210 (5th Cir. 2016); Bardes v. Bush, No. 23-3272, 2023 WL 9318039, at *2 (6th Cir. Dec. 4, 2023), *cert. denied*, 144 S. Ct. 1061 (2024); Flynn v. FCA US LLC, 39 F.4th 946, 954 (7th Cir. 2022); Cnty. of Mille Lacs v. Benjamin, 361 F.3d 460, 464 (8th Cir. 2004); Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2017); Brereton v. Bountiful City Corp., 434 F.3d 1213, 1216 (10th Cir. 2006); Kennedy v. Floridian Hotel, Inc., 998 F.3d 1221, 1235 (11th Cir. 2021); Attias v. Carefirst, Inc., 865 F.3d 620, 624–25 (D.C. Cir. 2017); Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996). *But see* Ernst v. Rising, 427 F.3d 351, 366 (6th Cir. 2005) (in rare circumstances, a district court that lacks subject-matter jurisdiction may dismiss action with prejudice as a sanction for misconduct).

[9] Brownback v. King, 592 U.S. 209, 217 (2021); 28 U.S.C. § 1346(b)(1).

[10] 592 U.S. at 220; 28 U.S.C. § 2676.

[11] 28 U.S.C. § 2676.

[12] *Brownback*, 592 U.S. at 213–14.

[13] *Id.* at 219.

passed on the substance of the plaintiff's FTCA claims while issuing its ruling that deprived it of subject-matter jurisdiction.[14] Judgments are preclusive with respect to issues decided, as long the court had the power to decide the issue, which the district court unquestionably did insofar as it was determining its own jurisdiction.[15]

In *Brownback*, the Supreme Court did not specifically address whether the district court's dismissal, formally issued under Rule 12(b)(6) considering the merits-based component of the ruling, should have been with or without prejudice.[16] But considering the Supreme Court's ruling that the dismissal had preclusive effect under the judgment bar, presumably dismissal with prejudice was appropriate.[17]

Litigants should be aware, however, that other FTCA jurisdictional requirements are not intertwined with the merits in the same way. For example, courts lack subject-matter jurisdiction over putative FTCA claims barred by the discretionary function or independent contractor exceptions to the FTCA.[18] Dismissals on those grounds should, therefore, be without prejudice.

With the caveat of circumstances when subject-matter jurisdiction is intertwined with the merits, subject-matter-jurisdiction dismissals should generally be without prejudice. If otherwise, a district court runs the risk of reversal or modification on appeal.[19]

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[14] *Id.* at 217.

[15] *See also* Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999) ("[A] judgment on the merits precludes relitigation of any ground within the compass of the suit, while a jurisdictional dismissal precludes only the relitigation of the ground of that dismissal.").

[16] *Brownback*, 592 U.S. at 209; Fed. R. Civ. P. 12(b)(6).

[17] *Brownback*, 592 U.S. at 211.

[18] *E.g.*, Simmons v. Himmelreich, 578 U.S. 621, 631 (2016) (discretionary function); Robb v. United States, 80 F.3d 884, 887 n.2 (4th Cir. 1996) (independent contractor).

[19] *E.g.,* Kamal v. J. Crew Grp., Inc., 918 F.3d 102, 119 (3d Cir. 2019) (vacating and remanding for "limited purpose" of issuing subject-matter-jurisdiction-dismissal-order "without prejudice"); Mecca v. United States, 389 F. App'x 775, 780–81 (10th Cir. 2010) (not precedential) (remanding with instructions to enter dismissal without prejudice of FTCA claims dismissed for lack of subject-matter jurisdiction); Ogunjobi v. United Nations, 833 F. App'x 388 (4th Cir. 2021) (not precedential) (vacating judgment to extent dismissal for lack of subject-matter jurisdiction was with prejudice, and remanding for dismissal without prejudice); Huang v. City of Los Angeles, 637 F. App'x 363 (9th Cir. 2016) (not precedential) (remanding with instructions to enter dismissal without prejudice because dismissal was based on lack of subject-matter jurisdiction).

III. District courts may dismiss a case without prejudice and without leave to amend

Despite the general rule that dismissals for lack of subject-matter jurisdiction should be without prejudice, confusion can result when courts seek to bar further amendment of the complaint. Many courts and litigants informally equate dismissal without prejudice and dismissal with leave to amend (and the converse, dismissal with prejudice and dismissal without leave to amend).[20]

Whether a plaintiff should be permitted leave to amend a complaint is an analytically distinct question from whether a dismissal is with prejudice (that is, whether the dismissal acts as an adjudication on the merits). When a court dismisses a complaint with prejudice and without any reference to leave to amend, it likely intends to preclude further amended complaints, as well as any subsequent actions. But when a court dismisses a complaint "without prejudice," especially in the context of a subject-matter-jurisdiction dismissal, it may not intend to comment on whether

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[20] *See, e.g.*, Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 449 (2d Cir. 1978) ("We also strongly suggest to the district courts that they use the terms 'with prejudice' or 'without prejudice' only when making a determination as to the Res judicata effect of a dismissal. These terms are not substitutes for clear indications as to whether repleading will be allowed."); *Mecca*, 389 F. App'x at 780 (not precedential) ("[B]ecause the district court found itself without jurisdiction over the FTCA claims, dismissal should have been entered without prejudice, even if the court deemed further amendment futile."); Thorne v. Pep Boys Manny Moe & Jack, Inc., 980 F.3d 879, 896 (3d Cir. 2020) (applying general rule that dismissal for lack of standing must be without prejudice, but using "leave to amend" and "without prejudice" interchangeably); Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006) (noting that denial of leave to amend and dismissal with prejudice are "two separate concepts," but concluding "district court extended the futility principle too far in this case by dismissing with prejudice for lack of standing, since it lacked jurisdiction to make a determination on the merits of the complaint"); Block v. United States, 768 F. Supp. 3d 221, 228 (D. Mass. 2025) (concluding that dismissal with prejudice on sovereign immunity grounds is appropriate, in part because "subsequent amendment to the Complaint would be futile under these circumstances" (footnote omitted) (citing additional cases)); Tierney v. United States, No. 5:24-xc-04400, 2024 **WL** 5109421, at *3 n.2 (E.D. Pa. Dec. 13, 2024) ("Dismissal with prejudice here is appropriate because 'amendment would be futile because the United States has not waived its sovereign immunity as to torts that arise from the collection of tax dollars.'"); Reyes v. Modesto, No. 2:14-cv-0795, 2014 WL 1392944, at *3 (E.D. Cal. Apr. 9, 2014) ("Dismissal of an action with prejudice, or without leave to amend, is considered a final judgment on the merits." (citation modified)); Rigby v. Cap. One Fin. Corp., No. 3:24-cv-98, 2025 WL 1407211, at *4 (M.D. Fla. May 14, 2025) ("Because Rigby has repeatedly failed to allege subject[-]matter jurisdiction, this case will be dismissed with prejudice.").

a plaintiff should be permitted to amend a complaint. Instead, the dismissal is "without prejudice" simply because the court lacks the power to issue an adjudication on the merits.[21]

Leave to amend is governed by Federal Rule of Civil Procedure 15(a).[22] That rule allows for one amendment early in the case as a matter of course and additionally with the opposing party's consent or the court's leave.[23] Importantly, Rule 15(a)(1)(2) directs that the "court should freely give leave when justice so requires."[24] This language has contributed to a paradigm of relatively permissive amendment in federal district court, enforced by watchful appellate courts.

But justice does *not* "so require" affording leave to amend when there has been undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by prior amendments, undue prejudice to the opposing party, and when amendment would be futile.[25] Futility is especially salient in cases when the United States has not waived sovereign immunity for the plaintiff's claim.

These established reasons for denying leave to amend are generally unrelated to the court's power to issue an adjudication on the merits. So there is nothing inconsistent about a court dismissing a complaint for lack of subject-matter jurisdiction without prejudice, but also without leave to amend.[26] Courts are often presented with fundamentally futile claims against the United States over which courts cannot exercise jurisdiction because the government enjoys sovereign immunity.[27] In those and sim-

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[21] Talley v. Wetzel, No: 1:22-CV-01712, 2023 WL 5163289, at *4 n.5 (M.D. Pa. July 17, 2023) ("Although a dismissal 'without prejudice' is often used to indicate that the plaintiff may amend his complaint in that case, in the context of a dismissal for lack of subject-matter jurisdiction, the dismissal 'without prejudice' indicates that the claim was not decided on the merits.").

[22] Fed. R. Civ. P. 15(a).

[23] *Id.*

[24] *Id.* at 15(a)(1)(2).

[25] Foman v. Davis, 371 U.S. 178, 182 (1962).

[26] *See, e.g.*, MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 935 F.3d 573, 581 (7th Cir. 2019) ("A dismissal for lack of jurisdiction without leave to amend is not the same thing as a dismissal with prejudice."); D'Agostino v. EV3, Inc., 845 F.3d 1 n.3 (1st Cir. 2016) ("[A] futility finding could also mean that the proposed complaint would require dismissal for other reasons, such as lack of subject-matter jurisdiction under Rule 12(b)(1)."); Gross v. Intratek Comput. Inc., No. 22-CV-7440, 2023 WL 144129, at *3 (E.D.N.Y. Jan. 10, 2023) ("Where a complaint has been dismissed for lack of subject[-]matter jurisdiction, denial of leave to amend on the basis of futility may be appropriate.").

[27] *E.g.*, Dudley v. U.S. Att'y's Off., No. 3:24-cv-01256, 2024 WL 4803452, at *5 (D. Conn. Nov. 15, 2024) (dismissing claims against federal defendants for lack of subject-matter jurisdiction on sovereign immunity grounds "without prejudice, but without leave to amend"); Lettieri v. Gaska, No. 3:24-cv-0102, 2025 WL 24030375 (N.D.N.Y.

ilar circumstances, many courts have recognized that dismissal without prejudice and without leave to amend is appropriate.[28]

IV. Implications for finality on appeal

A principal component of appellate jurisdiction is jurisdiction over "final" orders of district courts.[29] A comprehensive analysis of whether dismissals without prejudice are final for purposes of appeal varies by circuit and is beyond the scope of this article.[30] The specific case of without-prejudice dismissals for lack of subject-matter jurisdiction, however, is a subject of widespread agreement—courts generally recognize that the "without prejudice" nature of dismissals for lack of subject-matter jurisdiction does not preclude appellate finality.[31] Were it otherwise, dismissals

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Aug. 19, 2025) (dismissing claims against federal defendants "without prejudice because of lack of subject matter jurisdiction and without leave to amend in this action").

[28] *See, e.g.*, *MAO-MSO Recovery II*, 935 F.3d at 582 (although district court erroneously labeled subject-matter-jurisdiction dismissal "with prejudice," "[d]enying leave to amend under such circumstances was well within the district court's discretion"); *Talley,* 2023 WL 5163289, at *4 n.5, *10 n.10 ("Although a dismissal 'without prejudice' is often used to indicate that the plaintiff may amend his complaint in that case, in the context of a dismissal for lack of subject-matter jurisdiction, the dismissal 'without prejudice' indicates that the claim was not decided on the merits."); Tovar v. U.S. Healthworks, No. 3:19-CV-803, 2020 WL 1015824, at *2 (N.D. Tex. Feb. 3, 2020) ("Plaintiff has amended her complaint twice . . . in an attempt to establish subject[-]matter jurisdiction. Still she has failed to do so. At this juncture, it is clear that Plaintiff has pled her best case and granting her leave to amend yet again would be futile and cause needless delay." (citation omitted)); Morris v. Texas, No. 4:21-CV-3456, 2022 WL 2067825, at *2 (S.D. Tex. June 8, 2022) ("Morris's live complaint is materially identical to his proposed amended complaint. Neither complaint states claims over which the Court has subject[-]matter jurisdiction. Accordingly, the Court will deny Morris's request for leave to amend his complaint on the basis of futility and dismiss this case without prejudice for lack of subject[-]matter jurisdiction."); Campbell v. Evnen, No. 8:24CV394, 2025 WL 1167838, at *6 (D. Neb. Apr. 22, 2025) ("The Court does not have subject[-]matter jurisdiction over Plaintiff's claim for declaratory and injunctive relief as alleged in the Complaint. Plaintiff's action, therefore, will be dismissed without prejudice and without further leave to amend, which would be futile." (citing cases)); Lazo v. United States, No. 98CV0119-B, 99CV0037-B, 1999 WL 250893, at *2 (S.D. Cal. Feb. 9, 1999) ("When dismissing without prejudice and without leave to amend, the Court merely indicates for purposes of res judicata and collateral estoppel that a decision on the merits was not made. . . . [B]y dismissing without leave to amend, the Court means exactly that—without leave to amend, ever.").

[29] 28 U.S.C. § 1291.

[30] *See, e.g.*, Bryan Lammon, *There Is No Helpful General Rule About Appealing Dismissals Without Prejudice*, 123 MICH. L. REV. ONLINE 16 (2024).

[31] *E.g.*, Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017).

To accommodate both the rule that a dismissal for lack of subject-matter for lack of subject-matter jurisdiction, including routine dismissals based on the United States' sovereign immunity, would not be subject to appellate review—an untenable result. And a subject-matter-jurisdiction dismissal without prejudice and without leave to amend is unquestionably final for purposes of appeal.[32]

The somewhat more complicated question is whether a without-prejudice dismissal for lack of subject-matter jurisdiction, but with leave to amend, is final for purposes of appeal. But there, courts can rely on the robust (if not necessarily straightforward) body of law relating to the finality of dismissal orders granting leave to amend.[33]

> jurisdiction ordinarily ends the action and the need to respect the intentions of the district court that entered the order, we will presume, absent a clear indication to the contrary, that a dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1) is a final, appealable order. Other circuits have similarly concluded that a district court's dismissal for lack of subject-matter jurisdiction is generally final and appealable.

Id. at 624. *See also* Radha Giesmann, M.D., P.C. v. ZocDoc, Inc., 850 F.3d 507, 509 n.3 (2d Cir. 2017) ("The district court's dismissal for lack of subject[-]matter jurisdiction following the entry of judgment applies to the entire action, including the conversion claim, making it a 'final decision[]' over which we have jurisdiction." (citing 28 U.S.C. § 1291)); G.W. v. Ringwood Bd. Of Educ., 28 F.4th 465, 468 n.2 (3d Cir. 2022) ("Though the Board argues that the dismissal without prejudice is not an appealable final order, its contention is without merit."); Kowalski v. Bolikder, 893 F.3d 987, 994–95 (7th Cir. 2018) ("Moreover, a dismissal for want of subject-matter jurisdiction is necessarily without prejudice because it does not preclude pursuit of the action in a different forum. Such a dismissal is, however, appealable." (citations omitted)); Whisnant v. United States, 400 F.3d 1177, 1180 (9th Cir. 2005) ("A dismissal for lack of subject[-]matter jurisdiction is a final judgment over which this court has jurisdiction under 28 U.S.C. § 1291, *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir.1989), and is reviewed de novo, *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir.2003)."); Mecca v. United States, 389 F. App'x 775, 781 n.1 (10th Cir. 2010) (not precedential) ("One might argue that dismissal without prejudice of the FTCA claims—indeed, the Bivens claim as well—precludes appellate review, since such dismissals usually are not final decisions. We have jurisdiction, however, because the dismissal order finally disposed of the case and effectively excluded [the appellant] from federal court."); Lammon, *supra* note 29 ("[N]o one seriously doubts that dismissals for a lack of subject-matter jurisdiction [which are necessarily without prejudice] are appealable." (footnote omitted)).

32 *E.g.*, Wynder v. McMahon, 360 F.3d 73, 76 (2d Cir. 2004) ("[A] dismissal without prejudice that does not give leave to amend and closes the case is a final, appealable order under 28 U.S.C. § 1291.").

33 *See generally* Edward H. Cooper, *Jurisdiction of the Courts of Appeals*, *in* Charles A. Wright & Arthur R. Miller, 15A Federal Practice and Procedure: Jurisdiction and Related Matters § 3914.1 (3d ed. 2025).

> The basic rules of finality as to rulings on the pleadings are simple enough. Ordinarily orders that do not terminate the action by entry of judgment for plaintiff or defendant are not final. Orders that entail entry of judg-

V. Conclusion

Courts lacking subject-matter jurisdiction generally have no authority to adjudicate a case on the merits or dismiss a case "with prejudice." But that does not mean a court is restricted in its ability to preclude future attempts at amendment, relying on the well-accepted standards for denying leave to amend. Litigants, therefore, should be precise with their proposed orders accompanying motions to dismiss for lack of subject-matter jurisdiction. Nearly always, such motions should seek dismissal without prejudice. And, when appropriate, litigants should also ask for dismissal without leave to amend.

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> ment covering the entire action are final. Confusion is found, however, in efforts to reconcile the rules of finality with the pleading rules that encourage liberality in amending defective pleadings. The larger part of this subsection will be devoted to the tangle of decisions surrounding appeal from dismissal for failure to state a claim.

Id. See also Weber v. McGrogan, 939 F.3d 232 (3d Cir. 2019) (addressing finality of order dismissing for lack of subject-matter jurisdiction without prejudice and with leave to amend).

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Who Has the Pen? Jurisdictional Transfers Between District and Appellate Courts in Criminal Cases

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I. Introduction

Appellate procedure in criminal cases is generally straightforward: After sentencing, the district court enters final judgment; the defendant then files a notice of appeal with the district court; and jurisdiction transfers to the appellate court for further proceedings, sometimes coming back to the district court if the appellate court remands the case. This procedure ensures only one court has jurisdiction—and thus the power to act—at a time, thereby avoiding competing orders and procedures. In those common situations, there is little reason to question whether the district or appellate court has jurisdiction at any specific time, as the answer is obvious and, as a practical matter, there is nothing for the jurisdiction-lacking court to do anyway.

But complications and nuances abound. If a party takes an interlocutory appeal, does the district court lose jurisdiction over the entire case or just on the issue the party appealed? Can a defendant file a frivolous appeal to stop trial proceedings? What if new information would render the appeal moot, if only the district court could act? When the appellate court issues a decision, are lower courts bound by it immediately, or only when the mandate issues? And what happens if one court purports to act while another has jurisdiction?

Both trial and appellate courts have struggled with these questions. Some clear answers have emerged, but many gray areas and uncertainties remain.[1]

[1] This article primarily focuses on issues that arise in criminal cases, though many of the concepts have analogues in the civil context as well. *See generally* Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053, 2054 (2009) ("But as the

II. Usual procedure

In the usual case, after a court sentences a defendant, the defendant files a notice of appeal within 14 days, and the parties proceed to briefing and argument in the appellate court.[2] Once the defendant files a notice of appeal, jurisdiction transfers to the appellate court as to "any matter touching upon, or involved in, the appeal."[3] "[T]he trial court may continue to exercise a modicum of power over a case that is before the appellate court—but this power exists only in those few situations in which the risk of an intramural collision is small."[4] If the court confirms the conviction and sentence, the mandate issues, and other than the rare grant of en banc or certiorari, the case is over. If the appeals court reverses and remands the case, it returns to the district court for additional proceedings.

The idea that jurisdiction automatically transfers from the trial to appellate court on filing of a notice of appeal is purely judge-made, rather than spelled out in rule or statute.[5] It is nevertheless widespread because it avoids the "potential for conflict and confusion," serves "the interests of comity and judicial economy," and generally "keep[s] the district court and the court of appeals out of each other's hair."[6] Because it is judi-

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Supreme Court has suggested in other contexts, describing this transfer in jurisdictional terms may cause confusion." (citation modified)).

[2] Fed. R. App. P. 4(b)(1)(A).

[3] United States v. George, 841 F.3d 55, 71 (1st Cir. 2016) (quoting United States v. Brooks, 145 F.3d 446, 455 (1st Cir. 1998)). *See also* Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995) (noting "an important limitation on the rule that just one court at a time possesses jurisdiction: the doctrine applies only to 'those aspects of the case involved in the appeal'" (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982))); Fed. R. App. P. 4(b)(5) ("The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a)[.]").

[4] *Brooks*, 145 F.3d at 456. *See generally* Allan Ides, *The Authority of A Federal District Court to Proceed After A Notice of Appeal Has Been Filed*, 143 F.R.D. 307 (1992) (explaining the process of an appeal and that matters contained in the appeal are transferred to the court of appeals).

