FEDERAL JUDICIAL CENTER

Court Web Program 2021

on

ADVANCED LEGAL WRITING:

THE ESSENTIAL QUALITIES OF EFFECTIVE EDITING

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Presentation By

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In <u>Animal Crackers</u>, Groucho Marx defined the issue by example:

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

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THINKING LIKE A WRITER:
THE PRINCIPLES OF "SUPER-CLARITY"

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

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

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

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

From logic to coherence:

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

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

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

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

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

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

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

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

"tips." It means starting from the principles that lie at the foundation of effective communication.

The Principles

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

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

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

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

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

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

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

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

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

Principle 1, Corollary a:

PUT FOCUS BEFORE DETAILS

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

FOCUS BEFORE DETAILS: EXAMPLE #1

Before:

MOTION TO SUPPRESS AND
EXCLUDE EVIDENCE
UNLAWFUL SEARCH AND SEIZURE

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

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

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

After (insert before the original first paragraph):

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

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

FOCUS BEFORE DETAILS: EXAMPLE #2

Opening paragraphs of a judicial opinion.

Before:

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

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

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

After (substitute for first paragraph):

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

Appellant filed a claim .....

Principle 1, Corollary b:

PUT OLD INFORMATION BEFORE NEW INFORMATION

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

OLD INFORMATION BEFORE NEW: EXAMPLE #1

Before:

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

After:

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

OLD INFORMATION BEFORE NEW: EXAMPLE #2

Before:

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

After:

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

Principle 1, Corollary c:

MAKE THE STRUCTURE EXPLICIT

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

MAKING THE STRUCTURE EXPLICIT: EXAMPLE #1

Before:

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

After:

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

or

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

MAKING THE STRUCTURE EXPLICIT: EXAMPLE #2

Before:

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

After:

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

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

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

MAKING THE STRUCTURE EXPLICIT: CREATING ROADMAPS

Example #1:

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

* * * * * *

Example #2:

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

* * * * * *

Example #4:

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

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

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

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

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

* * * * * *

Example #5 (how not to do it):

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

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

USING STRUCTURE TO PERSUADE: EXAMPLE #1

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META-INFORMATION THROUGHOUT THE DOCUMENT:

CREATING FOCI AND ROADMAPS WHEREVER NECESSARY

Example #1:

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

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

A. The Section 304 Proceedings

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

* * * * * *

Example #2:

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

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

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

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

Example #3:

Before:

In *Grodt & McKay* the Tax Court found:

> Additionally, the agreements are clear that petitioners have no right to possess the cattle or to exercise any real control or dominion over them. Cattle Company has complete control over the sale of animals, the sales price, retention of progeny, the incorporation of progeny into the Breeding Herds, the culling and replacing of herd animals, and the location, maintenance, expansion and breeding (including artificial insemination) of the herds. Petitioners' only rights with respect to the possession, control or dominion of the herds are extremely limited and, as a practical matter, valueless.

After:

[CONTEXT:] In this case, the issue of control and its extent plays a key role in determining ownership, as it did in *Grodt & McKay*. There the petitioners had very limited control over the cattle they had purportedly purchased from Cattle Company, as the Tax Court observed:

> [T]he agreements are clear that petitioners have no right to possess the cattle or to exercise any real control or dominion over them. Cattle Company has complete control over the sale and . . . [care] of the herds. Petitioners' only rights with respect to the possession, control or dominion of the herds are extremely limited and, as a practical matter, valueless.

Example # 4:

Before:

DISCUSSION

> In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964). "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be '''appropriate.''' Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); see Staten Island University Hospital v. NLRB, 24 F.3d 450, 455 (2d Cir. 1994); see also American Hospital Assn. v. NLRB, 499 U.S. 606, 610 (1991), interpreting the language of Section 9(a) as suggesting that ''employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit.'' A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless ''an appropriate unit compatible with that requested unit does not exist.'' P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963); accord: Ballentine Packing Co., 132 NLRB 923, 925 (1961).

Overnite Transportation Co., 322 NLRB 723, 723-24 (1996). In Overnite, the Board went on to note that "[e]ven though [it] applies a presumption that a single location unit is appropriate, that presumption is not applicable when a broader multilocation unit is sought by the petitioner." Id. at n.6. Accordingly, it would appear that even though, as the Employer points out, the Board may apply a presumption that a production and maintenance unit is an appropriate unit, the question before me in this case is whether the unit sought by the Petitioner is an appropriate unit.