[5] *See* Catherine T. Struve, *Federal Rules of Appellate Procedure*, *in* Charles A. Wright & Arthur R. Miller, 16A Federal Practice an Procedure: Jurisdiction and Related Matters § 3949.1 (5th ed. 2025) (filing the notice of appeal); *Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

[6] *Brooks*, 145 F.3d at 455–56 (citing United States v. Ienco, 126 F.3d 1016, 1018 (7th Cir. 1997)); *id.* (citing Shewchun v. United States, 797 F.2d 941, 943 (11th Cir. 1986)); Matter of Jones, 768 F.2d 923, 930–31 (7th Cir. 1985) (Posner, J., concurring). *See also Brooks,* 145 F.3d at 455–56.

cially created, one may more accurately characterize the transfer not as a "jurisdictional" rule, but instead a "mandatory claim-processing rule."[7] But given the widespread use of "jurisdiction" language by district and appellate courts, as well as federal rules, this article will refer to "jurisdictional" authority while noting the nuanced usage might matter in some edge cases.[8]

III. Transferring jurisdiction to the appellate court

Automatically transferring jurisdiction on the filing of an appeal—an event controlled by a single party—has the potential for mischief. For example, a defendant may want to delay trial as long as possible, hoping that witnesses forget, evidence gets lost, the judge is replaced, or (if the defendant is out of custody) to delay the risk of imprisonment. Likewise, the government may seek delay to buy time to avoid Speedy Trial Act consequences, reverse a negative evidentiary ruling, or shore up its case by locating missing witnesses.[9] And if jurisdiction transfers automatically with no consideration of the merits, there is little to stop a savvy party from abusing the process.

> Though judicially spawned, not legislatively ordained, this rule has sturdy roots. . . . [A]lthough there has been some movement in the direction of a more flexible approach, the principle that jurisdiction over a single case ordinarily should reside in a single court at any single point in time still has widespread applicability.

Id. (citations omitted).

[7] Rodriguez v. Cnty. of Los Angeles, 891 F.3d 776, 790–91 (9th Cir. 2018) ("The Supreme Court has since made clear that only Congress may determine a lower federal court's subject-matter jurisdiction. Accordingly, jurisdictional rules derived from sources other than Congress are more accurately characterized as mandatory claim-processing rules that may be applied in a less stern manner than true jurisdictional rules." (citation modified)). *See also* United States v. Biden, No. 2:23-cr-599, 2024 WL 2739320, at *1 (C.D. Cal. May 9, 2024) ("Although the parties and many courts employ the term *jurisdiction*, a statutory concept, in connection with a discussion of whether a district court's authority to proceed is divested upon the filing of a notice of appeal, the divestiture rule is a nonjurisdictional doctrine of judicial creation."). *Cf.* Coinbase, Inc. v. Bielski, 599 U.S. 736, 740 (2023) (using "jurisdiction" interchangeably with "control" and noting the "longstanding tenet of American procedure" that an appeal "divests the district court of its control over those aspects of the case involved in the appeal" (quoting *Griggs*, 459 U.S. at 58)).

[8] *See, e.g.*, Fed. R. App. P. 4(b)(5). *Cf.* Kusay v. United States, 62 F.3d 192, 194–95 (7th Cir. 1995) (holding that when the appellate court has "jurisdiction," "any action by the district court is a nullity" because "as we keep repeating, the initial issue is one of power to act").

[9] *See* 18 U.S.C. §§ 3161–3174 (Speedy Trial Act).

One hurdle to potential abuse is the requirement that a party ordinarily can only appeal from a final judgment.[10] Most pretrial rulings are not "final" under that rule, so a notice of appeal from those rulings is ineffective and causes little or no delay to the district court proceedings.[11]

But some procedural protections prevent a trial from beginning. The right against double jeopardy, for example, is a right to not be tried twice, not just a right to avoid conviction twice.[12] A district court's denial of a motion to dismiss based on double jeopardy concerns is thus an appealable final order, even though it necessarily issues pretrial.[13]

A. The "dual jurisdiction" doctrine

To resolve this tension, most circuits have adopted a doctrine of "dual jurisdiction," whereby the district court retains jurisdiction if it deems the double jeopardy (or other immunity) motion is frivolous, without waiting for the appellate court to weigh in.[14]

If the district court rules the double jeopardy claim "to be frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal."[15]

It ultimately does not matter if the appellate court agrees that the

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[10] 28 U.S.C. § 1291. *See also* United States v. Amlani, 169 F.3d 1189, 1192 (9th Cir. 1999) ("[T]he principle that appellate review should be deferred pending the final judgment of the district court is central to our system of jurisprudence."); Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (noting "the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated" (citations omitted)).

[11] *See* 28 U.S.C. § 1291.

[12] Abney v. United States, 431 U.S. 651, 660–61 (1977) ("[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." (footnote omitted)).

[13] *Id.* at 660–62 ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.").

[14] United States v. Dunbar, 611 F.2d 985, 987 (5th Cir. 1980) (en banc); United States v. LaMere, 951 F.2d 1106, 1108–09 (9th Cir. 1991) ("This [*Dunbar*] approach has been uniformly followed by other circuits." (collecting cases)); United States v. Montgomery, 262 F.3d 233, 240 (4th Cir. 2001) ("Appellate courts, including this one, have developed a dual jurisdiction rule, which allows a district court to proceed with trial while a defendant pursues an Abney double jeopardy appeal, where the district court has concluded that the appeal is frivolous." (citation modified)).

[15] *Id.* at 988.

double jeopardy claim was frivolous or just losing. If it does not stay the second trial pending appeal, the court will hear the double jeopardy claim after conviction. If meritorious, the court will vacate the conviction (albeit after the harm of a second trial has already occurred). And if not meritorious—whether obviously or just barely—the court will uphold the conviction as it would have done without the interlocutory appeal.[16]

This exception to the automatic-transfer rule is, at bottom, a practical one. Holding otherwise "would enable a criminal defendant to unilaterally obtain a trial continuance at [a]ny time [before] trial by merely filing a double jeopardy motion, however frivolous, and appealing the trial court's denial thereof."[17] Despite those concerns, the D.C. Circuit has permitted a midtrial appeal of a double jeopardy claim, finding it not frivolous because of intervening precedent and accordingly issuing an order staying the trial.[18] The Fourth Circuit questioned the reasoning leading to that result, but ultimately distinguished the holding "[i]n light of the odd context in which [the D.C. Circuit case] arose."[19]

Some courts have extended the doctrine beyond double jeopardy and immunity cases. The Fifth Circuit, for example, held that a district court could correct an illegal sentence that was the subject of appeal without waiting for the appellate court to correct its mistake.[20] The Seventh Circuit, though, sharply criticized that result as "plainly incorrect."[21]

Courts have occasionally found other exceptions to the usual automatic-transfer rule of jurisdiction in the criminal context.[22] The Eleventh Circuit, for example, held that a district court could revoke a defendant's naturalization certificate despite a pending appeal challenging his convictions for falsely obtaining naturalization, reasoning that the revocation was statutorily mandated and vested no discretion in the district court. There was accordingly no reason to wait for the appellate process to com-

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16 *Id.* at 989.

17 *Id.* at 988 (noting the rule should be "reflective of practical common sense").

18 United States v. Coughlin, 610 F.3d 89, 96 (D.C. Cir. 2010).

19 United States v. Modanlo, 762 F.3d 403, 412 (4th Cir. 2014). *See Coughlin,* 610 F.3d at 96.

20 United States v. Ortega, 859 F.2d 327, 334–35 (5th Cir. 1988); United States v. Stafford, 29 F.3d 181, 183 (5th Cir. 1994).

21 Kusay v. United States, 62 F.3d 192, 195 (7th Cir. 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose. The district court may not alter the judgment unless the court of appeals grants leave."). The court's reasoning implicitly references Federal Rule of Appellate Procedure 12.1 and Federal Rule of Criminal Procedure 37.

22 *See* United States v. Vicaria, 963 F.2d 1412, 1415 (11th Cir. 1992) (collecting cases).

plete or to remand the case for the district court to regain jurisdiction.[23]

Other exceptions can include defects in the notice of appeal or appealing a non-appealable order, such that the notice is not operative and does not transfer jurisdiction.[24] In that case, the district court retains full jurisdiction. If in doubt, it can wait to act until the appellate court asserts or declines jurisdiction, to avoid stepping on the appellate court's toes. And if the district court proceeds despite an inoperative appeal, the ostensible appellant can seek clarification and relief from the appellate court.[25]

The Supreme Court has not spoken clearly on the subject. It has instead both praised and rejected the dual-jurisdictional doctrine, though only ever in passing. In its *Abney* decision categorizing the rejection of a double jeopardy claim as a final (and appealable) decision, the Court included a footnote responding to the government's fear that defendants would file frivolous motions to delay trial: "[W]e believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy."[26] That solution necessarily assumes jurisdiction transfers to the appellate court.

But in a later civil case, the Supreme Court, quoting *Abney*, considered "the analogous context of interlocutory appeals on the issue of double jeopardy," and wrote that the district court "appropriately certified peti-

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[23] United States v. Maduno, 40 F.3d 1212, 1218 (11th Cir. 1994) ("The revocation is a simple ministerial task and involves no exercise of discretion because the revocation is statutorily mandated. Moreover, there is existing case[]law indicating that the revocation does not have to wait until the defendant appeals his conviction.").

[24] *See, e.g.*, United States v. Sparks, 885 F. Supp. 2d 92, 102 (D.D.C. 2012) ("Because the defendant's notice of appeal is untimely on its face, the Court has not been divested of jurisdiction . . . .").

[25] Ruby v. Sec'y of U.S. Navy, 365 F.2d 385, 389 (9th Cir. 1966).

> Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction. If the district court is in doubt as to whether the notice of appeal is inoperative by reason of some such defect, it may decline to act further until the purported appellee obtains dismissal of the appeal in the court of appeals. In the rare instance where the district court proceeds with a case under the mistaken belief that a notice of appeal is inoperative, the appellant may apply to the court of appeals for a writ of prohibition.

Id.

[26] Abney v. United States, 431 U.S. 651, 662 n.8 (1977).

tioner's [civil qualified immunity] appeal as 'frivolous.'"[27] "This practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings."[28]

Given the uncertainty, perhaps unsurprisingly, many appellate courts have retained the dual-jurisdiction doctrine instead of expediting their consideration of possibly frivolous cases. The appellate courts have apparently concluded that "summary procedures" can include exceptions to the normal jurisdictional rules, keeping the workload, responsibility, and jurisdiction with the district courts.

B. Affirmative government appeals

Dual jurisdiction can also arise in the rarer cases in which the government is the party appealing. Section 3731 authorizes a pre-judgment appeal by the government if the district court dismisses the indictment, suppresses or excludes evidence (whether as a legal determination or for a discovery violation), or orders release of a detained defendant, with exceptions protecting double jeopardy rights.[29]

For government appeals, the onerous process of getting internal approval to appeal—requiring the personal authorization of the solicitor general—serves as a check on abusing jurisdictional transfers.[30]

As with the usual rule, the notice of appeal transfers jurisdiction to the appellate court, thereby pausing trial court proceedings. A district court accordingly cannot impanel a jury, for example, once a party has filed a section 3731 appeal.[31] The rationale is that, unlike a dismissal that can

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[27] Behrens v. Pelletier, 516 U.S. 299, 310 (1996).

[28] *Id.* at 310–11. *But see* United States v. Muller, No. 1:19-CR-109, 2023 WL 2773403, at *3 (D. Me. Mar. 30, 2023).

> The Government has cited out-of-circuit authority that suggests that the district court can retain jurisdiction if an appeal raising double jeopardy is either "frivolous or dilatory." But I have found no authority in the First Circuit which goes that far. . . . Because I cannot conclude that the Defendants' appeal is either defective or transparently frivolous, I grant the Defendants' request for a stay.

Id. (citation modified).

[29] United States v. Mavrokordatos, 933 F.2d 843, 846 (10th Cir. 1991) (collecting cases "conclud[ing] that some discovery sanctions are appealable pursuant to 18 U.S.C. § 3731"); 18 U.S.C. § 3731.

[30] U.S. Dep't of Just., Justice Manual 2-2.121; United States v. Centracchio, 236 F.3d 812, 813 (7th Cir. 2001) ("[S]ince the Solicitor General must in any event approve federal government appeals, there is no significant danger that the appeal will be frivolous."); United States v. W.R. Grace, 526 F.3d 499, 508 (9th Cir. 2008) (en banc).

[31] *Mavrokordatos*, 933 F.2d at 846; United States v. Brooks, 145 F.3d 446, 457

itself be appealed, seating a jury "bring[s] jeopardy into play" and "serves to frustrate the core purpose of section 3731, forcing the government to try the case without a substantial piece of evidence."[32]

But appeals under section 3731 "are not usual" and so do not follow the usual rule in all respects.[33] Even while a pretrial government appeal is pending, for example, the district court can still dismiss the indictment.[34] The rationale adopted by courts advancing this view is that "the government's right to appeal pretrial suppression orders must be balanced with a defendant's right to proceed to trial on the indictment. This can best be accomplished . . . by retaining jurisdiction in the district court to dismiss the indictment in appropriate cases."[35]

To avoid dismissal while appeal is pending, the government must request the district court stay all proceedings pending appeal and, if the court denies that, appeal the denied stay order itself.[36] (Midtrial exclusion of evidence is handled by seeking a writ of mandamus rather than appeal.[37])

Taking advantage of a jurisdictional transfer is not solely the domain of the parties though. A district court, perhaps frustrated by the government's prosecution, might want to swear in a jury (thereby ensuring jeopardy attaches) and thus functionally moot the government's appeal. Or it can try to dismiss an indictment with prejudice while appeal is pending.[38] But as with the circuit-made rules preventing jurisdictional shenanigans from the parties, similar exceptions to the general rule apply to the district court.[39]

(1st Cir. 1998).

[32] *Brooks*, 145 F.3d at 457.

[33] United States v. Gatto, 763 F.2d 1040, 1049 (9th Cir. 1985)

[34] *Id.* (citing United States v. Emens, 565 F.2d 1142, 1144 (9th Cir. 1977)).

[35] *Id. See also* United States v. Reliant Energy Servs., Inc., 420 F. Supp. 2d 1043, 1048–49 (N.D. Cal. 2006) ("Given these circumstances, this is an appropriate case for the court to entertain a motion to dismiss during the pendency of a § 3731 appeal of an evidentiary ruling." (citation modified)).

[36] *See Gatto,* 763 F.2d at 1049–50 (noting that the government could have protected its right to appeal pretrial suppression orders by "request[ing] the district court to stay proceedings pending appeal and, if refused, pursue the issue with [the appellate court]").

[37] *See, e.g.*, In re United States, 614 F.3d 661, 664 (7th Cir. 2010) ("But the government has not appealed from the order; it has sought mandamus, which is typically directed against nonappealable orders, as otherwise an appeal would do.").

[38] United States v. Centracchio, 236 F.3d 812, 813 (7th Cir. 2001). *See, e.g.*, *Gatto*, 763 F.2d at 1050 (reversing district court's dismissal with prejudice premised on government appeal delaying trial proceedings).

[39] *Centracchio*, 236 F.3d at 814 (rejecting district court's attempt to "merely [i]mpanel" a jury rather than "swear in the jury").

IV. Returning jurisdiction to the district court

A. When does the district court regain control?

Jurisdictional questions also arise going the other direction: If an appeals court remands a case, exactly when does the district court regain jurisdiction?[40] Because there is often a delay between the announcement of the appellate court's decision and the issuance of the mandate (to allow time for petitions for rehearing en banc and certiorari), the answer is not always obvious.

The Fifth Circuit confronted dueling jurisdictional claims in *Stafford*.[41] The appellate court affirmed Stafford's conviction but remanded to modify the conditions of his probationary sentence.[42] The district court complied with the ruling but also revoked Stafford's probation based on allegations that he had committed an additional criminal offense.[43] It did so even though the appellate court's mandate had not yet issued because Stafford's counsel had sought deadline extensions to file a petition for rehearing.[44]

That, the appellate court said, was improper: "The district court *should* have awaited our mandate; its failure to do so, although not a strictly jurisdictional defect, was error."[45]

But it did not reverse. Relying on cases from the illegal sentence and double jeopardy contexts, the court held that the case fell "within the narrow confines of the 'dual jurisdiction' theory" such that both the appellate and district courts could exercise authority over the case simultaneously.[46] Accordingly, though the appellate court "d[id] not endorse the district court's decision to act upon our judgment before the mandate issued, we conclude that no plain error occurred in Stafford's resentencing or in the revocation of his probation."[47]

That conclusion was largely supported by practical considerations. "The district court risked our modifying our opinion on rehearing, but

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[40] Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court. Until the mandate issues, the case is 'in' the court of appeals, and any action by the district court is a nullity.").
[41] United States v. Stafford, 29 F.3d 181, 182 (5th Cir. 1994).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 183.
[45] *Id.* at 184.
[46] *Id.*
[47] *Id.* at 182.

significantly, as it turns out, this did not come to pass."[48] Plus, the revocation was based on "valid grounds, supported by the evidence."[49] (Though query why a not-illegal result supports the power to act in the first place.) And in no-harm, no-foul analysis, the "district court's actions did not interfere with proceedings in our Court, nor did they implicate Stafford's constitutional rights."[50]

Other circuits have criticized that result. The Seventh Circuit, for example, mixed metaphors to criticize *Stafford*'s approach as enabling too much uncertainty: "Jurisdiction is unlike quantum mechanics. Elementary particles can both exist and not exist at the same time . . . . Litigants and judges should be able to know, from facts observable at the time they act, which shell covers the pea."[51] That court found it "essential to have clear rules that define who, if anyone, possesses this power" to act.[52] Other appellate courts have likewise favored a brightline rule, making it clear that "the district court is without jurisdiction to act until the mandate is received."[53]

However it happens, "[o]nce a mandate issues, jurisdiction over a criminal case revests in the district court."[54] But that does not mean the lower court regains authority over all aspects of the case. The district court "cannot vary [from the mandate] or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."[55] The lower court cannot "refuse to dismiss a case when the mandate required it," "revisit its already final determinations unless the mandate allowed

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48 *Id.* at 184.
49 *Id.*
50 *Id.*
51 *Kusay*, 62 F.3d at 194.
52 *Id.* (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988); Helm v. Resol. Trust Corp., 18 F.3d 446 (7th Cir. 1994)).
53 United States v. Arrellano-Garcia, 471 F.3d 897, 900–01 (8th Cir. 2006) (noting that the Rules of Appellate Procedure 41 "makes no mention of 'dual jurisdiction'" and the doctrine "would contravene the Supreme Court's admonition that 'a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously'" (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)). *See also* United States v. Ransom, 866 F.2d 574 (2d Cir. 1989); United States v. Nordean, No. CR 21-175, 2022 WL 2375810, at *7 (D.D.C. June 20, 2022) (collecting cases holding that when a case "is on appeal, the district court lacks power to proceed" and time is thus properly excluded from Speedy Trial Act calculations).
54 United States v. Cote, 51 F.3d 178, 182 (9th Cir. 1995).
55 United States v. Thrasher, 483 F.3d 977, 981 (9th Cir. 2007) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895)).

it," "entertain a proceeding inconsistent with the" decision, or otherwise act beyond whatever limitations the appellate court has placed on the remand.[56] Instead, a district court is empowered only to "consider and decide any matters left open by the mandate of [the appellate] court."[57] Whether those limitations are strictly jurisdictional has deeply divided the circuits.[58]

B. The post-decision, pre-mandate zone of uncertainty

A related issue arises when the appellate court has published its opinion, but the mandate has not yet issued. At what point does the opinion—and its analysis—become binding on other district courts? When the decision is first announced? When rehearing or certiorari is denied? When the mandate issues?

Though it creates a gray zone, appellate courts have held that a published decision "becomes binding precedent when it is decided."[59] "The fact that a mandate has not yet issued means only that jurisdiction over the case has not yet shifted back to the district court; it does not undermine the immediate precedential weight of our decision."[60] Though "until the mandate has issued, a published decision . . . is subject to modification, withdrawal, or reversal," the decision still "constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so," which can include the appellate court itself.[61] A published decision is thus binding until it is not, and reliance is both

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[56] *Cote*, 51 F.3d at 181–82 (citing Stamper v. Baskerville, 724 F.2d 1106, 1107–08 (4th Cir. 1984)); *id.* (citing United States v. Lewis, 862 F.2d 748, 750 (9th Cir. 1988)). *See, e.g.*, United States v. Wooden, 230 F. App'x 243, 244 (4th Cir. 2007) (not precedential) (per curiam).

> [T]he only issue before the district court by reason of our limited remand was a determination of the date on which Wooden gave his notice of appeal to prison officials . . . . [T]he district court was without authority to act on Wooden's motions which involved aspects of the case involved in the appeal.

Id.

[57] *Thrasher*, 483 F.3d at 981 (quoting *Sanford*, 160 U.S. at 256).

[58] Alaska Dep't of Fish & Game v. Fed. Subsistence Bd., 139 F.4th 773, 787 n.13 (9th Cir. 2025) (citing *Thrasher*, 483 F.3d at 982) (collecting cases and noting four-to-four split).

[59] Cox v. Dep't of Just., 111 F.4th 198, 209 (2d Cir. 2024).

[60] *Id.* (collecting cases).

[61] In re Zermeno-Gomez, 868 F.3d 1048, 1052 (9th Cir. 2017). *See also* Yong v. Immigr. & Naturalization Serv., 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority . . . .").

mandatory and a "gamble."[62]

Delayed issuance of the mandate further complicates the issue. Once the Supreme Court has denied certiorari, jurisdiction again reverts to the circuit court. And, nearly as automatically, the circuit court's mandate should then issue, terminating its jurisdiction.[63] But occasionally a panel of the circuit court will try to retain jurisdiction and enter additional orders by refusing to issue the mandate.

The Supreme Court has rejected those attempts, leaving only a narrow pathway for courts to avoid immediate issuance of the mandate. In *Bell*, the Supreme Court denied certiorari, but the Sixth Circuit did not issue a mandate.[64] Instead, five months later, it issued an amended opinion changing the outcome.[65] It claimed authority to do that based on "our inherent power to reconsider our opinion [before] the issuance of the mandate, which has not yet issued in this case."[66] The Supreme Court reversed, holding that "even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion."[67]

The Court considered a similar situation, and reached the same result, in *Schad*. There, after the Supreme Court denied certiorari in a state death-penalty case, the Ninth Circuit did not issue the mandate, but instead sua sponte resurrected a previously denied motion to stay the mandate, construed it as a motion to reconsider, and remanded to the district court for further proceedings that served to delay the execution.[68] This time, the Supreme Court granted certiorari to explain that a circuit court abuses its discretion when it "decline[s] to issue the mandate based on an argument it had considered and rejected months earlier."[69] And the Supreme Court added to its usual concluding language to leave no doubt as to the next steps: "The Ninth Circuit's judgment is reversed, the stay of execution is vacated, and the case is remanded with instructions to issue the mandate immediately and without any further proceedings."[70]

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[62] *In re Zermeno-Gomez*, 868 F.3d at 1052 (quoting United States v. Ruiz, 935 F.2d 1033, 1037 (9th Cir. 1991)).
[63] Fed. R. App. P. 41(d)(4) ("The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.").
[64] Bell v. Thompson, 545 U.S. 794, 800–01 (2005).
[65] *Id.*
[66] Thompson v. Bell, 373 F.3d 688, 691 (6th Cir. 2004).
[67] *Bell*, 545 U.S. at 796.
[68] Ryan v. Schad, 570 U.S. 521, 523–24 (2013).
[69] *Id.* at 526.
[70] *Id.* at 528.

The Ninth Circuit complied.[71]

Though appellate courts cannot delay issuing a mandate, they "have an inherent power to recall their mandates"—albeit a power that is "one of last resort, to be held in reserve against grave, unforeseen contingencies"—and so can retake jurisdiction from district courts as needed.[72]

The reverse is not true: A district court cannot wrest control of a case back from a higher court. But it can tell the higher court that further appellate work is unnecessary and request the higher court to return the case. It is to that topic we turn next.

V. Indicative rulings

Occasionally, new evidence or arguments come to light after a party has filed an appeal that would substantially alter the issues on appeal or even moot them altogether. Procedurally, it could be difficult to account for those facts: The district court has no jurisdiction to take new evidence or convene new hearings, and the appellate court generally will not consider facts outside the district court's existing record.[73] Into that breach steps Federal Rule of Appellate Procedure 12.1 and its district court counterpart, Federal Rule of Criminal Procedure 37.[74]

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[71] Filed Clerk Order, Schad v. Ryan, 671 F.3d 708 (9th Cir. 2011) (No. 07-99005), Dkt. No. 137 (issuing clerk order, which "constitutes the formal mandate of this Court," the day after receiving a certified copy of the Supreme Court's decision, though 2.5 months after the decision was issued).

[72] Calderon v. Thompson, 523 U.S. 538, 549–50 (1998). The Federal Rules of Appellate Procedure do not mention a mandate-recall mechanism, though some circuit rules implicitly recognize it. *See, e.g.*, 5th Cir. R. 41.2 (recall of mandate); 9th Cir. R. 40-2 (opportunity to respond before en banc review); 10th Cir. R. 41.2 (motion to recall mandate). *See also* Fed. R. App. P. 41 advisory committee's note to 1998 amendments ("Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted.").

[73] *See, e.g.*, United States v. Elias, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal." (citing Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988) (stating documents "not part of the record on appeal . . . must be stricken"))).

[74] Fed. R. Crim. P. 37 advisory committee's note to 2012 adoption (citation omitted) (noting that the drafters of the rule "anticipate[d] that Criminal Rule 37 [would] be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)."). *See* Fed. R. Crim. P. 33(b)(1), 35(b); 18 U.S.C. § 3582(c). *See also* Filed Order: The Parties' Joint Motion to Voluntarily Dismiss This Appeal as Moot, United States v. Bonds, No. 16-50239 (9th Cir. Feb. 13, 2017), Dkt. No. 17 (granting joint motion to dismiss appeal as moot after Rule 12.1 clarification from the district court); Filed (ECF) Appellee USA Unopposed Motion to Stay Appellate Proceedings, United States v. Bonds, No. 16-50239 (9th Cir. Nov. 18, 2016), Dkt. No. 12-1.

A party can move for relief in district court, even when the district court has lost jurisdiction over the case because of a pending appeal. Per Rule 37(a), the district court can then do the following: "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."[75] If it chooses the third option, then the moving party alerts the appellate court using the procedures set out in Appellate Rule 12.1.[76] That rule gives the appellate court the option to remand for further proceedings or dismiss the appeal entirely.[77] Notably, even if the appellate court "remand[s] for further proceedings," it still "retains jurisdiction unless it expressly dismisses the appeal."[78] The onus is then on the parties to notify the appellate court when the district court has ruled.[79] The rule prevents a type of reverse interlocutory appeal, in which jurisdiction temporarily reverts back to the district court, and avoids confusion about when jurisdiction would vest back in the appellate court.

Missing from the list of district court options is the ability to grant the motion.[80] The most the lower court can do is "state that it *would* grant the motion" *if* the appellate court remands the case.[81] That prevents an appellant from "fight[ing] for and obtain[ing] the same relief in two federal courts simultaneously."[82] It also ensures that district courts can "aid appellate courts in their decision-making process by providing additional information about the merits of an appellant's motion" without deciding the issue in a way that would "negate the need for, rather than aid in, the appellate process."[83]

District courts must be careful to stay within the contours of the indicative-ruling procedures.[84] Some district courts, for example, have not waited for an indicative-ruling motion and instead issued a post-judgment memorandum providing additional sentencing analysis. The First Circuit

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[75] Fed. R. Crim. P. 37(a).
[76] Fed. R. Crim. P. 37(b).
[77] Fed. R. App. P. 12.1(b).
[78] *Id.*
[79] *Id.*
[80] *See* United States v. Armstrong, 132 F.4th 736, 738 (4th Cir. 2025) (granting the motion "would be impermissible because Rule 37 does not provide such an exception to the general rule . . . [b]ut here, the district court proceeded in accord with Rule 37 by denying the motion for reconsideration").
Id. (citing Fed. R. Crim. P. 37(a)(1)–(3)).
[81] *Id.* at 737 (quoting Fed. R. Crim. P. 37(a)(3)).
[82] *Id.* at 738 n.3 (citing United States v. Christy, 3 F.3d 765, 768 (4th Cir. 1993)).
[83] *Id.*
[84] *See* Fed. R. Civ. P. 62.1.

took a “dim view” of a district court’s attempt to use other means to communicate its thoughts after transferring jurisdiction.[85]

VI. Conclusion

Most criminal appeals raise no issues of jurisdictional significance. Who has the power to act, however, is not always obvious. Given the complexities of jurisdictional transfer, including whether it is even a jurisdictional issue at all, attorneys and courts should be mindful of which court has authority over a case at any time, to avoid unnecessary and potentially tricky jurisdictional questions.

About the Author

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[85] United States v. Martin, 520 F.3d 87, 97 (1st Cir. 2008) (“The district court’s attempt to explain its sentencing rationale,” via a “sentencing memorandum” filed “nearly a year after sentence was imposed and after this case had been briefed on appeal,” “transgresses the spirit, if not the letter, of this rule. Introducing such a wild card into the deck is conducive to confusion.”). *See generally* Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 Notre Dame L. Rev. 2053, 2106 (2009) (explaining that indicative rulings promote fairness).

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Judicial Kudzu or Legal Lagniappe? Unpacking the Utilities and Drawbacks of Alternative Holdings in Judicial Opinions

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I. Introduction

In law, as in driving, alternative routes can be useful. Options reduce uncertainty. A persuasive advocate often offers multiple ways to resolve an issue to increase the odds of a favorable outcome. Many courts adopt the same approach and issue alternative rulings. At their best, alternative holdings are a welcome lagniappe to litigants that shed light on complex areas of law and promote judicial efficiency.[1] To critics, alternative holdings have become a form of judicial kudzu that overwhelm more than they inform.[2] The end result is an often-used legal mechanism that remains "an understudied and muddled" regime.[3]

This article seeks to unpack that system. It examines the origins of

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[1] *See* Joel Wm. Friedman, In Memoriam, *John Minor Wisdom: The Noblest Tulanian of Them All*, 74 Tul. L. Rev. 1, 9 (1999) (describing a lagniappe as "an extra bonus" in "New Orleans parlance"). *See, e.g.*, Bahr v. Regan, 6 F.4th 1059, 1071 n.12 (9th Cir. 2021) (explaining that alternative holdings can conserve judicial resources); United States v. Caporale, 701 F.3d 128, 142 n.8 (4th Cir. 2012) (recognizing the utility of alternative holdings).

[2] *See* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 180 (2009) (describing kudzu as a "non-indigenous climbing plant" that grows ferociously in the American South). *See, e.g.*, United States v. Burris, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Kethledge, J., concurring) (observing that alternative holdings are subject to the same criticisms as dicta); Phelps v. Alameda, 366 F.3d 722, 729 (9th Cir. 2004) (noting the utility of alternative holdings but cautioning that alternative dispositions can amount to advisory opinions).

[3] Justin W. Aimonetti, *Article III & Alternative Holdings*, 61 U. Louisville L. Rev. 455, 459 (2023).

alternative reasoning, reviews the benefits and critiques of alternative holdings, and explores ways to use alternatives effectively. Ultimately, this article contends attorneys and advocates can promote the prudent use of alternative reasoning by ensuring development of alternative arguments under preservation and preclusion principles.

II. Alternative reasoning is ubiquitous

Alternative reasoning has a longstanding place in U.S. law. Its roots derive from the adversarial system that underlies the entire judicial system. Under that system, courts apply a use-it-or-lose-it approach to legal issues. Courts rarely stray beyond those issues that parties have raised, and a party's failure to assert a claim constitutes forfeiture of it. These principles encourage alternative reasoning because a party has strong incentives to raise multiple potential meritorious arguments at one time. For the same reasons, courts rely frequently on those alternative rationales to strengthen opinions and reduce the odds of a successful appeal.

A. A brief overview of the party presentation rule

Federal courts resolve cases and controversies.[4] To that end, a court must resolve "concrete and particularized" injuries and avoid disposition of conjectural claims.[5] As a court hews to these constitutional guideposts, it depends "on the traditions of the adversarial process for sharpening, developing, and testing the issues" before it.[6] Under that adversarial framework, a court "relies on the advocates to inform the discussion and raise the issues to the court."[7] Party presentation assures that a court rules within the appropriate constitutional parameters.

Thus, timely assertion of a claim in the district court generally is a prerequisite to judicial consideration of the issue. A district court customarily will decline to pass judgment on an issue that the parties have not raised.[8] Likewise, an appellate court usually will not resolve an issue that

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[4] U.S. Const. art. III, § 2.
[5] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
[6] Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1184 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring).
[7] Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003).
[8] *See, e.g.*, Naabani Twin Stars, LLC v. Travelers Cos., 497 F. Supp. 3d 1011, 1023 (D.N.M. 2020) (limiting the analysis to issues that the plaintiff had raised); Ryan v. Shawnee Mission Unified Sch. Dist. No. 512, 437 F. Supp. 2d 1233, 1257 n.9 (D. Kan. 2006) (noting that the court would restrict its analysis to the issues the parties presented); United States v. Steele, 648 F. Supp. 1375, 1377 (N.D. Ind. 1986) (considering only an issue that the parties asserted).

the district court had no opportunity to resolve in the first instance.[9]

There are narrow exceptions to this principle. Some appellate courts have indicated an inclination to review legal issues that would yield a manifest injustice if unaddressed.[10] In addition, an appellate court typically may affirm a district court's ruling on any ground that the record supports.[11] This rule usually allows a winner in the district court more leeway to advance a new argument in the appellate court. Nonetheless, many courts remain reluctant to consider such new issues.[12] The exception also contemplates a pellucid record, which usually occurs only with the benefit of development by a party.

Appellate review is more forgiving in criminal cases too, but only slightly. In a criminal appeal, the appellate court may review an unpreserved objection for plain error.[13] Even then, the Supreme Court has cautioned that this power is "circumscribed" and intended to be used "sparingly."[14] At most, plain error review is a narrow exception to the general requirement of party presentation in the district court.

To preserve an issue, the party must renew the argument as the case progresses. As with the district court, an appellate court typically treats an issue as abandoned unless a party asserts it in the initial brief.[15] The Eleventh Circuit has elaborated further that "passing references" to an issue are insufficient to brief it adequately.[16] For those few cases that reach

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[9] *See, e.g.*, InfoDeli, LLC v. W. Robidoux, Inc., 136 F.4th 792, 806 n.13 (8th Cir. 2025) (declining to consider an argument raised for the first time on appeal); Bryant v. McDonough, 72 F.4th 149, 151 n.1 (6th Cir. 2023) (same); *In re* Energy Future Holdings Corp., 990 F.3d 728, 739 (3d Cir. 2021) (same); Waldrop v. Jones, 77 F.3d 1308, 1313 n.3 (11th Cir. 1996) (same); McDonald's Corp. v. Watson, 69 F.3d 36, 45 (5th Cir. 1995) (same).

[10] Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co., 546 F.3d 1142, 1146 (9th Cir. 2008) (recognizing a manifest injustice exception but declining to consider a new contention); Kelly v. Foti, 77 F.3d 819, 822 (5th Cir. 1996) (finding a litigant did not establish a manifest injustice).

[11] *See, e.g.*, McGriff v. City of Mia. Beach, 84 F.4th 1330, 1333 (11th Cir. 2023) (recognizing that the court may affirm on alternative grounds); Muff v. Wells Fargo Bank NA, 71 F.4th 1094, 1099 (8th Cir. 2023) (same); Angel v. Kentucky, 314 F.3d 262, 264 (6th Cir. 2002) (same).

[12] *See* Bruno v. Biomet, Inc., 74 F.4th 620, 626–27 (5th Cir. 2023) (recognizing that the court could affirm on alternative grounds but declining to do so because the district court did not have an opportunity to consider the matter).

[13] Fed. R. Crim. P. 52(b).

[14] Jones v. United States, 527 U.S. 373, 389 (1999).

[15] *See, e.g.*, Doe v. Mich. St. Univ., 989 F.3d 418, 425 (6th Cir. 2021) (finding that an appellant abandoned issues not raised in the initial brief); United States v. Duboc, 694 F.3d 1223, 1226 n.1 (11th Cir. 2012) (concluding that the appellee abandoned a timeliness issue that it did not raise in the initial brief).

[16] Sapuppo v. Allstate Floridian Ins., 739 F.3d 678, 681 (11th Cir. 2014).

the Supreme Court, it too has a general expectation that the parties will develop the arguments on the issues that the Supreme Court selects for review.[17] At every turn, a party receives an unambiguous message: Raise an argument or lose it.

Party presentation has an impressive historical lineage. In 1839, the Supreme Court indicated that a party's claim of error had "been abandoned at the argument" and reasoned that "therefore it need not be examined."[18] In the decision, Justice Story proceeded to address the two remaining issues.[19] In 1894, roughly 60 years later, the Second Circuit noted that a "plaintiff in error has assigned error in 12 particulars, but, as several of them were not argued to this court, and are not referred to on the brief, it may be assumed that they are abandoned, and they need not be discussed."[20] In 1915, the Fourth Circuit stated emphatically that it was "a court of errors only" and would "not consider questions not raised in the court below."[21] These illustrative decisions demonstrate that party presentation is nothing new.

Instead, courts have long turned to parties to define the issues at stake in litigation. A party that fails to raise an issue loses the ability to assert it, both in that round of litigation and in subsequent appeals from the decision.

B. This regime encourages alternative arguments

With these preservation rules, parties naturally have turned to alternative reasoning to advance claims. The best advocates may screen claims to raise the most persuasive points, but alternative reasoning is "a well-accepted practice" in the legal system.[22]

How should a litigator select the issues to raise in a case? Seasoned litigators often select "one central issue" or "a few key issues" from many to focus a court on the strongest points.[23] Precision has risks, though, because no advocate can predict the decisive point with certainty. Instead, "[i]n some cases, the lawyer's flagship argument may not carry the day, while the court embraces a secondary argument the lawyer rated less favorably."[24] An advocate must choose arguments with these uncertainties

[17] Food & Drug Admin. v. Wages & White Lion Invs., LLC, 604 U.S. 542, 568 n.4 (2025) (declining to decide a claim that a party referenced "fleetingly").
[18] Whiting v. Bank of U.S., 38 U.S. 6, 14 (1839) (Story, J.).
[19] *Id.* at 14–16.
[20] Springer Lithographing Co. v. Falk, 59 F. 707, 710 (2d Cir. 1894).
[21] City of Charlotte v. Atl. Bitulithic Co., 228 F. 456, 463 (4th Cir. 1915).
[22] Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982).
[23] Jones v. Barnes, 463 U.S. 745, 751–52 (1983).
[24] Goos v. Nat'l Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995).

in mind. Thus, a party with several paths to victory usually identifies those routes to the court.

Indeed, alternative reasoning is a central part of both civil and criminal practice. The Federal Rules of Civil Procedure authorize a party to set out multiple "statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."[25] In that same vein, "[a] party may state as many separate claims or defenses as it has, regardless of consistency."[26] Thus, alternative reasoning is a basic tenet of civil pleading.

As for criminal cases, alternative reasoning can carry constitutional ramifications. Criminal defendants generally have a constitutional right to counsel.[27] A defense attorney's performance violates the Sixth Amendment if the attorney's representation was unreasonable "under prevailing professional norms."[28] A district court concluded that an attorney's performance fell short of that constitutional standard when the attorney failed to raise an alternative argument that could have benefited the defendant.[29] In at least some criminal cases, alternative strategies may be a constitutional necessity.

Similarly, prosecutors have an obligation to search carefully for alternative arguments. The United States generally defends criminal appeals as the victor, which allows some latitude to advance alternative bases to affirm.[30] Nonetheless, forfeiture principles apply to the United States too.[31] In addition, the record typically supports an affirmance only when the parties have developed those issues in the district court. Thus, attorneys for the United States also face the potential loss of legal arguments that prosecutors failed to preserve properly.

In short, alternative reasoning has a prominent place in both civil and criminal cases. Practitioners should be prepared to deploy alternative legal reasoning when appropriate.

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[25] FED. R. CIV. P. 8(d)(2).
[26] *Id.* at 8(d)(3).
[27] U.S. CONST. amend. VI.
[28] Strickland v. Washington, 466 U.S. 668, 688 (1984).
[29] United States v. Frost, 612 F. Supp. 2d 903, 911–12 (N.D. Ohio 2009).
[30] *See* United States v. James, 135 F.4th 1329, 1332–33 (11th Cir. 2025) (recognizing that a court may affirm a ruling for any reason that the record supports).
[31] *See, e.g.*, United States v. Mix, 791 F.3d 603, 612 (5th Cir. 2015) ("[T]he government clearly can forfeit arguments by failing to raise them."); United States v. Duboc, 694 F.3d 1223, 1226 n.1 (11th Cir. 2012) (finding that the United States waived the timeliness of the defendant's notice of appeal by failing to raise the issue in its initial brief).

C. Alternative holdings spring from this system

Alternative holdings emanate from this regime. Attorneys provide multiple routes to decide a case, and both trial and intermediate appellate judges face similar information deficits. A district court cannot anticipate the argument that an appellate court might find most persuasive. Just as strong alternative arguments advance a party's position, compelling alternative holdings may encourage an appellate court to affirm the decision below.

At the core, judges do not like to be reversed.[32] Alternative holdings make reversals less likely. For starters, the losing party faces additional hurdles to challenge the defeat on appeal. Any losing party ignores a portion of a court's ruling at its peril.[33] For good measure, multiple courts of appeals expressly require an appellant to refute each stated ground that a district court gives for its ruling to obtain a reversal.[34] In the same vein, the Supreme Court may be more reluctant to grant certiorari in a case with alternative holdings.[35] Ultimately, the losing party must cover more ground at each successive point in the litigation when a court has rendered alternative holdings.