After:

DISCUSSION

[CONTEXT:] Although the Employer has correctly argued that the Board may presume that a production and maintenance unit is an appropriate unit, that is not the issue to be decided. Instead, as the Board's decision in Overnite Transportation Co., 322 NLRB 723, 723-24 (1996), makes clear, the question is whether the unit sought by the Petitioner is an appropriate unit, regardless of its size or content or any other characteristic:

> In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. . . .

Example #5:

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

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

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

Example #6:

Before:

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

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

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

After (changes in italics):

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

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

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

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

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

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

PART II: META-INFORMATION AND THE CHALLENGE OF STRONG INTRODUCTIONS

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

SMART—provide information about your information.

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

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

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

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

COMFORTABLE—establish common ground.

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

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

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

WRITING EFFECTIVE INTRODUCTIONS: EXAMPLE #1

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

Before:

Dear Mr. Jones:

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

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

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

First revision:

Dear Mr. Jones:

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

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

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

Second revision (for in-house counsel):

Dear Mr. Jones:

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

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

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

I. Priority of Mechanic's Liens

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

Third revision (for the banker):

Dear Mr. Jones:

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

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

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

I. Terms of a Construction Mortgage

WRITING EFFECTIVE INTRODUCTIONS: EXAMPLE #2

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PANACEA

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

Before:

PRELIMINARY STATEMENT

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

FACTS

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

After:

PRELIMINARY STATEMENT

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

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

FACTS

.....

WRITING EFFECTIVE INTRODUCTIONS: EXAMPLE #3

Memorandum from associate to partner

Before:

JONES v. SMITH

FACTS

.....

ISSUE

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

CONCLUSION

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

After:

FACTS

.....

ISSUE

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

CONCLUSION

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

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

EDITING EXERCISE #1: MACRO-ORGANIZATION

UNITED STATES DISTRICT COURT
DISTRICT OF LOUSIANA

UNITED STATES OF AMERICA

V. CAUSE NO. SA-89-CR-83

MARIO BAUZA

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

MAY IT PLEASE THE COURT:

Defendant Mario Bauza respectfully submits that, under the provisions of the Speedy Trial Act, the information against him should be dismissed with prejudice.

I

The Speedy Trial Act provides, in pertinent part, that

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161 (b) (emphasis added). If this time limit not be met, the mandatory sanction is clear:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3162(a)(1). Where the thirty-day filing provision is violated, dismissal is mandatory, and the only determination to be made is whether the dismissal must be with prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the

> following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

II

The factors in § 3162 as they apply here are as follows:

1. Seriousness of the offense. Mr. Bauza is charged with theft of $26 worth of merchandise from the Base Exchange at Brooks Air Force Base. The offense is a misdemeanor. It is not a serious offense. Defendant does not claim he should not be prosecuted, but merely that he should have been prosecuted in a timely fashion and the government should not be allowed a cavalier disregard of the clear requirements of the statute.

2. The facts and circumstances surrounding the delay. There is no explanation given for the delay in the filing of this case. Defendant appeared before the Magistrate on the complaint on December 27, 1988. Counsel was appointed and the undersigned first met Mr. Bauza in the Public Defender Office on January 6, 1989. On January 9, 1989, the date scheduled for the preliminary examination, the undersigned contacted the Special Assistant U.S. Attorney at Brooks Air Force Base, advised that the preliminary examination had been waived, and suggested that the case be resolved by Pretrial Diversion. Two days later, the undersigned was informed that the case would not be recommended for Pretrial Diversion. Nothing more was heard from the government until the motion to dismiss count one of the complaint. In that motion, the government conceded that more than thirty days had elapsed since the summons was served and implied that the date of the initial appearance was somehow relevant to the determination of the motion. Even so, the dismissal was not entered until more than thirty days had elapsed following the initial appearance. The only reference in the Speedy Trial Act to an

appearance by a defendant before a judicial officer's being a factor in calculating time, is in calculating the time for trial to begin after an indictment or information has been filed. 18 U.S.C. § 3161(c)(1). The government supported its plea for a dismissal without prejudice by stating a need for "effective plea negotiations" to continue. However, the undersigned had informed the government that there would not be a plea of guilty on January 11, 1989, when the Special Assistant U.S. Attorney advised that there would not be a Pretrial Diversion recommendation. There was no further contact from the government until March 3, 1989, when, again, the Special Assistant U.S. Attorney asked if a plea agreement could be reached and was informed that one could not. Even so, it was one month later that the government got around to filing the Information. Any failure to comply with the Speedy Trial Act is due entirely to the failure of the government to act. Where it is the government that has failed to accord the defendant his rights under the Speedy Trial Act, that fact should weigh against the government and in favor of the defendant, requiring that the dismissal should be with prejudice.