Alternative holdings may enhance a decision's persuasiveness. Some points are more convincing when coupled, especially when a court pairs a procedural ruling with a substantive point. For example, a court may be more inclined to enforce a harsh procedural rule if it also safely confirms that a claim lacks merit.[36] The Sixth Circuit relied on the value of such explanations when it elected to give deference to alternative state court

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[32] Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. Pa. L. Rev. 1129, 1149 (2022) ("[T]here are others who also don't like being told no: lower court judges." (footnote omitted)).

[33] *See, e.g.*, Ozee v. Am. Council on Gift Annuities, Inc., 143 F.3d 937, 940–41 (5th Cir. 1998) (noting that the court previously had imposed sanctions on a collateral appeal that "blithely ignored the nature of the claim and the basis of the district court's ruling" and reimposing sanctions on remand); United States v. Chestna, 962 F.2d 103, 107 n.5 (1st Cir. 1992) (refusing to "completely ignore a district court's expression of an alternative basis for its ruling").

[34] Rivero v. Bd. of Regents of Univ. of N.M., 950 F.3d 754, 763 (10th Cir. 2020) ("If the district court states multiple alternative grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then we may affirm the ruling."); Sapuppo v. Allstate Floridian Ins., 739 F.3d 678, 680 (11th Cir. 2014) ("To obtain reversal of a district court judgment that is based on multiple, independent grounds, an appellant must convince us that every stated ground for the judgment against him is incorrect.").

[35] Nielson & Stancil, *supra* note 32, at 1193.

[36] *See* Carey v. Saffold, 536 U.S. 214, 225–26 (2002) (observing that a court may rule on the merits "to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief").

holdings under the Antiterrorism and Effective Death Penalty Act.[37] Just as alternative rulings may reassure litigants, alternative dispositions may convince an appellate court or other members of an appellate panel that a particular outcome is just.

Thus, alternative holdings have become commonplace.[38] Justice Scalia suggested that such alternative rulings are "more appropriate for lower courts" than in the Supreme Court but did not condemn the practice outright.[39] Instead, Justice Scalia maintained that "[t]here are proper occasions for alternative holdings" so long as one alternative does not eliminate the jurisdictional basis for another.[40] One commentator observed that a quick search "reveals the commonness of alternative holdings."[41] Another scholar described alternative holdings as a "prevalent and widely accepted" practice.[42]

In sum, alternative holdings are a natural offshoot of the adversarial system. Under that system, courts resolve claims brought by parties and decline to consider issues that parties fail to raise. That framework encourages alternative argumentation and promotes judicial consideration of multiple ways to decide a case. Judges give multiple reasons for the ruling to improve the decision's persuasiveness and to increase the odds of an affirmance on appeal.

III. Alternative holdings: feature or bug?

Alternative holdings may be a natural byproduct of the adversarial system, but are they an asset to that system? Advocates and judges serve different roles.[43] While attorneys present arguments on the law, a court's fundamental duty is "to say what the law is."[44] A judge also must decide cases "under great time pressure" and work "with a tiny staff, whose attention is spread over the multitude of cases and areas on which the court will need to rule."[45] Given the stakes and limitations, the use of

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[37] Brooks v. Bagley, 513 F.3d 618, 624–25 (6th Cir. 2008).

[38] Aimonetti, *supra* note 3, at 459, 460–61 (discussing the common use of alternative holdings in federal courts).

[39] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 296 (1987) (Scalia, J., concurring).

[40] *Id.*

[41] Aimonetti, *supra* note 3, at 461.

[42] Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 919 (2005).

[43] Jesse N. Panoff, *Why State Trial Court Judges Should Write Their Own Decisions: Transforming the Current System*, 51 S. Tex. L. Rev. 307, 331 (2009).

[44] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[45] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1261–62 (2006).

alternative holdings is complex.

Accordingly, alternative holdings have both proponents and critics. Proponents point primarily to efficiency and legitimacy gains. Alternative holdings make it easier for appellate courts to review the district court's work and increase the likelihood that it ruled correctly in the first instance. Consideration of alternative arguments also reassures litigants that a court considered the case carefully and gave more than a cursory glance at the merits. Critics complain that alternative holdings stray beyond a federal court's proper constitutional boundaries and lower the overall quality of judicial decisions.

A. Alternative holdings can benefit a busy judiciary

Used well, alternative holdings can alleviate judicial burdens. A district court that gives several reasons for its decision creates multiple clear paths for the court of appeals to affirm the ruling. An increase in affirmances leads to a corresponding reduction in do-overs of trial proceedings and, over time, reduces the likelihood of an appeal altogether.[46]

These benefits are particularly clear when a court reviews an underlying administrative decision, such as a social security claim. The Tenth Circuit's decision in *Murrell v. Shalala* addressed those benefits head-on when a litigant challenged the propriety of alternative administrative rulings.[47] There, an administrative-law judge (ALJ) applied a "five-step evaluative procedure" and found that the plaintiff failed to satisfy two of those five steps.[48] The ALJ first concluded that the plaintiff was not disabled because he could return to prior work and held in the alternative that the plaintiff could find other work if he could not return to his old job.[49]

On appeal, the plaintiff addressed only the first part of the ruling.[50] As for the alternative ruling, the plaintiff argued that the ALJ's analysis "was not only unnecessary but legally improper."[51]

The Tenth Circuit rejected the plaintiff's argument of impropriety. It noted pointedly that the plaintiff sought to impose an "analytical restriction" on the resolution of disability claims that was "impractical and

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[46] *See* Stefanie A. Lindquist & Kirk Randazzo, *The Vanishing Appeal?*, 86 U. Pitt. L. Rev. 477, 488 (2024) (recognizing that restrictions on appeals in prisoner litigation under the Antiterrorism and Effective Death Penalty Act might "change the likelihood of success on appeal and thus reduce the incentive to appeal").

[47] 43 F.3d 1388 (10th Cir. 1994).

[48] *Id.* at 1388–89.

[49] *Id.*

[50] *Id.* at 1389.

[51] *Id.*

unprecedented."[52] In the Tenth Circuit's view, "the use of alternative dispositions generally benefits everyone."[53] Among those benefits, the court cited relief of the administrative agency's workload, avoidance of "successive, piecemeal" appellate litigation, and reduction of delays from "bouncing back-and-forth between administrative (re)determinations and judicial review thereof."[54] The court upheld the ALJ's determination because the plaintiff failed to challenge the alternative ruling on its merits.[55]

Murrell reinforces Justice Scalia's observation that alternative holdings have the greatest utility in lower courts.[56] By providing alternative grounds, the ALJ gave subsequent federal courts options to uphold that ruling. The ALJ's approach strengthened the decision, gave the parties certainty, and avoided the delays of a remand. Hence, the ALJ promoted more efficient disposition of the claims during the successive steps in the review process.

Federal courts can obtain these same benefits. Alternative holdings allow an appellate court "to address each of the issues at once, without the cost in time and effort that would arise from each justification for a particular result being handled by seriatim appeal."[57] Moreover, alternative holdings persuade both parties and appellate courts that the initial court considered the issues carefully.[58]

Indeed, the Fourth Circuit has promoted alternative holdings as "a practice that facilitates review and promotes judicial efficiency."[59] The court indicated its desire to "encourage that beneficial practice" in judicial proceedings.[60]

The multifaceted nature of the federal judicial system also guards against the risk of legal misstatements. District court rulings are not binding precedent.[61] Likewise, a ruling in one court of appeals does not

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52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* at 1389–90.
56 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 296 (1987).
57 Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc., 36 F.3d 8, 11 (4th Cir. 1994).
58 *See* Brooks v. Bagley, 513 F.3d 618, 624 (6th Cir. 2008) (explaining that alternative rulings on procedural and substantive issues can offer reassurance to the parties of a decision's merits).
59 United States v. Caporale, 701 F.3d 128, 142 n.8 (4th Cir. 2012).
60 *Id.*
61 Portsmouth Ambulance, Inc. v. United States, 756 F.3d 494, 502 (6th Cir. 2014) ("[A] decision of a district court is not binding on us, especially if such a district court ruling conflicts with existing circuit precedent.").

bind another.[62] Many appellate courts also have substantial latitude to designate an opinion as "unpublished."[63] Unpublished dispositions are not binding precedent.[64]

Some circuits expressly encourage such rulings. The Seventh Circuit has a policy "to avoid issuing unnecessary opinions."[65] Going even further, the Eleventh Circuit's rules essentially default against publication, providing that "[a]n opinion shall be unpublished unless a majority of the panel decides to publish it."[66] Thus, appellate courts have significant tools to avoid setting unnecessary precedent.[67]

In short, alternative holdings benefit courts as well as litigants by offering greater certainty. Alternative rulings discourage appeals and aid the parties in understanding the reasons for a win or loss. If the parties appeal, alternative modes of decision aid the appellate court and offer clearer paths to affirm the lower court's rulings. For new or evolving areas of law, alternative holdings offer clear guidance for future cases. Alternative holdings have clear benefits.

B. Frequent use has led to criticism

Despite the utility of alternative holdings, they are susceptible to criticism. These critiques generally fall into one of two categories: legal or prudential. Some critics contend that alternative holdings amount to impermissible advisory opinions in at least some cases. Other critics have suggested that alternative holdings yield friction on courts, confusion for parties, and increased risks for mistakes. This article examines these legal and prudential lines of critique.

1. Alternative holdings may present legal concerns

As a constitutional matter, federal courts decide cases and controversies.[68] The Supreme Court has "long understood that constitutional phrase to require that a case embody a genuine, live dispute between ad-

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62 United States v. Tucker, 28 F.3d 1420, 1425 (6th Cir. 1994) (turning to "sister circuits for persuasive authority" in the absence of binding precedent).

63 *See, e.g.*, 1st Cir. R. 36.0(a); 4th Cir. R. 36(b); 7th Cir. R. 32.1(a); 9th Cir. R. 36-3(a); 11th Cir. R. 36-2.

64 *See, e.g.*, *In re* Blasingame, 986 F.3d 633, 637 n.2 (6th Cir. 2021) (recognizing that because an unpublished decision "is not binding authority"); *In re* Naranjo, 768 F.3d 332, 344 n.15 (4th Cir. 2014) (observing that a cited opinion "is unpublished and of no precedential weight")

65 7th Cir. R. 32.1(a).

66 11th Cir. R. 36-2.

67 *See* Nielson and Stancil, *supra* note 32, at 1145–48 (discussing the potential use of unpublished decisions to avoid Supreme Court review).

68 U.S. Const. art. III, § 2.

verse parties, thereby preventing the federal courts from issuing advisory opinions."[69] Especially if overused, alternative holdings can create constitutional tensions because such holdings have the potential to stretch beyond the confines of a particular case.[70]

The Fourth Circuit's decisions demonstrate the delicate balance of legal concerns and efficiency gains. The Fourth Circuit has extolled the benefits of alternative holdings.[71] In another decision, though, the court took a more circumspect approach.[72] There, the Fourth Circuit described alternative rulings as a "tricky subject" that may benefit the judiciary while posing constitutional challenges.[73] It observed that alternative holdings provide an incentive for appellate courts "to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them."[74] Under that court's reasoning, alternative rulings pose particular problems if a court pairs a procedural ruling with a substantive one.[75] Once the court rules procedurally, the court viewed a substantive ruling as unnecessary to the decision.[76]

In a similar vein, an alternative holding poses the strongest potential legal problem if a court pairs a jurisdictional dismissal with a dismissal on the merits. Federal courts exercise only limited jurisdiction as authorized by the Constitution or a statute.[77] This mandatory aspect of jurisdiction renders it a threshold issue, and, without it, "a court has no power to decide anything except that it lacks jurisdiction."[78] Hence, the constitutional problems particularly are acute in this circumstance.[79]

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[69] Carney v. Adams, 592 U.S. 53, 58 (2020).
[70] Phelps v. Alameda, 366 F.3d 722, 729 (9th Cir. 2004) ("Alternative holdings may be valuable tools of judicial administration, but they can present potential advisory-opinion problems.").
[71] United States v. Caporale, 701 F.3d 128, 142 n.8 (4th Cir. 2012). *See* subsection III.A, *supra*.
[72] Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc., 36 F.3d 8, 11 (4th Cir. 1994).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 377 (1994).
[78] United States v. Salmona, 810 F.3d 806, 810 (11th Cir. 2016).
[79] Aimonetti, *supra* note 3, at 475 (contending that a court issues an advisory opinion if it finds that it lacks jurisdiction but issues an alternative ruling on the merits).

2. Alternative holdings may be unwise

Even if alternative holdings are constitutional, they may be imprudent in some cases. Alternative rulings increase the likelihood of a mistake. In an examination of dicta, Judge Leval observed that courts work with small staffs under significant time pressure to resolve questions that span an array of areas.[80] Given these burdens, "[t]here is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention."[81] Judge Kethledge observed that the same criticisms of dicta—namely that such statements tend to lack careful consideration or depth of thought—apply with the same force to alternative holdings.[82]

Judge Newsom expounded on these prudential critiques as well in *United States v. Files*.[83] The Eleventh Circuit applied an alternative holding to construe a provision in the First Step Act of 2018 that allowed certain crack cocaine offenders to seek a sentence reduction.[84] Writing for the court, Judge Newsom gave effect to that alternative holding and applied it as binding precedent.[85]

Despite that conclusion, Judge Newsom wrote a separate concurrence that Judge Tjoflat joined, criticizing alternative holdings.[86] Judge Newsom asserted that a court should end its analysis when it has "fulfilled its obligation" to resolve the dispute at issue.[87] He rejected a "muscular view" of judicial authority that promoted the declaration of law even if not strictly necessary.[88] In addition, Judge Newsom reiterated the critiques of Judge Leval and Judge Kethledge that alternative reasoning can increase the risk of error.[89]

Notably, Judge Newsom emphasized a fairness concern from a judge's position. As Judge Newsom explained, the Eleventh Circuit's panel precedent rule "afford[s] equal respect to each panel, in that no one collection of three judges can overrule the decision of any other."[90] The system would become unequal, in Judge Newsom's view, if some judges produced "narrow, constrained opinions" but others "reach[ed] out to decide as many

80 Leval, *supra* note 45, at 1261.
81 *Id.* at 1262.
82 United States v. Burris, 912 F.3d 386, 410 (6th Cir. 2019).
83 63 F.4th 920 (11th Cir. 2023).
84 *Id.* at 931. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.
85 *Files*, 63 F.4th at 931.
86 *Id.* at 931–35 (Newsom, J., concurring).
87 *Id.* at 933.
88 *Id.*
89 *Id.* at 933–34.
90 *Id.* at 935.

issues as possible in successive alternative holdings."[91] Such a framework "systematically" would favor "the views of the most aggressive."[92] Judge Newsom suggested that this approach also could erode public confidence in the courts because the public would view judges as political actors.[93]

The risks associated with alternative holdings grow as a case ascends the judicial ladder. Judge Newsom's critiques focused on the unique equities associated with panel decisions in which multiple judges seek to forge areas of consensus.[94] District judges typically have fewer such concerns. Moreover, the stakes grow higher at each stage. Appellate courts render decisions that affect multiple jurisdictions, and the Supreme Court sets nationwide precedent. Thus, Justice Scalia recognized correctly that alternative holdings have the least utility before the Supreme Court.[95] Alternative reasoning also carries the greatest risk at that point in the proceedings.

In sum, alternative holdings are not a universal positive. If overused, alternative holdings pose potential constitutional concerns and could be unwise regardless.

IV. Using alternative reasoning wisely

Alternative reasoning still carries substantial value despite the criticism of alternative holdings. The judicial system remains premised on party presentation. Hence, parties continue to advance alternative arguments because failure to raise them usually constitutes forfeiture. Courts, in turn, can use alternative holdings to increase efficiency. Both advocates and courts have roles to play in using alternative reasoning effectively.

Three legal concepts should guide this analysis. First, the party presentation rules that have shaped alternative reasoning also guard against its overuse. Parties seeking alternative rulings should develop each point sufficiently. Courts may promote that development by holding parties strictly to these rules. Second, issue preclusion principles also offer helpful guidance. A court may turn to these elements on the front end of litigation to ensure an alternative disposition is sufficiently clear to constitute an alternative holding in a case. Third, alternatives to alternative holdings are available in some appellate proceedings. Appellate courts may consolidate unrelated cases to issue an opinion that spans multiple

91 *Id.*
92 *Id.*
93 *Id.* at 934–35.
94 *Id.*
95 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 296 (1987) (Scalia, J., concurring).

issues in a common legal area. This framework promotes the prudent use of alternative reasoning in arguments and decisions.

A. Party presentation rules provide guidance

The principles of party presentation that generate alternative holdings also provide natural guardrails against overuse. Courts can limit the risk of mistakes and avoid advisory opinions by ruling on grounds that the parties have developed appropriately. Likewise, advocates can aid the courts by holding themselves to the principles of party presentation. To that end, parties usually should object when the other side attempts to inject an unpreserved issue into a case or otherwise raises a matter with insufficient clarity.

Before district courts, attorneys should use "[p]lain talk" to articulate any issues with a ruling.[96] Appellate courts, in turn, should enforce forfeiture and plain error review to issues that the parties failed to preserve properly in the district court.[97]

On appeal, the Federal Rules of Appellate Procedure provide appropriate guidance on the development of arguments. An acceptable argument should include the party's "contentions and the reasons for them, with citations to the authorities and parts of the record" that are pertinent to the claim.[98] Appellate courts should decline to consider a point that a party has raised with "passing references" or asserted "in a perfunctory manner without supporting arguments and authority."[99] So, too, appellate courts ought to avoid consideration of arguments that a party has buried within footnotes.[100]

Rigorous application of these standards reduces both the legal and prudential risks associated with alternative holdings. These guideposts ensure that a court rules on issues of consequence in an action and does not stray into hypotheticals.[101] Similarly, a court faces a diminished risk of legal error when the parties have raised an issue thoroughly. A meticulous distillation of an issue by the parties naturally aids the decisionmaker's assessment of those issues.[102] Thus, party presentation rules provide a

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[96] United States v. Reyes Vasquez, 905 F.2d 1497, 1500 (11th Cir. 1990).

[97] See *id.* at 1500–01 (finding "no plain and obvious error" in the district court's ruling).

[98] Fed. R. App. P. 28(a)(8)(A).

[99] Sapuppo v. Allstate Floridian Ins., 739 F.3d 678, 681 (11th Cir. 2014).

[100] Coal. for a Healthy Cal. v. Fed. Commc'ns Comm'n, 87 F.3d 383, 384 n.2 (9th Cir. 1996) (finding that "a perfunctory request, buried amongst the footnotes, does not preserve an argument on appeal").

[101] *See* Aimonetti, *supra* note 3, at 465 (noting the Supreme Court's rejection of hypothetical jurisdiction).

[102] *See* Leval, *supra* note 45, at 1261 (recognizing that courts usually only receive

partial solution.

B. Issue preclusion offers a useful benchmark

Similarly, the res judicata principle of issue preclusion offers a helpful framework to evaluate the propriety of an alternative disposition. Issue preclusion seeks to answer a back-end enforceability question: Should a past judgment on a factual or legal matter bind the parties in a subsequent action?[103] Under issue preclusion, a later court may hold the parties to a prior outcome if the parties litigated that issue previously.[104] Thus, the issue typically arises when a party seeks to enforce the effect of the prior judgment in future litigation.

This preclusion analysis grapples with alternative holdings. Indeed, the First and Second Restatements of Judgments have split on whether to give effect to alternative holdings. The First Restatement took the position that a judgment generally is preclusive on alternative grounds.[105] Both prongs apply "although either alone would have been sufficient to support the judgment."[106] It included a caveat for appellate decisions in which an appellate court subsequently affirmed on a sole ground.[107] Conversely, the Second Restatement adopted the contrary view that a "judgment is not conclusive with respect to either issue standing alone" if "a court of first instance" relies on alternative grounds.[108]

Unsurprisingly, appellate courts have split on the preclusive effect of alternative holdings.[109] For courts that give preclusive effect to alternative rulings, that analysis provides a useful framework to evaluate alternative holdings generally. In that vein, the Third Circuit's decision in *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, provides a particularly helpful framework.[110]

There, two litigants, L'Oreal and Jean Alexander, engaged in administrative proceedings over trademarks.[111] The administrative tribunal concluded first that L'Oreal could not establish its mark's priority over

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input from litigants when deciding a case).

[103] Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (discussing issue preclusion and claim preclusion).

[104] *In re* Kane, 254 F.3d 325, 328 (1st Cir. 2001).

[105] Restatement (First) of Judgments § 68 cmt. n (Am. L. Inst. 1942).

[106] *Id.*

[107] *Id.*

[108] Restatement (Second) of Judgments § 27 cmt. i (Am. L. Inst. 1982).

[109] Monica Renee Brownewell, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 Valparaiso U. L. Rev. 879, 895–96 (2003).

[110] 458 F.3d 244 (3d Cir. 2006).

[111] *Id.* at 246.

Jean Alexander's trademark.[112] It concluded "for the sake of completeness," however, that "there was no likelihood of confusion" between the two marks.[113] L'Oreal did not appeal that ruling but instead sought to register its mark because there was no potential for confusion between the competing marks.[114] Jean Alexander challenged the registration decision, and the administrative tribunal upheld the registration based on the prior administrative finding of no confusion.[115] Following that defeat, Jean Alexander proceeded to contest the decision in the district court and again in the Third Circuit.[116]

The Third Circuit turned to issue preclusion principles to decide whether Jean Alexander could attack the earlier ruling.[117] It applied a four-part test for issue preclusion: (1) a previous adjudication of the identical issue; (2) actual litigation of that issue; (3) the necessity of the prior determination; and (4) full representation.[118] Jean Alexander claimed that the ruling was unnecessary to the prior administrative decision.[119] In contrast, L'Oreal asked the court "to adopt a rule under which preclusive effect is given to a finding that is an alternative ground for a judgment where that finding, standing alone, would have been sufficient to support the judgment."[120]

As the court examined necessity, it considered "principles of fairness."[121] It noted that the confusion claim had been "the focus of the parties' pleadings and had been litigated extensively over the course of four years."[122] The court reviewed the split in the First and Second Restatements as well as the divergence among appellate courts.[123]

The Third Circuit decided to give effect to the alternative ruling in that dispute.[124] It noted that "[c]ourts routinely decide cases on multiple grounds, each of which has been fully litigated and given careful consideration due to their potentially dispositive role in the case."[125] The court reasoned that a ruling in this circumstance is not collateral to the judg-

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[112] *Id.*
[113] *Id.* at 246–47.
[114] *Id.* at 247.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 248–49.
[118] *Id.* at 249.
[119] *Id.*
[120] *Id.* at 250.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 251.
[124] *Id.* at 255.
[125] *Id.* at 253.

ment and observed that "it is reasonable to expect that such a finding is the product of careful judicial reasoning."[126] In addition, the court found no unfairness for Jean Alexander because it could have appealed even a favorable administrative ruling.[127]

Issue preclusion is itself a doctrinal matter worthy of extensive examination.[128] This article submits merely that the preclusion analysis can assist courts and parties with the development of alternative reasoning on the front end. This approach guides parties because it suggests the appropriate level of detail to develop an issue for appellate review. It also can assist courts as judges decide whether to issue an alternative holding in the first place. Thoroughness is the most crucial inquiry.

At bottom, decisions that properly bind the parties are likely to make the most reliable precedent. Such decisions are the result of thorough litigation and meticulous development. Consideration of this postjudgment preclusion issue before a judgment issue can offer helpful clarity in the development of alternative reasoning by both litigants and courts.

C. Appellate courts may consolidate cases

Courts, at least at the appellate level, have additional tools to avoid alternative holdings. As one natural option, an appellate court may decide a case on specific grounds to allow other issues to percolate over time.[129] Thus, a court may reject expansive rulings for narrower ones.

An appellate court is not out of luck, however, if it decides that an area of law would benefit from a comprehensive opinion. If a broader ruling is appropriate, appellate courts have the option to consolidate cases, even unrelated ones. In *Ruan v. United States*, the Supreme Court consolidated two physicians' separate cases as it explored a physician's liability for unlawful drug distribution.[130] Similarly, in *United States v. Jones*, the Eleventh Circuit consolidated four defendants' cases to provide a unified, single opinion on the application of a sentence reduction provision in the First Step Act of 2018.[131]

Jones is notable because it addressed the same provision at issue in the

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[126] *Id.* at 254.

[127] *Id.* at 255–56.

[128] *See* Brownewell, *supra* note 109, at 922–28 (proposing amendments to the Second Restatement of Judgments to account differently for alternative holdings).

[129] *See* Leval, *supra* note 45, at 1264–65 (suggesting that employment discrimination standards would "have developed more sensibly" if the Supreme Court decided cases individually instead of setting a singular standard that "bewildered . . . everyone who has tried to deal with it").

[130] 597 U.S. 450, 455 (2022) (noting that the physicians had separate trials).

[131] 962 F.3d 1290, 1293 (11th Cir. 2020). *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

Eleventh Circuit's subsequent decision in *Files* that applied an alternative holding.[132] The Eleventh Circuit's approach in *Jones* demonstrates that an appellate court may resolve several issues of importance in a single opinion through consolidation. Under that approach, the parties may develop individualized arguments, and the court likewise may resolve them on discrete facts.

The consolidation alternative is useful because, as noted, the risks of alternative holdings increase as the case proceeds on appeal. Appellate courts have more expansive precedential power. Before an appellate court resorts to alternative holdings, it may find it useful to consider whether an alternative approach would be more beneficial. That analysis may identify issues more worthy of percolation or cases that would benefit from consolidation.

V. Concluding thoughts

To sum up, alternative reasoning is unavoidable in U.S. law. As parties present alternative arguments daily, courts will provide alternative holdings too. Although this approach has critics, the core principles of the adversarial system that invited alternative reasoning to provide a roadmap for its effective use too. Party preservation rules and preclusion principles can shape the prudent use of alternative holdings.

Responsible use of alternative reasoning can benefit everyone.[133] Both courts and litigants have a role to play to develop alternative reasoning appropriately. Attorneys should consult these presentation and preclusion principles to ensure that they develop alternative arguments thoroughly. Courts can reinforce that development by enforcing those presentation standards. This approach maximizes the efficiency benefits of alternative reasoning and minimizes the corresponding risks.

About the Author

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[132] *Compare Jones*, 962 F.3d at 1297 (interpreting a provision in the First Step Act of 2018 that authorized a sentence reduction for certain crack cocaine offenders), *with Files*, 63 F.4th at 922 (addressing another interpretive issue in the same statutory provision).
[133] Murrell v. Shalala, 43 F.3d 1388, 1389 (10th Cir. 1994).

Enforcing Appeal Waivers Requires Meaningful Resolution of Motions to Dismiss

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I. Introduction

Cyron Norman pled guilty to using a cell phone to facilitate the crime of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 843.[1] His written plea agreement included his waiver of "any right to an appeal or other collateral review of [his] sentence in any court except for a claim of ineffective assistance of counsel."[2] He would be relieved of this waiver if "the [d]istrict [c]ourt impose[d] a sentence that exceeds the advisory guideline range."[3] Nevertheless, after the district court imposed judgment, sentencing Norman to a within-guidelines sentence of 37 months, Norman appealed, asserting that his sentence was both procedurally and substantively unreasonable.[4] The government moved to dismiss the appeal, relying on Norman's bargained-for sentencing appeal waiver.[5] The Eleventh Circuit examined the terms of the appeal waiver and the record of Norman's plea colloquy, and the court determined that the plea was valid, the terms Norman had accepted barred the appeal, and the court should dismiss the appeal.[6] It did this, however, after carrying these questions with the case and requiring the government to brief the merits of Norman's appeal.[7] Did it actually enforce the appeal waiver? I

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[1] 21 U.S.C. § 843; United States v. Norman, 789 F. App'x 187, 188 (11th Cir. 2019) (not precedential).
[2] *Norman*, 789 F. App'x at 188.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 189–90.
[7] *Id.* at 188. *See* Appellee's Brief, United States v. Norman, No. 17-14486 (11th Cir. Apr. 29, 2019).

say no.

Enforcing a criminal defendant's appeal waiver requires determining that the underlying plea (whose terms included the waiver) was valid and that the terms of the waiver precluded the appeal. A court should not carry those issues with the case and require merits briefing. When the government moves to enforce an appeal waiver and asks the appellate court to dismiss an appeal, that court should resolve the validity of the plea and the preclusive effect of the waiver as part of resolving the motion. Carrying these issues with the case denies the government the benefit of its bargain.

While it is within the courts' discretion to either summarily grant motions to dismiss based on appellate waivers or send the issue to merits panels for full briefing, we should try to convince the courts to take the more efficient and expeditious route of enforcing the waivers.

II. Plea agreements, including appeal waivers, provide bargained-for benefits to both sides

The Supreme Court has recognized that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."[8] "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated."[9]

The benefits to a defendant are real. The government may agree to dismiss other charged counts and make stipulated sentencing recommendations. If the government fails to stand by its sentencing stipulations, even inadvertently, it breaches the agreement, and the judge will either relieve the defendant of the agreement or a different judge—untainted by having heard the government's arguments in contravention of the agreement—will resentence the defendant.[10]

Federal criminal defendants who accept responsibility in a timely manner can earn up to a three-point decrease in their United States Sentencing Guidelines (U.S.S.G. or Guideline) offense levels.[11] Defendants who "clearly demonstrate[] acceptance of responsibility for [their] offense[s]"

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[8] Blackledge v. Allison, 431 U.S. 63, 71 (1977).
[9] Brady v. United States, 397 U.S. 742, 752 (1970).
[10] United States v. Hunter, 835 F.3d 1320, 1329 (11th Cir. 2016).
[11] U.S. Sent'g Guidelines Manual § 3E1.1(a)–(b) (U.S. Sent'g Comm'n 2023).

receive a two-level reduction in their U.S.S.G. offense levels.[12] Defendants who qualify for that acceptance-of-responsibility decrease can receive an additional two-point reduction "by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently."[13] The difference between a total offense level of 33 and an acceptance-of-responsibility-decreased level of 30, for example, is the difference between an advisory Guideline imprisonment range of 135 to 168 months and a range of 97 to 121 months for defendants in criminal history category I.[14] That is more than a three-year decrease in the defendant's low-end Guideline imprisonment term, and such ranges are the "lodestar" for many sentencing judges.[15] Though this is only advisory, and sentencing judges still have discretion to sentence outside the advisory Guideline range, "the Guidelines are the framework for sentencing and anchor the district court's discretion."[16]

Strictly enforcing defendants' plea agreements (including any appeal waivers) does not take advantage of defendants—it merely holds them to the bargains from which they also benefited. The acceptance-of-responsibility reduction *is* a benefit, not a cudgel. Decrying the acceptance-of-responsibility reduction as creating a "trial penalty" or depriving defendants of their trial rights misstates how judges calculate sentences and what a defendant gives up by pleading guilty.[17] Ending the practice of plea bargains, acceptance-of-responsibility decreases, and bargained-for appeal waivers would neither reduce criminal sentences nor preserve any lost trial rights.

Removing the U.S.S.G. offense level reduction for accepting responsibility would not then lessen every defendant's sentence. It would leave every defendant subject to the same congressionally imposed statutory

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[12] *Id.* § 3E1.1(a).

[13] *Id.* § 3E1.1(b).

[14] *Id.* ch. 5 pt. A.

[15] *See* Molina-Martinez v. United States, 578 U.S. 189, 200 (2016).

[16] *Id.* at 198–99 (citation modified).

[17] *See generally* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019) ("Few defendants exercise their right to trial . . . and those who do tend to receive significantly harsher punishments if convicted. This phenomenon [is] known as a trial tax or . . . a guilty plea discount."); David Oscar Markus, Hearing Before the United States Sentencing Commission Regarding the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984 (Feb. 10, 2009) ("When the guidelines were first enacted, many predicted that the harsh guidelines would cause an explosion in trials. . . . [T]he harshness of the guidelines has caused an explosion in guilty pleas—even among defendants who would otherwise have been acquitted had they proceeded to trial.").

sentencing range as before and the same advisory Guideline sentencing range based on their offense characteristics and personal circumstances. Those baselines would not change. One might argue that statutory and Guideline sentencing ranges are too high, but that is not a problem with granting reductions to defendants who accept responsibility and plead guilty. Guilty pleas can only result in *decreases* for defendants.[18] Defense bar arguments are wrong that a "plea discount" should more properly be considered a "trial tax."[19] Every defendant—those who plead guilty and get the acceptance-of-responsibility decrease and those who do not—are still otherwise subject to the same statutory and U.S.S.G. ranges. Eliminating the acceptance-of-responsibility decrease would only remove an available benefit for defendants, while providing no new benefit to anyone.

Nor do the benefits of pleading guilty impair a defendant's ability to challenge the criminality of his charged conduct or the admissibility of the evidence offered against him. Cyron Norman, for example, had his day in court on the admissibility of the government wiretaps that formed the basis of his charges for using a cell phone to facilitate drug transactions.[20] After the district court denied suppression of the evidence against him, Norman was still able to bargain for an acceptance-of-responsibility reduction in his U.S.S.G. offense level.[21] Neither dismissal motions challenging the legal sufficiency of an indictment nor suppression motions challenging the legality of the government's evidence preclude a defendant from receiving an acceptance-of-responsibility decrease by pleading guilty if he loses his pretrial challenges.[22] The existence of the acceptance-of-responsibility decrease is not an unfair pressure tactic precluding defendants from contesting their guilt.[23] Defendants are not pressured against

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[18] U.S.S.G. § 3E1.1(a)–(b).

[19] *See* Johnson, *supra* note 17, at 315.

[20] Defendant Middleton Motion to Suppress, United States v. Middleton, No. 15-cr-35 (M.D. Ga. July 13, 2016); Defendant Norman Motion to Adopt, United States v. Maxwell, No. 15-cr-35 (M.D. Ga. July 15, 2016); Order Denying Suppression, United States v. Jackson, No. 15-cr-35 (M.D. Ga. Mar. 10, 2017).

[21] Plea Agreement at 5–6, United States v. Norman, No. 15-cr-35 (M.D. Ga. Nov. 30, 2016).

[22] "A defendant should not be denied a reduction for acceptance of responsibility when he only challenges the legal conclusion that should be drawn from facts that he has admitted." United States v. Acosta, 534 F.3d 574, 581 (7th Cir. 2008) (citation modified). "[A] motion to suppress is not synonymous with putting 'the government to its burden of proof at trial.'" United States v. Washington, 340 F.3d 222, 228 (5th Cir. 2003) (holding that a suppression motion does not preclude a defendant from receiving an acceptance-of-responsibility decrease).

[23] Whether "innocence" is a "state of being or a conclusion derived from a valid, judicial process" is beyond the scope of this essay. Jonathan D. Colan, *The*

contesting the illegality of their charged conduct or the admissibility of the evidence establishing that conduct by the existence of an acceptance-of-responsibility decrease that is still available to them after they contest those issues before the trial that they subsequently forgo.

Few trials are whodunnits. There was no dispute that investigators heard Norman on wiretaps arranging illegal drug transactions.[24] Once a defendant unsuccessfully challenges the admissibility of the evidence or the criminal nature of what it shows, there is often little point to having the government present that evidence at trial for the sake of putting it to its proof.

Once entered, the "valid guilty plea," itself, generally "relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty."[25] "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction . . . ."[26] If we are serious about holding defendants to their guilty pleas, we should be equally serious about enforcing the waivers that accompany them.

So long as defendants have entered their pleas knowingly and voluntarily, they can waive their right to have the government prove their guilt at trial and their right to contest certain issues on appeal. "'[A] guilty plea reduces the scope of potentially appealable issues' on its own."[27] By pleading guilty, a defendant "forgoes not only a fair trial, but also other accompanying constitutional guarantees."[28] He thus automatically waives certain potential appellate issues, like "the constitutionality of case-related government conduct that takes place before the plea is entered."[29]

Beyond those issues implicitly waived merely by pleading guilty, defendants may also choose to bargain away their right to raise other, non-automatically-waived, appellate issues in return for the government's promises in plea deals.[30] "After all, defendants may waive important con-

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Supreme Court's Talmudic Debate on the Meanings of Guilt, Innocence, and Finality, 73 Wash. & Lee L. Rev. 1243, 1247 (2016) (citation modified).

[24] Brief of Appellee at 2, United States v. Norman, No. 17-14486 (11th Cir. May 29, 2019).

[25] Class v. United States, 583 U.S. 174, 183 (2018) (citation modified).

[26] Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[27] Garza v. Idaho, 586 U.S. 232, 243 (2019) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)).

[28] *Class*, 583 U.S. at 182 (quoting United States v. Ruiz, 536 U.S. 622, 628 (2002)).

[29] *Id.*

[30] *See* United States v. Teeter, 257 F.3d 14, 23 (1st Cir. 2001) (noting the "weight of authority" among the circuits upholding the validity of knowing and voluntary appeal waivers). *See also* United States v. Khattak, 273 F.3d 557, 560 (3d Cir. 2001)

stitutional rights when pleading guilty. We would be hard-pressed to find a reason to prohibit a defendant from waiving the purely statutory right to appeal."[31] Defendants can thus waive their right to appeal. But despite having done so in their plea agreements, defendants sometimes appeal anyway.

The problem I address here is the reluctance of some appellate courts to resolve the validity of the guilty pleas, and accompanying bargained-for appeal waivers, when ruling on government motions to enforce defendants' waivers by dismissing their appeals before requiring the government to file briefs addressing their merits. The government's motion asks the court to confirm the validity of the plea and waiver—those are necessary conditions to enforcing the waiver. So barring, perhaps, cases requiring delving more deeply into the record than just the plea agreement and colloquy, the appellate court's ruling on a dismissal motion should not defer questions about the validity of the appeal waiver until after it has rendered it moot by requiring the government to file a merits brief.

III. Carrying the enforceability of an appeal waiver with merits briefing deprives one side its bargained-for benefit

An appellate court cannot enforce an appeal waiver without first ensuring that it is valid and effective to preclude the appeal the government seeks to dismiss. But this also means that appellate courts should *do that* when considering whether to grant government dismissal motions.

"The Constitution insists, among other things, that the defendant enter a guilty plea that is voluntary and that the defendant must make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences."[32] Thus, for an appellate waiver to be effective both it and the underlying plea "must be knowing and voluntary."[33] "[T]he touchstone for assessing this question" is whether the district court at the plea colloquy clearly conveyed to the defendant the appellate rights he was forgoing by agreeing to the waiver.[34] Federal Rule of Criminal Procedure 11 requires that before a court accepts a defendant's guilty plea, it "must inform the defendant of, and

(joining other circuits to have "found waivers of appeals generally permissible and enforceable").

[31] United States v. Williams, 81 F.4th 835, 840 (8th Cir. 2023) (citation modified).

[32] *Ruiz*, 536 U.S. at 629 (citation modified).

[33] United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993).

[34] *See* United States v. Boyd, 975 F.3d 1185, 1192 (11th Cir. 2020).

determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence."[35]

In *United States v. Boyd*, the Eleventh Circuit was able to examine the plea transcript and conclude that "Boyd's appeal waiver was knowing and voluntary because the district court specifically questioned him about the waiver during the plea colloquy."[36]

An appeal waiver must also cover the issue or issues the appellant raises for it to preclude the appeal. "A valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope."[37]

In *United States v. Hardman*, the court was able to first determine from the plea colloquy that the appellant "knowingly and voluntarily waived the right to appeal his sentence subject to a limited number of exceptions."[38] It then looked at "the text of the plea agreement" to decide whether it barred his appeal.[39] The written plea agreement "provided that Hardman voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding on any ground."[40] Whether Hardman's waiver would bar his appeal depended on whether his challenge to the size of the district court's Rule 35 sentence modification, given for Hardman's substantial assistance to the government, was a challenge to his "sentence."[41] Because the court was unable to find anything in the text of the plea agreement, the district court's explanation of the waiver at Hardman's plea colloquy, or Rule 35 that would have indicated to Hardman that he was waiving such a challenge, the Eleventh Circuit denied the government's motion to dismiss the appeal.[42] It had no basis to conclude that the appeal was covered by the waiver, "given the silence of the plea agreement and Rule 11 colloquy."[43] The court was able to make this determination at the motion stage, before the government

[35] Fed. R. Crim. P. 11(b)(1)(N).

[36] *Boyd*, 975 F.3d at 1192. Of course, the court so ruled after ordering oral argument and supplemental briefing, albeit limited to the issue of the defendant's appeal waiver and the impact, if any, of the Supreme Court's intervening decision in *Rehaif v. United States*. 588 U.S. 225 (2019). *See* Order, United States v. Boyd, No. 18-11063, (11th Cir. Oct. 31, 2019). *See generally* section IV, *infra* (whether this was the appropriate way to handle the matter).

[37] United States v. Hardman, 778 F.3d 896, 899 (11th Cir. 2014).

[38] *Id.* at 900–01.

[39] *Id.* at 901.

[40] *Id.* (citation modified).

[41] *See id.*

[42] *Id.* at 902–03.