3. Impact of reprosecution on the administration of the Act and the administration of justice. In determining whether a dismissal for violation of the Speedy Trial Act should be with or without prejudice, the legislative history is instructive. In the legislative process, there was much concern over possible abuse in the dismissal-without-prejudice option:

> The Committee believes that permitting the reprosecution of a defendant whose case has been dismissed for failing to meet the speedy trial limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:
>
> > Another area of doubt is that engendered by a consideration of the technique of the bill's (S. 754) dismissal "without prejudice." I would think if I were you, of the impact on the grand jury systems of re-indictments and the time requirements of

> re-indictment.
>
> Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists.
>
> * * *
>
> With respect to the propriety of requiring a permanent bar to future prosecutions, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee in their Commentary on Standards Relating to Speedy Trial.
>
> The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.
>
> Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli, endorsed the ABA position . . . .

1974 U.S. Code Cong. & Admin. News 7401, 7430. While it can no longer be argued that the "with prejudice" dismissal is presumptively favored, United States v. Taylor, 108 S. Ct. 2413, 2418 (1988), where the avowed purpose of the dismissal without prejudice is to coerce a plea by threat of reprosecution, dismissal without prejudice will simply send a message that the courts are determined to ignore the "with prejudice" sanction. That message can only lower the public's esteem for a judicial system by reinforcing the current perception that the system is "rigged."

III

In United States v. Angelini, 553 F. Supp. 367 (D. Mass. 1982), a prosecution was not brought to trial within the seventy-day limit of § 3161 (c)(1), plus exclusions. The

defendant's motion to dismiss was granted 25 days after the expiration of the time for trial.

Although Angelini's holding that dismissal is presumptively with prejudice, has been rejected in United States v. Taylor, supra; see also United States v. Caparella, 716 F.2d 976 (2d Cir. 1983); United States v. Russo, 741 F.2d 1264 (11th Cir. 1984), some courts have nonetheless implied a certain preference for such dismissal, even where the offense is a serious one, where the government failed to act through negligence.

> . . . unlike the speedy trial rights of an accused under the Sixth Amendment, see Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2191, 3 L.Ed.2d 101 (1972), the Act's purpose was to fix specific and arbitrary time limits within which the various stages of a criminal prosecution must occur.

United States v. Caparella, 717 F.2d at 981 (emphasis added), citing United States v. Iaquinta, 674 F.2d 260, 264 (4th Cir. 1982).

In United States v. Caparella, supra, cited approvingly in Taylor, 108 S. Ct. at 2418, the Second Circuit discussed the policy implications inherent in the Speedy Trial Act in order to determine whether a criminal complaint, charging the defendant with the misdemeanor offense of opening mail without authority, should have been dismissed with or without prejudice. After a lengthy discussion of the legislative history of the Act, the Court balanced the § 3162 factors and determined that the dismissal should have been with prejudice. The Court found first that the misdemeanor offense was not a serious one and, second, that the prosecutor's negligence was the sole cause of the delay. Focusing primarily in this case on the impact on the administration of the Speedy Trial Act, and on the administration of justice, the Court took the view that a violation of any of the Act's time limitations negatively impacted on the administration of the Act. Id. at 981. As to the effect of dismissal of a prosecution on the administration of justice, the Court found it greatly significant to reaffirm Congress's basic

purpose in enacting the Speedy Trial Act. Quoting then Assistant Attorney General William Rehnquist, the Second Circuit stated as follows:

> . . . it may well be Mr. Chairman, that the whole system of federal criminal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Id. This case closely parallels the Caparella case in that it involves a non-serious misdemeanor and the cause of the violation is solely negligence on the part of the government. The result should be the same.

In United States v. Russo, supra, the Eleventh Circuit in a serious drug case dismissed with prejudice for violation of the Speedy Trial Act's time-to-trial provision, citing the reasoning the rationale of Caparella as authority. Finding that delay in the case was the result of the simple negligence of the prosecution, the Eleventh Circuit held that the case should have been dismissed with prejudice although the underlying offenses were of a very serious nature.

The Fifth Circuit considered the with-or-without prejudice issue in United States v. Salgado-Hernandez, 790 F.2d 1265 (5th Cir) cert. denied, 107 S. Ct. 463 (1986), and United States v. Melquizo, 824 F.2d 320 (5th Cir. 1987). A dismissal without prejudice was upheld in both cases. However, mentioned in both Melquizo and Salgado-Hernandez, is the factor of whether the government "regularly or frequently fails to meet the time limits." Melquizo, 824 F.2d at 372.