[43] *Id.* at 902.

was required to file a merits brief.[44] Though the court did not enforce the appeal waiver, *Hardman* illustrates that courts are able to fully rule on such motions before requiring the government to file a merits brief.[45]

Contrast that handling of a dismissal motion with what another Eleventh Circuit motion panel did in *United States v. Beauchamp*.[46] There, the plea agreement and Rule 11 colloquy—that would allow the court to decide whether Beauchamp accepted his appeal waiver knowingly and voluntarily and whether it precluded his appeal—were attached to the government's motion to dismiss.[47] But instead of examining them to resolve the government's motion, the Eleventh Circuit simply ordered the appeal waiver question carried with the case without any explanation.[48] It did so without waiting for the appellant to respond to the government's motion with any arguments why his appeal waiver should not apply and where the appellant's initial brief made no such argument.[49] Indeed, the appellant's initial brief acknowledged that he had "agreed to waive his right to appeal with the exceptions of ineffective assistance of counsel or prosecutorial misconduct."[50]

Ultimately, after requiring the government to brief the merits of Beauchamp's appeal, the court agreed with the government that "the record shows that Beauchamp knowingly and voluntarily waived his right to appeal his sentence" and that "neither of the circumstances under which Beauchamp reserved his right to appeal his sentence exists."[51]

In *Hardman*, the Eleventh Circuit recognized that "[a]bsent extraordinary circumstances, we resolve such motions to dismiss before requiring the government to file an appellee's brief."[52] So why didn't it in *Beauchamp*?

This is not an isolated problem. I cannot claim to have compiled an

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[44] *See* Order, United States v. Hardman, No. 13-14626 (11th Cir. Sept. 24, 2014) (docket reflecting order denying the government's motion to dismiss issued on September 24, 2014, before government's merit's brief filed on October 31, 2014).
[45] *Hardman*, 788 F.3d at 903.
[46] United States v. Beauchamp, No. 24-10457, 2025 WL 899985 (11th Cir. Mar. 24, 2025).
[47] Motion to Dismiss Appeal Based on Appeal Waiver in Plea Agreement, United States v. Beauchamp, No. 24-10457 (11th Cir. Aug. 12, 2024).
[48] *See* Order, United States v. Beauchamp, No. 24-10457 (11th Cir. Oct. 2, 2024).
[49] *See* Brief of Appellant, United States v. Beauchamp, No. 24-10457 (11th Cir. July 29, 2024).
[50] *Id.* at 5.
[51] United States v. Beauchamp, No. 24-10457, 2025 WL 899985, *1 (11th Cir. 2025). *See* Brief of Appellee, United States v. Beauchamp, No. 24-10457 (11th Cir. Oct. 28, 2024).
[52] United States v. Hardman, 778 F.3d 896, 899 (11th Cir. 2014).

exhaustive list of cases where circuit courts have carried with the case the enforceability of appeal waivers that could have been resolved at the motion stage, given the difficulty of searching for such cases. To be reasonably searchable, the eventual circuit court decision would have to have noted the details of the pre-decision motion practice. But even a few hours reading through cases noting the existence of government dismissal motions uncovered more than a few examples of such cases, several of which I discuss in this essay.

In *United States v. Watkins*, the defendant argued that his appeal waiver was not enforceable "because the district court failed to follow" Rule 11's requirements by "never explicitly refer[ing] to the appeal-waiver provision [of his plea agreement] during his plea hearing."[53] The originally assigned Sixth Circuit panel chose not to examine the record and law for itself and resolve the government's dismissal motion, explaining that "because there are sufficient questions concerning the adequacy of the plea colloquy, a merits panel is better situated to consider the appeal after it is fully briefed."[54]

The merits panel, however, was able to see from the plea colloquy that "the district court in this case failed to comply literally with Rule 11(b)(1)(N) because it did not directly address the appeal-waiver provision during Watkins's plea hearing."[55] But it was also able to see from the same plea-hearing transcript—that it quoted and cited—that the district court's colloquy with Watkins was "on all fours with" that court's decision in *United States v. Wilson*, which had enforced an appeal waiver in these circumstances.[56] The *Watkins* merits panel explained that in *Wilson*, though "the district court did not read and explain the terms of Wilson's appeal-waiver provision when it accepted his plea agreement," the colloquy was nonetheless "sufficient to constitute a functional substitute for Rule 11(b)(1)(N)."[57] It then detailed the same sort of questioning reflected in Watkins's plea-hearing transcript.

> The district court here reviewed the charges against Watkins, inquired into Watkins's competency, and asked Watkins whether he was satisfied with his attorney. The district court also verified that Watkins had read his plea agreement, had understood the terms of this agreement, and had discussed these terms with his attorney, all before voluntarily entering into

[53] United States v. Watkins, 603 F. App'x 387, 390 (6th Cir. 2015) (not precedential).
[54] Order, United States v. Watkins, No. 14-5003 (6th Cir. Aug. 8, 2014).
[55] *Watkins*, 603 F. App'x at 390.
[56] United States v. Wilson, 438 F.3d 672 (6th Cir. 2006). *See Watkins,* 603 F. App'x at 391 (discussing *Wilson*).
[57] *Watkins*, 603 F. App'x at 390.

> the agreement. Finally, the district court asked the prosecutor to outline the substance of the plea agreement. During this discussion, the prosecutor noted that as part of this plea agreement, the defendant is waiving his right to appeal with the exception of appeals for prosecutorial misconduct or ineffective assistance of counsel. When asked whether the United States had accurately set forth the substance of the plea agreement in this matter, counsel for Watkins answered in the affirmative.[58]

The government's dismissal motion had quoted the key passages of the plea colloquy, and it was available to the circuit court in the appellate record.[59] Both the government's motion and Watkins's response opposing dismissal of his appeal had discussed *Wilson* and its impact on Watkins's appeal waiver.[60] Both also discussed other cases that the merits panel cited in resolving the waiver issue.[61]

The earlier motion panel could have examined the transcript and relevant cases. Instead, it required the government to brief Watkins's case, and then the merits panel ruled that "Watkins's appeal waiver bars our review."[62] That extra briefing allowed the merits panel to rule "in passing," that "even if we were to consider Watkins's claim on the merits, we would determine it to be without merit."[63] Was that not expressly what the government's bargained-for appeal waiver was supposed to obviate?

When another defendant argued that his appeal waiver should not be enforced because "he did not knowingly and voluntarily give up his right to appeal his conviction," a Sixth Circuit motion panel concluded that "[t]his is an issue that is more appropriate for consideration by the panel that will be assigned to decide the merits of the appeal."[64] The merits panel, however, read the defendant's arguments as only "vaguely disput[ing] his knowing and voluntary waiver of his right to appeal, suggesting that the magistrate judge's description of the waiver during the plea colloquy left open the possibility that he could appeal the convic-

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[58] *Id.* at 391 (citation omitted).

[59] Government Motion to Dismiss Appeal at 4–6, United States v. Watkins, No. 14-5003 (6th Cir. June 4, 2014).

[60] *Id.* at 7; Appellant's Response to Motion to Dismiss Appeal at 3, United States v. Watkins, No. 14-5003 (6th Cir. June 24, 2014).

[61] Government Motion to Dismiss Appeal, *supra* note 59, at 6–9 (discussing United States v. Murdock, 398 F.3d 491 (6th Cir. 2005); United States v. Sharp, 442 F. 3d 946 (6th Cir. 2006); and United States v. Mack, 219 F. App'x 456 (6th Cir. 2007) (not precedential)); Appellant's Response to Motion to Dismiss Appeal, *supra* note 60, at 3–5 (same). *See Watkins,* 603 F. App'x at 390–91.

[62] *Watkins*, 603 F. App'x at 392.

[63] *Id.*

[64] Order at 1, United States v. Smith, No. 11-5882, (6th Cir. May 30, 2012).

tion."[65] The defendant's response to the government's dismissal motion, as noted by the merits panel, had cited the plea-hearing transcript from which the appeals court could determine the sufficiency of the magistrate judge's colloquy.[66] The merits panel concluded that "[t]he above-quoted portions of the plea-hearing transcript belie [the defendant's] claim."[67] Certainly the motion panel could have read the plea transcript.

Similarly, in *United States v. Sabater*, after the initial panel addressing the government's motion to dismiss the appeal referred the matter to the merits panel, the merits panel was "satisfied that Sabater voluntarily, knowingly and intelligently waived his right to appeal" and "decline[d] to consider the merits of Sabater's appeal."[68] And yet, the court required the government to brief those merits.[69]

Some panels have considered that determining whether a plea was valid, or a waiver was enforceable, may require too broad an analysis as grounds for not conducting that analysis at the motion stage. In *United States v. Presley*, because the district court at sentencing "appear[ed] to have gone beyond [the] stipulations [in the plea agreement] in calculating Presley's combined adjusted offense level," the panel considering the government's motion to dismiss the appeal stated that this "suggest[s] that Presley's plea, as a whole, may have been unknowing and involuntary, which would render his appellate-waiver provision unenforceable."[70] It therefore ruled that "[t]he merits panel is best situated, upon the completion of briefing, to decide whether the appellate waiver remains enforceable and bars Presley's appeal."[71]

To answer the question, the merits panel started with the plea agreement.[72] It found nothing in the agreement's terms contradicting the sentencing court's actions "that Presley might reasonably have relied upon."[73] The merits panel "[n]ext consider[ed] Presley's affirmations at the change-of-plea colloquy."[74] That record showed that "Presley confirmed that he understood" the maximum sentence he faced, how his sentence would be determined, and that his sentence might differ from the estimate that

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[65] United States v. Smith, 525 F. App'x 294, 296 (6th Cir. 2013) (not precedential).
[66] *Id.* (citing the appellant's response to the government's dismissal motion and the relevant pages of the plea hearing transcript).
[67] *Id.*
[68] United States v. Sabater, 270 F. App'x 219–21 (3d Cir. 2008) (not precedential); Order, United States v. Sabater, No. 6-4842 (3d Cir. Apr. 13, 2007).
[69] Brief of Appellee, United States v. Sabater, No. 6-4842 (3d Cir. May 29, 2007).
[70] Order at 2–3, United States v. Presley, No. 20-5213 (6th Cir. Jan. 6, 2021).
[71] *Id.* at 3.
[72] United States v. Presley, 18 F.4th 899, 904–05 (6th Cir. 2021).
[73] *Id.* at 904–05.
[74] *Id.* at 905.

the government or his attorney provided.[75] The merits panel then went beyond the plea agreement and proceedings and considered "Presley's subsequent actions," including his limited objections to the presentence investigation report and his failure to try to withdraw from the plea.[76] "In light of all this contemporaneous evidence, we are convinced that Presley was adequately informed of the consequences of his plea, even if the specific Guideline range was not known by him."[77] The merits panel "disagree[d] that the agreement's terms precluded further enhancements" and concluded that "the plea agreement itself provide[d] the remedy" of withdrawing from the plea if the agreed stipulations were rejected.[78]

One judge thought the issue was unclear enough that she wrote separately to suggest that the court should have analyzed it as a matter of compliance with Rule 11.[79] She noted that "when a district court modifies or rewrites a plea agreement, it has violated Rule 11 and breached the plea agreement, rendering the agreement null and void."[80] But because Presley did not object and argue that the district court violated the plea agreement by adding additional enhancements, the concurring judge would have concluded, under plain error review, that the sentencing judge's actions did not constitute an "obvious and express breach of the plea agreement."[81]

Both the panel majority and the concurring judge agreed, however, that Presley's plea and appeal waiver were valid.[82] The court granted the government's motion to dismiss the appeal after already having it fully brief the merits of Presley's arguments.[83]

Deeper inquiry or no, anything a merits panel can decide the motion panel could have decided.

IV. Appellate motion panels can resolve most questions about the enforceability of appeal waivers

Asking appellate courts to meaningfully resolve all issues relevant to the enforceability of appeal waivers at the motion stage is not asking them

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[75] *Id.*
[76] *Id.*
[77] *Id.* (citation modified).
[78] *Id.* at 906.
[79] *See id.* at 907 (Moore, J., concurring).
[80] *Id.*
[81] *Id.* at 908.
[82] *Id.* at 906–07.
[83] *Id.* at 901.

to do anything they were not going to do anyway. It is simply asking them to resolve the issues presented to them in the dismissal motions sooner, before the benefit to the government has been lost.

In *United States v. Rollings*, the Tenth Circuit found it necessary to carry the enforceability of an appeal waiver with the merits of the case to resolve the question of whether the issue was the validity of the appeal waiver provision itself or the validity of the plea as a whole.[84] This required it to resolve "ambiguity in our cases [as to] whether an *appellate waiver* contained in a plea agreement can be knowing and voluntary if the *plea* in the plea agreement was not also knowing and voluntary."[85]

The court rejected the government's argument that its handling of the matter had undercut "the benefit of the bargain—avoiding appeals that the defendant has relinquished," because, the court explained, "we already undertake a searching review of the plea agreement and Rule 11 colloquy in determining whether the appellate waiver was knowing and voluntary."[86] But it did not do so until requiring the government to expend the time and effort of merits briefing that the government's bargain was meant to avoid. The court even required the government to expend the additional effort of preparing for and presenting oral argument.[87]

Though it ultimately enforced the appeal waiver, it could have undertaken this same searching review at the motion stage and reached the same conclusion to grant the government's motion without requiring merit's briefing and argument.[88]

One approach courts could take to deal with sufficiently substantial questions about the validity of a plea (and its incorporated appeal waiver) is to ask for further briefing limited to that issue.

In *United States v. Presendieu*, the defendant's initial brief argued that his plea was invalid because the district court failed to adequately explain the elements of the charges against him, that his sentencing appeal waiver was therefore unenforceable, and that the district court committed various errors during his sentencing.[89] After the government moved to enforce the appeal waiver, the motion panel granted the government's motion to dismiss "regarding Presendieu's claims of sentencing error," while denying and carrying the validity of Presendieu's guilty plea and

[84] United States v. Rollings, 751 F.3d 1183, 1187 (10th Cir. 2014).
[85] *Id.* at 1189.
[86] *Id.* at 1190.
[87] *See id.* at 1191 n.6 (noting positions taken at oral argument in the case).
[88] *Id.* at 1194.
[89] Brief of the Appellant Stanley Presendieu, United States v. Presendieu, No. 15-14830 (11th Cir. June 6, 2016).

its accompanying sentencing appeal waiver with the case.[90]

The panel made a good point. If they found the defendant did not knowingly and voluntarily enter the entire plea—not just the appeal waiver itself—then the proper remedy is not to void the appeal waiver and consider the merits of the defendant's appeal. In such a case, the court would have already found that the defendant did not knowingly and voluntarily plead guilty. The court should vacate the plea and conviction and remand the case for further proceedings.[91] If the defendant does not wish to go forward with the plea as previously negotiated, then the court should relieve both the defendant and the government of the agreement, restore any dismissed charges, and allow the case to proceed to trial. If, however, the defendant now knowingly and voluntarily accepted the plea deal, then the court would enforce it. Presendieu had the right to knowingly and voluntarily choose whether to accept his plea deal and not appeal his sentence or go to trial and appeal his sentence if desired. He did not have the right to deny the validity of his guilty plea but then appeal the sentence resulting from his guilty plea (which included a bargained-for acceptance-of-responsibility U.S.S.G. offense level decrease).[92]

The panel's solution—dismissing the sentencing appeal but considering the merits of Presendieu's challenge to the validity of his guilty plea—"allow[ed] the government to receive its benefit of the appeal waiver."[93] The only merits brief the court required the government to file was limited to the issue of the validity of Presendieu's guilty plea.[94]

Another Eleventh Circuit panel found a way to give both parties the benefits of their bargains—sort of. In *United States v. Utsick*, the defendant had agreed to waive his right to appeal his sentence "unless the sentence exceeds the maximum permitted by statute or treaty or is the result of an upward departure or a variance from the Sentencing Guideline range that the [c]ourt establishes at sentencing."[95] Utsick's initial brief argued that his plea was not knowing and voluntary, that his sentence exceeded the terms permitted by the United States's extradition treaty

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[90] Order, United States v. Presendieu, No. 15-14830 (11th Cir. Dec. 14, 2016).

[91] *See id.* at 2 ("If Presendieu is successful in challenging his guilty plea, then Presendieu's claims of sentencing error become moot, as an involuntary guilty plea would require a vacatur of his conviction.").

[92] *See* Plea Agreement ¶ 7, United States v. Presendieu, No. 15-cr-20032 (S.D. Fla. Aug. 6, 2015).

[93] Order, *supra* note 90, at 2.

[94] Government Answer Brief, United States v. Presendieu, No. 15-14830 (11th Cir. Jan. 12, 2017).

[95] Plea Agreement at 6, United States v. Utsick, No. 10-cr-20242 (S.D. Fla. June 10, 2016). *See* United States v. Utsick, 45 F.4th 1325, 1331 (11th Cir. 2022).

with Colombia, and that his sentence was erroneous for that and other reasons.[96] The government moved to dismiss the appeal, attaching copies of the plea agreement and plea colloquy, which the government argued showed that Utsick validly entered his plea and specifically agreed to be sentenced according to the stipulated terms that Utsick now argued were precluded by the terms of his extradition.[97]

The Eleventh Circuit motion panel ruled that "the appeal waiver does not apply to the challenges to the validity of the guilty plea."[98] "The appeal waiver states that Mr. Ustick is waiving his rights under [28 U.S.C.] § 3742, and that provision only concerns the appeals of sentences."[99] And so the motion panel "granted" the government's dismissal motion "as to Mr. Utsick's federal law challenges to his sentence and to the forfeiture and restitution orders."[100] "But the waiver," it ruled, "does not prevent Mr. Utsick from challenging the length of his sentence, or the forfeiture and restitution orders, on the ground that they were contrary to the treaty by which he was extradited."[101]

To the government's argument that Utsick in his plea agreement had specifically stipulated to the sentencing terms that he now claimed violated the agreement's reservation of treaty rights, the motion panel ruled that "Mr. Utsick claims that his plea was invalid for a number of reasons, and that sort of challenge is not precluded by the appeal waiver because the waiver cannot stand if the guilty plea on which it was based is set aside."[102]

Presumably, although they did not so explain, the motion panel reconciled this portion of its ruling with its otherwise enforcement of the appeal waiver (dismissing Utsick's federal law challenges to his sentence and forfeiture and restitution orders) under the same rationale as the *Presendieu* motion panel—that any subsequent merits ruling against the validity of Utsick's guilty plea would negate any need to review the dismissed sentencing challenges.

But the motion panel did manage to provide the government with at least some of what it bargained for—obviating the need to respond to Utsick's non-treaty-related challenges to his sentence and forfeiture and

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[96] Appellant's Initial Brief, United States v. Utsick, No. 16-16505 (11th Cir. Feb. 16, 2021).
[97] Government's Motion to Dismiss Appeal Pursuant to a Valid Appeal Waiver, United States v. Utsick, No. 16-16505 (11th Cir. Mar. 4, 2021).
[98] Order at 2, United States v. Utsick, No. 16-16505 (11th Cir. May 10, 2021).
[99] *Id.* at 2–3.
[100] *Id.* at 3.
[101] *Id.*
[102] *Id.*

restitution orders. And it gave Utsick his bargained-for right to challenge his sentence and forfeiture and restitution orders on the grounds that they violated the terms of the extradition treaty.[103]

Still, the court forced the government to brief the merits of Utsick's challenge to the underlying validity of his guilty plea and present oral argument on the issue.[104] The court's explanation that "the appeal waiver [did] not apply to the challenges to the validity of the guilty plea," ignores that the court must always decide the validity of the plea wherein the defendant agreed to waive his appellate rights before the court can grant a government motion to enforce an appeal waiver.[105]

Perhaps this is an example of where the validity of the plea required more than consideration by a motion panel? Perhaps the Sixth Circuit panel in *United States v. Presley* was right that such a deeper examination justifies carrying the issue over to the merits panel after additional briefing.[106]

Utsick's challenge was not just that the district court had not complied with Rule 11 by ensuring that he understood the terms he was accepting.[107] In addition to that more typical challenge—something I argue that a motion panel should always necessarily have to resolve to rule on a motion to enforce an appeal waiver—Utsick also argued that competency issues "le[ft] unresolved the question of his ability to understand his rights, the charges, and the law, and to knowingly and voluntarily waive his rights."[108] Resolving the question of Utsick's competency required the parties and the merits panel to go outside the plea agreement and plea colloquy and address the testimony and ensuing ruling at a pretrial competency hearing.[109] Ultimately, the merits panel held that "there is no basis to conclude that the district court erred, plainly or otherwise in finding Utsick competent" and that there was "no reason to conclude that the district court plainly erred in finding that Utsick's guilty plea

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[103] Indeed the "or treaty" exception to his sentencing appeal waiver had been a handwritten addition to the plea agreement before the parties signed it. Plea Agreement at 6, United States v. Utsick, No. 10-cr-20242 (S.D. Fla. June 10, 2016).
[104] Brief for the United States at 22–30, United States v. Utsick, No. 16-16505, (11th Cir. July 23, 2021); Transcript of Oral Argument, United States v. Utsick, No. 16-16505 (11th Cir. June 7, 2022).
[105] Order at 2, United States v. Utsick, No. 16-16505 (11th Cir. May 10, 2021).
[106] *See* United States v. Presley, 18 F.4th 899, 904–05 (6th Cir. 2021).
[107] Appellant's Brief at 23–24, United States v. Utsick, No. 16-16505 (11th Cir. Feb. 16, 2021).
[108] *Id.* at 24.
[109] *See* Brief for the United States, *supra* note 104, at 31–33; Appellant's Reply Brief at 10, United States v. Utsick, No. 16-16505, (11th Cir. Oct. 13, 2021); United States v. Utsick, 45 F.4th 1325, 1338–39 (11th Cir. 2022).

was entered knowingly and voluntarily."[110]

I am willing to concede that cases requiring examining more than just the plea agreement and plea colloquy might be where a motion panel should defer to a merits panel. But even that line may leave cases where a motion panel *could* have resolved the issue without too much difficulty.