The record in this district is replete with such failures, starting with the Salgado-Hernandez case. A cursory examination of cases in the office of the Federal Public Defender reveals the following: Most recently this court dismissed without prejudice United States v. Small, SA-89-CR-16 (driving while intoxicated). Cases filed by complaint and still

pending, with no information or indictment filed by the government, include United States v. Cano, SA-88-421M-1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Rodriguez, SA-87-605M-1 (driving while intoxicated, complaint filed December 17, 1987); United States v. Hernandez, SA-88-337M-1 (driving while intoxicated, complaint filed August 18, 1988); United States v. Buchanan, SA-88-515M-1 (driving while intoxicated, complaint filed December 23, 1988); United States v. Ayala, SA-88-109M-1 (driving while intoxicated, complaint filed March 18, 1988); United States v. Austin, SA-88-34M-1 (misdemeanor theft, complaint filed February 4, 1988); United States v. Ritter, SA-88-500M-1 (driving while intoxicated, complaint filed December 7, 1988); United States v. Salas, SA-89-2M-1 (felony theft, complaint filed January 5, 1989); United States v. Runkle, SA-88-222M-1 (driving while intoxicated, complained filed June 7, 1988); United States v. Barreda, SA-88-340M-1 (driving while intoxicated and felony destruction of government property, complaint filed August 18, 1988); United States v. Tucker, (driving while intoxicated, complaint filed October 25, 1988); United States v. Ramirez, SA-88-230M-1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Martinez, SA-88-438M-1 (driving while intoxicated, complaint filed October 25, 1988); United States v. Knight, SA-88-482M-1 (driving while intoxicated, complaint filed December 1, 1988); United States v. Asebedo, SA-88-422M-1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Acuna, SA-88-436M-1 (driving while intoxicated, complaint filed October 25, 1988); United States v. Delgado, SA-88-385M-1 (driving while intoxicated, complaint filed September 29, 1988); United States v. Esparza, SA-88-315M-1 (driving while intoxicated, complaint filed August 1, 1988); United States v. Esquivel, SA-88-221M-1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Flores, SA-87-398M-1 (driving while intoxicated, complaint filed

August 18, 1987); United States v. Heinrich, SA-88-65M-1 (passing insufficient check, complaint filed March 3, 1988); United States v. Rodriguez, SA-87-268M-1 (driving while intoxicated, complaint filed June 8, 1987); United States v. Moore, SA-87-400M-1 (driving while intoxicated, complaint filed August 20, 1987); United States v. Martinez, SA-87-439M-1 (case dismissed a year after filing when defendant made restitution); United States v. Meye, SA-87-552M-1 (driving while intoxicated, complaint filed November 10, 1987); United States v. Maldonado, SA-88-130M-1 (misdemeanor theft, complaint filed April 5, 1988); United States v. Perry, SA-88-220M-1 (uttering worthless checks, complaint filed June 7, 1988); United States v. Lacy, SA-88-220M-1 (driving while intoxicated, complaint filed June 7, 1988). A more thorough search of the files in the Public Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many, many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement, revealing a continuing pattern of failure to bring formal charges within the time permitted by the Act. The government in this district does indeed "frequently fail to meet the time limits." . . .

MACRO-ORGANIZATION REVISION: THE ARGUMENT

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

[Introductory sentence or two, as required by the rules or conventions of the jurisdiction.]

After charging Mr. Bauza with the theft of merchandise worth $26, a misdemeanor, the government failed to indict him within the Speedy Trial Act's 30-day time limit. That failure resulted solely from the government's procrastination and negligence, not from plea bargaining or any action by the defense. The Court should therefore dismiss this case with prejudice, a result dictated by the Act's language and legislative history, and by relevant case law.

The Act requires dismissal *with prejudice* when, as in this case, the offense is minor, the delay was caused solely by the government, and reprosecution would not contribute to the administration of justice. This remedy is further justified by the Act's legislative history, which warns that routine dismissal of cases by the government *without* prejudice will undermine the Act's effectiveness.

Courts have consistently ordered dismissal with prejudice when, as in this case, delay results from the government's negligence. Although the Fifth Circuit has not confronted this precise issue, it has noted that dismissal with prejudice would be appropriate when the government regularly violates the Act's time limits. Prosecutors in this District have indeed regularly done so.