In *United States v. Soloff*, the defendant appealed the reasonableness of his sentence for receipt of child pornography. In his plea agreement, he had waived "all rights to appeal the conviction and whatever sentence is imposed on any ground reserving only the right to appeal from a sentence in excess of the applicable advisory [U.S.S.G.] range," subject to additional exceptions.[111] Soloff responded to the government's motion to dismiss the appeal, arguing that "the waiver [could not] bind him because the district court never explicitly accepted the plea agreement."[112] The Fourth Circuit "deferred action on the motion to dismiss to consider it with the merits issues."[113] It also required the parties to present oral argument.[114]

The court acknowledged that "[t]he only question . . . is whether the waiver is valid and binding."[115] Soloff conceded and "the record plainly established that his acceptance of the waiver was knowing and intelligent."[116] The court just had to decide "whether a district court's failure to expressly accept an agreement renders an appellate waiver contained in that agreement unenforceable."[117] Though the merits panel's examination went beyond what the magistrate judge said at the plea hearing, the district court judge's statements at the various subsequent hearings that the merits panel discussed were all there in the record for the court to consider.[118] The merits panel ultimately deemed the record before it to be "very clear evidence uniformly suggesting constructive acceptance" of the plea and terms.[119] And so, deciding that constructive acceptance was sufficient, the court held that "[s]ince the waiver is enforceable and this case falls within its scope, we do not reach the merits of Soloff's challenge," that it had made the parties brief and argue.[120]

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[110] *Utsick*, 45 F.4th at 1339–40 (citing United States v. Presendieu, 880 F.3d 1228, 1238 (11th Cir. 2018)).
[111] United States v. Soloff, 993 F.3d 240, 242 (4th Cir. 2021) (citation modified).
[112] *Id.* at 243.
[113] *Id.*
[114] *See id.* (noting positions presented at oral argument).
[115] *Id.*
[116] *Id.* (citation modified).
[117] *Id.*
[118] *See id.* at 242–45.
[119] *Id.* at 244.
[120] *Id.* at 245.

What about a purely legal issue, and so not one requiring facts or records outside the plea agreement and colloquy, but only exploration of a legal issue underlying the validity of the plea? In *United States v. Moran*, the defendant pled guilty to sexual abuse and enticement of a minor while working as a janitorial contractor at a U.S. marine base in Japan.[121] The indictment alleged jurisdiction over his offense under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, which provides for prosecution and punishment of felonies committed by anyone "employed by or accompanying the Armed Forces outside the United States."[122] His plea agreement included a waiver of his right to appeal his conviction and sentence "excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct."[123] Nevertheless, he appealed, arguing that the United States had no jurisdiction over his offense because he was not employed by or accompanying U.S. forces and that the district court committed various sentencing errors.[124] The government moved to dismiss Moran's appeal, arguing that he had stipulated to the facts establishing jurisdiction and that his appellate arguments did not fall within the agreed exceptions to his appeal waiver.[125] The Fourth Circuit motion panel "defer[red] action on the motion to dismiss" and ordered full briefing of Moran's appeal.[126] Here, too, the government was also required to prepare for and present oral argument.[127]

Explaining why the case had come to briefing, argument, and decision, the merits panel noted that while none of Moran's appellate claims fit within the allowed exceptions to his appeal waiver, Moran was "casting one of his arguments as a jurisdictional challenge" and "subject-matter jurisdiction can never be waived."[128] "If Moran were right that his challenge is jurisdictional, then his appeal waiver would not stand in the way."[129]

"But Moran is wrong," the merits panel concluded.[130] "He conflates subject-matter jurisdiction with a jurisdictional element of his offenses."[131]

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[121] United States v. Moran, 70 F.4th 797, 800 (4th Cir. 2023). *See* 18 U.S.C. §§ 2422(b), 2243(a).
[122] 18 U.S.C. § 3261(a)(1).
[123] *Moran*, 70 F.4th at 800.
[124] Brief of the Appellant, United States v. Moran, No. 21-4411 (4th Cir. Mar. 18, 2022).
[125] Motion by United States to Dismiss Appeal, United States v. Moran, No. 21-4411 (4th Cir. June 3, 2022).
[126] Order, United States v. Moran, No. 21-4411 (4th Cir. Oct. 6, 2022).
[127] *Id.* (reflecting oral argument held March 8, 2023).
[128] *Moran*, 70 F.4th at 802.
[129] *Id.*
[130] *Id.*
[131] *Id.* (citation modified).

Moran was contesting the sufficiency of the evidence establishing his guilt, not the district court's authority to hear the case. "We see it for what it really is: a sufficiency-of-the-evidence challenge which he renounced any right to bring."[132] "Trying to force the government to now prove their case on appeal is the very right that a defendant gives up when entering a plea agreement with an appeal waiver."[133] Just so.

The merits panel decided that Moran's argument fell within the scope of his appeal waiver. That legal determination is inherent in any resolution of a motion to dismiss an appeal based on an appeal waiver.

Contrast the *Moran* motion panel's deferring whether Moran's challenge fell within the scope of his appeal waiver with the handling of a similar issue in *United States v. Arguedas*.[134] There, after defense counsel submitted an *Anders* brief acknowledging the defendant's appeal waiver and asserting that there were no non-frivolous grounds for appeal, the government moved to dismiss the appeal on the basis of the appeal waiver.[135] The motion panel concluded that "under the appeal waiver, Arguedas waived his right to challenge any *term* of supervised release that is less than or equal to the statutory maximum, but he did not waive his right to appeal the *conditions* of supervised release."[136] Because defense counsel had only thus far filed an *Anders* brief addressing claims regarding the terms of supervised release, the motion panel directed him to file a supplemental brief informing the court if Arguedas wished to pursue any non-frivolous claims challenging his conditions of supervised release, and, if so, it directed the government to file a brief responding to any such claims.[137] Once the government completed that limited supplemental briefing, the motion panel would decide all pending issues, including defense counsel's *Anders* motion and the government's motion to dismiss any waived issues.[138]

Ultimately, Arguedas opted to challenge one supervised release condition, but not another.[139] The government therefore did have to file a

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[132] *Id.* at 804.
[133] *Id.*
[134] United States v. Arguedas, 134 F.4th 54, 64 (2d Cir. 2025) (Arguedas was one of several co-defendants appealing the judgments entered against them).
[135] *Id.* at 64. *See* Anders v. California, 386 U.S. 738, 744 (1967) (allowing defense attorneys to inform the appellate court that there are no no-frivolous grounds for appeal to pursue, and asking permission to withdraw as counsel, if "accompanied by a brief referring to anything in the record that might arguably support the appeal").
[136] *Arguedas*, 134 F.4th at 66 (citation modified).
[137] *Id.* at 72.
[138] *Id.*
[139] Supplemental Brief of the Defendant, United States v. Arguedas, No. 22-1355 (2d Cir. May 9, 2025).

merits brief but not one addressing any issue that the circuit court determined the appeal waiver covered.

Arguments addressing the validity of the plea and/or waiver that require analysis outside the corners of the plea agreement and colloquy may be the proper line to draw, allowing a motion panel to properly refer the matter to the eventual merits panel.

In *United States v. Hanlon*, an Eleventh Circuit panel ruled that Hanlon's sentencing appeal waiver barred both his substantive sentencing challenges and his claim of ineffective assistance of counsel during sentencing.[140] While his plea agreement only waived his right to appeal his "sentence," the panel explained that it would interpret "ineffective assistance of counsel claims regarding sentencing" following a "a knowing and voluntary [sentencing] appeal waiver" to be barred.[141] "A contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless."[142] Hanlon's ineffective assistance of counsel claim regarding the entry of the plea itself, however, was outside the scope of the waiver "because that claim goes to the heart of whether the guilty plea, including the waiver, is enforceable."[143]

Like *Presendieu*, although not explored, if the court then found the plea itself to be invalid, the dismissed sentencing issues would be moot because the court would vacate the conviction.[144] As it happens, the panel went on to determine that the record was "not sufficiently developed for us to address in this direct appeal Hanlon's claims that his counsel was ineffective at the plea negotiation."[145] And so it dismissed that claim, too, without prejudicing Hanlon's ability to raise it in any subsequent collateral action under 28 U.S.C. § 2255.[146]

Nevertheless, the *Hanlon* panel recognized its responsibility to address whether the defendant's claims were outside the scope of his waiver.[147] It did not allow the defendant to simply label a sentencing claim an ineffective assistance of counsel claim to get around the waiver.[148]

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[140] United States v. Hanlon, 694 F. App'x 758, 759 (11th Cir. 2017) (not precedential).
[141] *Hanlon*, 694 F. App'x at 759. *See* Plea Agreement at 11, United States v. Hanlon, No. 14-cr-18, (M.D. Fla. Oct. 1, 2014).
[142] *Hanlon*, 694 F. App'x at 759 (citation modified).
[143] *Id.*
[144] *See* Brief of the Appellant Stanley Presendieu, *supra* note 89.
[145] *Hanlon*, 694 F. App'x at 759.
[146] *Id.*; 28 U.S.C. § 2255.
[147] *Hanlon*, 694 F. App'x at 759.
[148] *Id.* at 758–59.

And yet, courts are allowing defendants to simply assert that there were insufficient factual bases for their pleas as ways of attacking the validity of their pleas (and their accompanying appeal waivers).[149] Even where an appellate court was ultimately able to simply look at the defendant's plea stipulations to determine that there was no merit to his claim that his plea lacked a factual basis, it still deferred deciding the issue at the motion stage and required the government to brief the merits and present oral argument.[150]

V. Conclusion

The Tenth Circuit, at least, has stopped generally deferring to merits panels to rule on dismissal motions, concluding that such a process "robs [the government] of the benefit of its bargain."[151] No other circuit appears to have commented on the Tenth Circuit's announcement that it would end its "practice" of "defer[ring] ruling on the government's motion" or its rationale for doing so.[152]

But the Tenth Circuit is correct that "only through the efficient dismissal of an appeal will the government receive the benefit of its appellate waiver bargain."[153] As the First Circuit observed, "such waivers are meant to bring finality to proceedings conducted in the ordinary course."[154] The Eleventh Circuit asserts that, "[a]bsent extraordinary circumstances, we resolve such motions to dismiss before requiring the government to file an appellee's brief," but its practice suggests that it could do so more stringently than it does.[155]

Courts have held open the possibility of appellate relief, despite a knowing and voluntary appeal waiver, in "egregious cases" "where a miscarriage of justice occurs."[156] It is beyond the scope of this essay to examine where the line is between an enforceable waiver of a valid claim

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149 *See* United States v. McCoy, 895 F.3d 358, 364 (4th Cir. 2018) (approving decisions from and joining the Second, Fifth, and Eleventh Circuits).

150 *See* Order, United States v. McCoy, No. 17-4117 (4th Cir. Oct. 30, 2017); Transcript of Oral Argument, United States v. McCoy, No. 17-4117 (4th Cir. Mar. 22, 2018).

151 United States v. Hahn, 359 F.3d 1315, 1328 (10th Cir. 2004).

152 *See id.* at 1328.

153 *Id.* (citation modified).

154 United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001).

155 United States v. Hardman, 778 F.3d 896, 899 (11th Cir. 2014). *See* Motion to Dismiss Appeal Based on Appeal Waiver in Plea Agreement, *supra* note 47; Order, *supra* note 48 (regarding Beauchamp resolving after merits briefing).

156 *Hardman*, 778 F.3d at 899. *See also Hahn*, 359 F.3d at 1329 (finding "the waiver was knowing and voluntary" and "enforcing the waiver would not result in a miscarriage of justice").

of error and an unenforceable waiver of an appeal asserting a "miscarriage of justice."[157] After all, "[a] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues—indeed, it includes a waiver of the right to appeal blatant error."[158] "Waiver would be nearly meaningless if it included only those appeals that border on the frivolous."[159]

But resolving the validity of the appeal waiver (and underlying plea) and the scope of that waiver should not be beyond the scope of the motion panel's consideration.

About the Author

Jonathan D. Colan is a former Senior Appellate Lawyer for the U.S. Attorney's Office for the Southern District of Florida. Before recently ending his government service, he helped teach the Criminal Appellate Advocacy course at the Department of Justice's National Advocacy Center and had been an adjunct professor of appellate law at the University of Miami School of Law. He was awarded the Executive Office for U.S. Attorneys Director's Award for his handling of the Liberty City/Sears Tower Bombing terrorism appeal in *United States v. Augustin*.[160] He is now an appellate lawyer at Kluger, Kaplan, Silverman, Katzen & Levine, P.L., in Miami.

[157] *Teeter*, 257 F.3d at 25. *See* Hunter v. United States, No. 24-1063, 2025 WL 2885281 (U.S. Oct. 10, 2025) (granting certiorari to consider, inter alia, the potential circumstances under which a defendant may appeal his sentence notwithstanding a general appeal waiver in his plea agreement). *See also* United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993) (acknowledging that "[e]ven a defendant who has executed an effective waiver does not 'subject himself to being sentenced entirely at the whim of the district court'"). It seems agreed that "public flogging" is right out. United States v. Howle, 166 F.3d 1166, 1169 n.5 (11th Cir. 1999).
[158] *Howle*, 166 F.3 at 1169.
[159] *Id.*
[160] 661 F.3d 1105 (2011).

The Final Judgment Rule and Its Common Exceptions: A Primer

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I. Introduction

In response to a novel class-action claim in an untested area of law, you moved to dismiss the complaint because—under your reading of the statute—the defendant should be immune from the cause of action. But the district court disagreed, holding, as a matter of first impression, that the plaintiff's theory is colorable enough to proceed.

As a result, you face expansive (and expensive) class, fact, and expert discovery, followed by motions practice and a trial—meaning it may be years before your arguments about immunity will again be ripe for consideration in an appeal. Can you find a way to avoid protracted and costly litigation through an earlier, interlocutory appeal?

In general, federal courts of appeals have jurisdiction to review only "final decisions."[1] But this "final judgment rule" is needlessly complex, has led to "considerable confusion," and, moreover, is subject to several exceptions—each with its own advantages and disadvantages.[2]

To assist practitioners considering whether and how an interlocutory appeal may be available, this article provides a primer of the relevant law and procedures and a brief hypothetical case study applying it.

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[1] 28 U.S.C. § 1291.

[2] Flanagan v. United States, 465 U.S. 259, 263 (1984) ("final judgment rule"); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 91 (1975) ("considerable confusion"). *See* McGourkey v. Toledo & O.C. Ry. Co., 146 U.S. 536, 544–45 (1892) ("Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees."); United States v. Baxter, No. 1:10-cv-435, 2012 WL 315509, at *1 (D. Me. Feb. 1, 2012) ("The final judgment rules are not easy to grasp."); Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 295 (3d Cir. 1987) (Gibbons, C.J., dissenting).

II. The final-judgment rule

The "general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[3] This rule predates the Constitution, was included in the limits on federal courts' jurisdiction in the Judiciary Act of 1789, and has been part of federal law, in some form, ever since.[4]

In its current form, courts of appeals "have jurisdiction of appeals from all final decisions of the district courts," except where direct review is possible in the Supreme Court, or review is specifically reserved for the Court of Appeals for the Federal Circuit.[5] And a "final decision" is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[6] For example, a final judgment in a criminal case means the order sentencing the defendant.[7]

"Restricting appeals to final judgments serves important interests," including efficient judicial administration, and the deference owed to trial judges charged with managing litigation and the discovery process.[8] Congress has also expressed a preference for rulemaking, "not expansion by court decision," as the proper method of determining which orders are immediately appealable.[9]

In accordance with the final-judgment rule, certain trial court rulings are presumptively "interlocutory," rather than "final," and are therefore not immediately appealable.[10] These include orders requiring or denying civil or criminal discovery, denying a motion to dismiss, denying a mo-

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[3] Dupree v. Younger, 598 U.S. 729, 734 (2023) (citation modified).

[4] *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541–48 (1932) (outlining the rule's historical development); Cobbledick v. United States, 309 U.S. 323, 324 n.2 (1940) (citing sections 21, 22, and 25 of the Judiciary Act of 1789); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989); Judiciary Act of 1789, 1 Stat. 73, 83–85.

[5] 28 U.S.C. § 1291. *See id.* §§ 1292(d)–(e), 1295.

[6] Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

[7] *See* Parr v. United States, 351 U.S. 513, 518 (1956); United States v. Bailey, 512 F.2d 833, 836 (5th Cir. 1975).

[8] Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr., 913 F.3d 443, 448 (5th Cir. 2019). *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Cunningham v. Hamilton Cnty., 527 U.S. 198, 209 (1999); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 436 (1985).

[9] Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 48 (1995); *Cunningham*, 527 U.S. at 210.

[10] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

tion for summary judgment, transferring a case, and denying a criminal defendant's motion to withdraw a guilty plea.[11]

Alternatively, Congress has provided for immediate appeals of some non-final orders. For example, courts of appeals have jurisdiction to hear these three challenges: (1) orders relating to receiverships; (2) decrees determining rights and liabilities in admiralty cases; and (3) orders denying motions to enforce contractual arbitration clauses.[12] Likewise, in federal criminal cases, the government has a statutory right to appeal certain orders: (1) dismissing an indictment or information; (2) granting a new trial; (3) suppressing or excluding evidence; (4) requiring the return of seized property; (5) granting the release of a person charged with or convicted of an offense; and (6) denying a motion to revoke or modify the conditions of release.[13]

In most cases, however, without a "final judgment," a court of appeals lacks jurisdiction over an appeal of a challenged order, "unless an exception to the rule applies."[14]

III. Exceptions to the final-judgment rule

A. Statutory and rule-based exceptions

1. Interlocutory appeals related to injunctions

By statute, Congress has provided courts of appeals with jurisdiction to review some "interlocutory decisions," including orders "continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[15] This jurisdiction extends not only to appeals of "orders that grant or deny injunctions," but also to "orders that have the practical effect of granting or denying injunctions and have serious,

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[11] *See, e.g.*, United States v. Ryan, 402 U.S. 530, 531–34 (1971); *Cobbledick*, 309 U.S. at 324–30; Alexander v. United States, 201 U.S. 117, 118–22 (1906); Coleman v. Am. Red Cross, 979 F.2d 1135, 1138 (6th Cir. 1992); Rouse Const. Int'l, Inc. v. Rouse Const. Corp., 680 F.2d 743, 745 (11th Cir. 1982); Branch v. Phillips Petrol. Co., 638 F.2d 873, 877–78 (5th Cir. Unit A 1981); Beard v. Falkenrath, 97 F.4th 1109, 1114 (8th Cir. 2024); Price v. Socialist People's Libyan Arab Jamahiriya, 389 F.3d 192, 199 (D.C. Cir. 2004); Courtright v. City of Battle Creek, 839 F.3d 513, 517 (6th Cir. 2016); *Dupree*, 598 U.S. at 734; Aaacon Auto Transp., Inc. v. Ninfo, 490 F.2d 83, 84 (2d Cir. 1974); United States v. Gottlieb, 817 F.2d 475, 476 (8th Cir. 1987).

[12] 28 U.S.C. § 1292(a)(2)–(3); 9 U.S.C. § 16(a). *See, e.g.*, Sec. & Exch. Comm'n v. Barton, 135 F.4th 206, 217 (5th Cir. 2025); Chem One, Ltd. v. M/V Rickmers Genoa, 660 F.3d 626, 639 (2d Cir. 2011); Coinbase, Inc. v. Bielski, 599 U.S. 736, 738–40 (2023).

[13] 18 U.S.C. § 3731. *See, e.g.*, United States v. Johnson, 228 F.3d 920, 923–24 (8th Cir. 2000).

[14] United States v. Aliotta, 199 F.3d 78, 81 (2d Cir. 1999).

[15] 28 U.S.C. § 1292(a)(1).

perhaps irreparable, consequence."[16]

Nonetheless, two things can limit an interlocutory appeal under that statute: (1) the propriety of injunctive relief; and (2) the merits only to the extent necessary to review issuance of the injunction.[17] The statute also does not permit an appeal of a trial court's decision to stay (or refuse to stay) its own proceedings, even if such an order has the same effect as an injunction.[18]

2. Certified interlocutory appeals

Another exception, applicable only in civil actions, provides that a party may request an otherwise non-final order be accepted for an early, interlocutory appeal.[19] It involves a multistep process.

First, a party may petition the district court to certify three things: (1) the ruling at issue involves "a controlling question of law"; (2) there is substantial ground for difference of opinion on the decision; and (3) an immediate appeal of the order which may materially advance the ultimate termination of the litigation.[20]

If the district judge agrees, the court must make written findings in a certification order.[21] Moreover, an application for an interlocutory appeal does not automatically stay proceedings in the district court.[22] The district court's consent is mandatory, and its refusal to certify issues for interlocutory review is not appealable, although some courts of appeals have suggested it may be reviewed in a mandamus proceeding.[23]

Second, within 10 days after the entry of the district court's certification order, the party seeking review must apply to the court of appeals to permit an appeal. A petition for permission to appeal "must be filed

[16] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 287–88 (1988) (citation modified).

[17] *See, e.g.,* United States v. Allen, 155 F.3d 35, 40 (2d Cir. 1998).

[18] *Gulfstream*, 485 U.S. at 280–81 (overruling the prior "*Enelow–Ettelson*" rule).

[19] 28 U.S.C. § 1292(b). The statute does not apply to criminal cases. United States v. Pace, 201 F.3d 1116, 1119 (9th Cir. 2000); In re Grand Jury Proc., 832 F.2d 554, 557 (11th Cir. 1987); United States v. White, 743 F.2d 488, 493 (7th Cir. 1984); United States v. Lowe, 433 F.2d 349 (5th Cir. 1970).

[20] *See* 28 U.S.C. § 1292(b); Microsoft Corp. v. Baker, 582 U.S. 23, 28 (2017); Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974).

[21] 28 U.S.C. § 1292(b).

[22] *Id.*

[23] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1977); In re Master Key Antitrust Litig., 528 F.2d 5, 8 (2d Cir. 1975); Pfizer, Inc. v. Lord, 522 F.2d 612, 614 n.4 (8th Cir. 1975); United States v. 687.30 Acres of Land, 451 F.2d 667, 670 (2d Cir. 1971); Milbert v. Bison Labs., 260 F.2d 431, 433–35 (3d Cir. 1958). *See, e.g.*, In re Powerhouse Licensing, 441 F.3d 467, 471 (6th Cir. 2006). *But see* D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967).

within the time specified by the statute" authorizing the appeal, and courts have concluded that 28 U.S.C. § 1292(b)'s 10-day filing period is jurisdictional.[24] The court of appeals may then, in its discretion, either agree or decline to review a certified question on an interlocutory basis.[25] Historically, however, relatively "few certified appeals are accepted by the circuit courts."[26]

Nonetheless, if accepted, "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court."[27] The court of appeals may not reach beyond the certified order to address other orders made in the case, but it may address any issue "fairly included within the certified order" because it is the *order* that is appealable, and not the controlling question identified by the district court.[28]

3. Partial judgment on fewer than all claims or parties

Congress has also empowered the Supreme Court to promulgate rules that permit other interlocutory appeals and rules that determine when orders are otherwise "final."[29]

Using that authority, Federal Rule of Civil Procedure 23(f) permits interlocutory appeals from orders granting or denying the certification of a class.[30] Rule 23(f) applies only narrowly, however, as appeals are limited

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[24] Fed. R. App. P. 5(a)(2). *See* 28 U.S.C. § 1292(b); Carr Park, Inc. v. Tesfaye, 229 F.3d 1192, 1194 (D.C. Cir. 2000); Groves v. United States, 941 F.3d 315, 323 (7th Cir. 2019); Myles v. Laffitte, 881 F.2d 125, 127 (4th Cir. 1989); Gen. Television Arts, Inc. v. S. Ry., 725 F.2d 1327, 1330 (11th Cir. 1984); Hellerstein v. Mr. Steak, Inc., 531 F.2d 470, 471–72 (10th Cir. 1976); Hanson v. Hunt Oil Co., 488 F.2d 70 (8th Cir. 1973); Ala. Labor Council v. Alabama, 453 F.2d 922, 925 (5th Cir.1972); Milbert v. Bison Labs., Inc., 260 F.2d 431 (3d Cir. 1958).

[25] *See* 28 U.S.C. § 1292(b). *See also Digit. Equip. Corp.*, 511 U.S. at 883 n.9 ("We recognize that [28 U.S.C.] § 1292 is not a panacea, both because it depends to a degree on the indulgence of the court from which review is sought and because the discretion to decline to hear an appeal is broad." (citation modified)); Tidewater Oil Co. v. United States, 409 U.S. 151, 173 n.50 (1972) ("In this respect, it must be recalled that interlocutory appeal under [section] 1292(b) is subject to the decision of the court of appeals in the exercise of its discretion, to allow appeal of the question certified by the district court.").

[26] Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1174 (1990).

[27] Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996).

[28] *Id. See Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b),* 88 Harv. L. Rev. 607, 628–29 (1975).

[29] *See* 28 U.S.C. §§ 1292(e), 2072(a), (c); *Swint,* 514 U.S. at 48; *Microsoft Corp.*, 582 U.S. at 30.

[30] Fed. R. Civ. P. 23(f).

to those issues related to the class-certification decision.[31]

Additionally, Federal Rule of Civil Procedure 54(b) permits a district court to enter judgment on fewer than all claims or parties, thereby creating a "final and immediately appealable" order.[32] It applies to any case with multiple claims or parties, but if there are only two parties, Rule 54(b) certification requires multiple claims.[33]

Certification under Rule 54(b) requires the district court to do the following: (1) "direct entry of a final judgment as to one or more, but fewer than all, claims or parties"; and (2) "expressly determine[] that there is no just reason for delay" of appellate review.[34] Nonetheless, this "deceptively simple language," has led to confusion about the standards courts of appeals are required to use in reviewing a certification.[35]

Moreover, courts of appeals have held that "Rule 54(b) should be used sparingly," and will reverse certifications for abuse of discretion if determined to be improper.[36] And while a party may appeal the grant of a Rule 54(b) motion, the denial is not appealable.[37]

B. The nonstatutory collateral-order doctrine

Courts have also recognized nonstatutory exceptions to the final-judgment rule, most commonly under the collateral-order doctrine.[38] (Other judicially created exceptions include the doctrine of practical finality,

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[31] *See, e.g.*, Moser v. Benefytt, Inc., 8 F.4th 872, 876 (9th Cir. 2021); DeKeyser v. Thyssenkrupp Waupaca, Inc., 860 F.3d 918, 922 (7th Cir. 2017); In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 106 (D.C. Cir. 2002).

[32] Carter v. City of Phila., 181 F.3d 339, 343 (3d Cir. 1999). *See* FED. R. CIV. P. 54(b); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431–32 (1956).

[33] *See* Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1028 (6th Cir. 1994); Matter of Wood & Locker, Inc., 868 F.2d 139, 144 (5th Cir. 1989). *See, e.g.*, Jacqueline Gerson, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. CHI. L. REV. 169, 189 (1990).

[34] FED. R. CIV. P. 54(b). *See Gen. Acquisition,* 23 F.3d at 1026.

[35] Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711, 727 (2013).

[36] Nichols v. Cadle Co., 101 F.3d 1448, 1449 (1st Cir. 1996). *See* Ebrahimi v. City of Huntsville Bd. of Educ., 114 F.3d 162, 166 (11th Cir. 1997). Corrosioneering, Inc. v. Thyssen Env't Sys., Inc., 807 F.2d 1279, 1282 (6th Cir. 1986).

[37] *See* McCall v. Deeds, 849 F.2d 1259 (9th Cir.1988); Makuc v. Am. Honda Motor Co., 692 F.2d 172, 173 (1st Cir.1982) (because only the granting of a Rule 54(b) motion interferes with the policy against piecemeal review, only the grant of the motion is reviewable under the abuse of discretion standard); Boer v. Borg–Warner Corp., 364 F.2d 907 (3d Cir. 1966); Miles v. City of Chandler, 297 F.2d 690, 691 (9th Cir. 1961). *See also* Jeanette Sheet Glass Corp. v. United States, 803 F.2d 1576, 1580–81 (Fed. Cir. 1986) (only mandamus would lie from a refusal to certify in an exceptional case).

[38] *See Cohen,* 337 U.S. at 545–46 (first recognizing the doctrine).

which permits appeals of orders directing the immediate delivery or possession of property.[39] But in modern practice, such other exceptions are rarely encountered.[40])

The collateral-order doctrine provides that even where a district court ruling does not "end the litigation on the merits," a court of appeals may nonetheless consider a decision that meets the following criteria as a "final judgment": (1) it determines claims of right; (2) it is separate from, and collateral to, rights asserted in the action; (3) it is too important to be denied review; and (4) it is too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated.[41]

In other words, to fall within the narrow class of orders satisfying the collateral-order doctrine, a ruling must do three things: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.[42] The third criterion is the most crucial, and especially difficult to satisfy because the collateral-order exception is limited to orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.[43]

Consequently, very few interlocutory rulings satisfy the doctrine.[44] For example, in criminal cases, the Supreme Court has interpreted the exception "with the utmost strictness," and has found denials of only three types of motions to be immediately appealable: (1) motions to reduce bail; (2) motions to dismiss on double jeopardy grounds; and (3) motions

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[39] *See* Forgay v. Conrad, 47 U.S. 201, 204 (1848).

[40] *See* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 185–92 (2001).

[41] *Midland Asphalt*, 489 U.S. at 798. *See Coopers & Lybrand,* 437 U.S. at 468; *Digit. Equip. Corp.,* 511 U.S. at 867.

[42] *See* Will v. Hallock, 546 U.S. 345, 349 (2006); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

[43] *See* Herx v. Diocese of Fort Wayne–S. Bend, Inc., 772 F.3d 1085, 1090 (7th Cir. 2014); Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 546 (7th Cir. 2001) (citing Richardson–Merrell, Inc. v. Koller, 472 U.S. 424, 430–31 (1985)). *See also Mohawk Indus.,* 558 U.S. at 107–08 (concluding that the district court's "privilege-waiver order satisfied the first two conditions of the collateral order doctrine—conclusiveness and separateness—but not the third—effective unreviewability"); *Midland Asphalt,* 489 U.S. at 799 ("[T]he third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978))).

[44] *See Will,* 546 U.S. at 350 ("[A]lthough the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership.").

to dismiss under the Speech or Debate Clause.[45]

Conversely, courts have held that certain types of orders denying dismissal based on an "immunity" are immediately appealable under the collateral-order doctrine. These include claims of presidential absolute immunity, foreign sovereign immunity, a government official's qualified immunity, and a state's Eleventh Amendment immunity.[46] Nonetheless, the Supreme Court and most courts of appeals have declined to extend the collateral-order doctrine to permit interlocutory appeals on the grounds that federal sovereign immunity would bar a claim against the federal government or its officials.[47]

IV. An interlocutory appeal case study

With this basic background, we return to the hypothetical case from the introduction—in which, on a matter of first impression, the district court denied your motion to dismiss a putative class-action claim by holding that the defendant is not immune.

To avoid the delay and the expense of additional proceedings, what paths to an interlocutory appeal are available, and which are best?

First, because the trial court did not issue (or decline to issue) an injunction, the right to interlocutory review of injunctive relief will not work.[48] And, in any event, an early appeal on those grounds is limited to the propriety of injunctive relief.[49] So that path is unavailable and insufficient.

Second, because the case is a putative class action, you will have an early opportunity to appeal a decision to certify a class.[50] But while

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[45] *Midland Asphalt*, 489 U.S. at 799 (quoting Flanagan v. United States, 465 U.S. 259, 265 (1984)). *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (motion to reduce bail); Abney v. United States, 431 U.S. 651, 659, 662 (1977) (motion to dismiss on double jeopardy grounds); Helstoski v. Meanor, 442 U.S. 500, 506–08 (1979) (motion to dismiss under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1).

[46] Nixon v. Fitzgerald, 457 U.S. 731, 742–43 (1982) (presidential absolute immunity); Trump v. United States, 603 U.S. 593, 635 (2024) (same); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 667 (7th Cir. 2012) (foreign sovereign immunity); Compania Mexicana De Aviacion, S.A. v. U.S. Dist. Ct., 859 F.2d 1354, 1356 (9th Cir. 1988) (same); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (government official's qualified immunity); *P.R. Aqueduct*, 506 U.S. at 144–45 (State's Eleventh Amendment immunity).

[47] *See Hallock*, 546 U.S. at 351–54; Hou. Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc., 481 F.3d 265, 276–79 (5th Cir. 2007); State of Alaska v. United States, 64 F.3d 1352, 1355–58 (9th Cir. 1995); Pullman Const. Indus., Inc. v. United States, 23 F.3d 1166, 1168 (7th Cir. 1994). *But see* In re Sealed Case No. 99-3091, 192 F.3d 995, 999–1001 (D.C. Cir. 1999).

[48] *See* subsection II.A.1, *supra*.

[49] *See id. See, e.g.*, United States v. Allen, 155 F.3d 35, 40 (2d Cir. 1998).

[50] Fed. R. Civ. P. 23(f). *See also* subsection II.A.3, *supra* (partial judgment on fewer

an early appeal class-certification might impact the parties' cost-benefit assessments of the case, it comes too late to avoid the "expensive and time consuming" discovery and proceedings that led to the class-certification ruling.[51] It is also unlikely a court of appeals will use Rule 23(f)'s narrow grant of jurisdiction to reach the merits (for example, your immunity argument).[52] So that path is most likely insufficient.

Third, you could invoke the collateral-order doctrine and argue that immediate review of the immunity ruling is necessary because years of discovery, motions practice, and a trial would nullify the right not to be tried at all.[53] But that narrow route is both difficult and fraught. As noted above, only some types of immunity qualify, and the Supreme Court has instructed that when applying the collateral-order doctrine, courts of appeals should "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye."[54] So that path is also insufficient.

Fourth, moving for a partial final judgment would not work. There are no other parties, and no claims that could be separately decided.[55] The defendant is either immune or not. So that path is irrelevant.

Finally, you could ask the district court to certify its order that the defendant is not immune as appropriate for an interlocutory appeal.[56] That would require convincing the court of the following: (1) its ruling involves "a controlling question of law"; (2) there is substantial ground for difference of opinion on the ruling; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.[57] But even if the district court agreed, you would still need to separately petition the court of appeals to accept the appeal, which often does not happen.[58]

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than all claims or parties).

[51] Vaughn v. Am. Honda Motor Co., 627 F. Supp. 2d 738, 747 (E.D. Tex. 2007). *See* Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

[52] *See, e.g.*, Stockwell v. City & Cnty. of S.F., 749 F.3d 1107, 1113 (9th Cir. 2014); In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d at 107; Fox v. Saginaw Cnty., Michigan, 67 F.4th 284, 292 (6th Cir. 2023).

[53] *See, e.g.*, *Mitchell*, 472 U.S. at 526; Hunter v. Bryant, 502 U.S. 224, 227 (1991); Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002).

[54] *Swint*, 514 U.S. at 43 (quoting *Digit. Equip. Corp.*, 511 U.S. at 873). *See* subsection II.B, *supra*.

[55] Fed. R. Civ. P. 54(b). *See* subsection II.A.3, *supra*.

[56] *See* subsection II.A.2, *supra*.

[57] 28 U.S.C. § 1292(b); *Katz*, 496 F.2d at 754; Doe 1 v. United States, Civ. No. 20-1947, 2021 WL 5969660, at *1–3 (E.D. Pa. Apr. 28, 2021) (example of section 1292(b) certification order).

[58] *See* 28 U.S.C. § 1292(b); Hewitt v. Joyce Beverages of Wis., Inc., 721 F.2d 625, 626 (7th Cir. 1983). *See, e.g.*, Emery G. Lee III et al., Fed. Jud. Ctr., Permissive Interlocutory Appeals, 2013–2019, at 1–2 (2020) (finding that between 2013 and 2019, courts of appeals granted 52% of all section 1292(b) applications); Michael E.

Nonetheless, of all possible paths to an early, interlocutory appeal, it is likely the most appropriate and the most likely to succeed.[59]

V. Conclusion

The requirement of finality must be given "a practical rather than a technical construction" that considers "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[60] "The final judgment rule is not unbending," and to avoid "harsh and unjust results that may otherwise occur" if review must wait, practitioners should consider whether one of the many exceptions to the rule might apply to permit an interlocutory appeal.[61]

About the Author

Mark J. Sherer is an Assistant United States Attorney in the Eastern District of Pennsylvania. In addition to his own cases, he serves as a supervisory reviewer of appeals in civil cases in the U.S. Court of Appeals for the Third Circuit that are handled by the U.S. Attorney's Office. He is a graduate of the University of Michigan Law School and before joining the Department of Justice, he was in private practice in Washington, D.C. and served as a law clerk on the U.S. Court of Appeals for the Ninth Circuit.

Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. 607, 614 (2019) (finding that between 1985 and 1989, on average about 36% of orders certified under section 1292(b) were accepted each year by the courts of appeals, while in 2018, 15.7% were granted).

[59] *See, e.g.*, Solimine, *supra* note 26, at 1204 (arguing that section 1292(b) appeals are the superior device for seeking interlocutory review).

[60] Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–53 (1964) (citation modified).

[61] In re Stone, 94 B.R. 298, 301 (S.D.N.Y. 1988); Williston v. Anderson, No. CV 10-154, 2012 WL 12887880, at *2 (D. Mont. Aug. 8, 2012).

Note from the Outgoing Editor-in-Chief

Please enjoy this issue dedicated to legal writing. It is no secret that many lawyers do not write well. Indeed, in this high-speed world of texts and instant messages littered with abbreviations and emojis, many people are not GR8 writers. 🙁 This issue's authors will give you the tools to follow the Office of Legal Education's (OLE's) Publications Team's mantra: Be kind to your reader. It is my hope that you will keep this issue by your side and refer to it often as you continue to improve your legal writing.

This issue is bittersweet for me. It is my last as editor-in-chief. By the time you read this, I will be retired from federal service. (But I will probably be writing an online movie review or recording a podcast somewhere.) Over the past eight years, I have loved watching the *Department of Justice Journal of Federal Law and Practice* (*DOJ Journal*) grow from the USABulletin—a glossy magazine with articles about "how I won my trial last summer"—to a full-blown law review with lots of footnotes. I am forever grateful to all our authors over the years, as well as the Publications Team. Managing Editor Kari Risher and Associate Editor Abbie Hamner, along with technology wizard Jim Scheide and our University of South Carolina law clerks, make the *DOJ Journal* what it is today—something I think can compete with the country's best law reviews. I would also like to thank my bosses at the OLE, Mary Beth Pfister and Bob Daley, for supporting our mission. To them and all those who have gone before them, my sincerest thanks.

I will step out of the way now, but not before introducing the new editor-in-chief. Benjamin Holley comes to OLE with a wealth of experience. In his previous position with the Department of Justice (Department), he wrote lots of appellate briefs and trained many Department attorneys. He is not only a great writer but also a wonderful friend. He is going to do well.

So good luck to Benjamin and the gang. Goodbye to the Department and a job that I truly, madly, deeply loved. Best wishes to you, dear reader, in all your future adventures. Stay well as you continue to fight the good fight. Because that is what we do.

Chris Fisanick
Columbia, South Carolina
December 2025

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Note from the Editor-in-Chief

We are pleased to publish this issue of the *Department of Justice Journal of Federal Law and Practice* (*DOJ Journal*), which focuses on appellate procedure and effective writing. The hard work of investigation, trial, and sentencing is all for naught if error along the way results in reversal by an appellate court. Understanding the intricacies of the appellate process is thus of supreme importance. The insightful articles in this edition of the *DOJ Journal* shed needed light on the often-murky appellate world. But even those who do not write appellate briefs or care about the intricacies of appellate jurisdiction will find value in this issue, as the sections on effective writing provide gems of knowledge applicable to all Department of Justice employees. Unsurprisingly, explanations of how to be an excellent writer feature excellent writing, so we can learn from both the content and style of the articles.

Thank you to the many people who helped put this issue together. Our expert authors volunteered their limited time to share their knowledge. Managing Editor Kari Risher and Associate Editor Abbie Hamner continue to do excellent work, ensuring this issue was finalized with only minimal disruption from the government shutdown. Even though I am listed as Editor-in-Chief, they both did significantly more work than me, such that the only contribution I needed to make as editor is this short note. Thanks also to law clerks Bethany Lawless and Caroline Gooding for their contributions. And certainly not least, thanks to Jim Scheide, who does the typesetting that creates the aesthetically pleasing look of the *DOJ Journal*. (It is a more-involved job than you might think; certainly more than just saving as a PDF.)

Be well, write well, and always mind your appellate procedure.

Benjamin Holley
San Diego, California
January 2026