I. All three of the Speedy Trial Act's elements for dismissal – non-seriousness of the offense, prosecutorial misconduct, and the administration of justice – are evident in this case.

The Speedy Trial Act not only requires charges to be dismissed if no information or indictment is filed within thirty days from the date on which an individual is arrested or served with a summons. 18 U.S.C. 3161(b). It also establishes three factors that a court must consider, among others, indeciding whether to dismiss with prejudice:

a. the seriousness of the offense,
b. the facts and circumstances leading to the dismissal, and
c. the impact of a reprosecution on the administration of justice.

In this case, all three of these factors weigh in favor of dismissal with prejudice.

A. The charges against Mr. Bauza are minor. ….

B. Delay has been due to prosecutorial procrastination.

The record demonstrates that the government has failed to take further action for at

least a month after each of its contacts with the defense. It offers no explanation for these delays. Although it refers to a need for continued plea negotiations, it has known since January 11, 1989, almost three months before it filed an information, that Mr. Bauza would not plead guilty.

….

C. Reprosecution would be inconsistent with the administration of justice.

In deciding whether dismissal should be with or without prejudice, the Speedy Trial Act's legislative history is instructive. It reflects much concern that dismissal without prejudice would overburden the grand jury system and, more important, would diminish or destroy the Act's effectiveness as a sanction against unjustified prosecutorial delays.

….

II. Case law supports dismissal with prejudice when a delay results from the Government's negligence or when prosecutors regularly fail to meet time limits.

Although courts have generally rejected a presumption that a dismissal for violating the Speedy Trial Act should be with prejudice, several courts have held that dismissal with prejudice is required when the government fails to act through negligence, as occurred in this case. In addition, two Fifth Circuit opinions have stated in dicta that dismissal with prejudice is appropriate when the government "regularly or frequently fails to meet the time limits." [Citation] Federal prosecutors in this district have an established pattern of failing to meet the limits.

A. Other Circuits routinely approve dismissal with prejudice when, as in this case, a delay results from government negligence.

Both the Second and Eleventh Circuits have held that such government negligence justifies dismissal with prejudice—even though, in the Eleventh Circuit case, the underlying offenses were serious.

[DISCUSSION OF CAPERELLA AND RUSSO]

B. This Circuit's reasoning supports dismissing cases with prejudice where the government frequently fails to comply with the Act.

The government's negligence warrants dismissal with prejudice, especially in a case involving the theft of $26 of merchandise, even if no other factors did. In addition, however, the Fifth Circuit has said in dicta that courts should look to whether the government "regularly or frequently fails to meet the time limits."

[EXPANDED DISCUSSION OF SALGADO-HERNANDEZ AND MELQUIZO]

[Note: in the original, this discussion is too sketchy to be helpful or persuasive. Either the cases and the dicta that resulted should be discussed in more detail, or—if they will not bear closer examination—dropped from the brief or, at most, relegated to a footnote.]

The record in this case is replete with such failures, starting with the Salgado-Hernandez case. A cursory, incomplete examination of cases in the Federal Public Defender's office reveals 29 instances in which the government has failed to prosecute within the time limits of the Speedy Trial Act. While most of the cases involve charges of drunk driving, several involve fraud and theft charges similar to those in the present case.

Most recently....

A more thorough search of the files in the Public Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement. Such a continuing pattern of failure to bring formal charges within the time permitted by the Act justifies . . .

PART III: EFFECTIVE ORGANIZATION OF LAW AND FACTS

IMPLEMENTING PRINCIPLE 2:
AVOIDING DEFAULT ORGANIZATIONS

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

ORGANIZING A DISCUSSION OF THE LAW:

THE PROBLEM OF "DEFAULT" (OR "READY-MADE") ORGANIZATIONS

The most common traps:

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

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

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

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #1

Before:

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

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

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

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

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

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

After:

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

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

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

In NLRB v. Acme Manufacturing ....

In Comfort Hotels v. Hotel Employees ....

In John Smith v. Jones ....

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #2

Before:

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

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

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

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

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

After:

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

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

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #3

Before:

ASSESSMENT OF COSTS

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

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

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

After:

ASSESSMENT OF COSTS

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

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

....

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

....

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

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #4

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

Before:

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

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

After:

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

1. The Content of the Non-Disturbance Agreement

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

ORGANIZING FACTS

The Methods:

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

The Danger:

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

ORGANIZING FACTS: EXAMPLE #1

By Chronology & Protagonist: J. entered first grade ….

In 1981, he was placed in ….

Two years later, he was moved to ….

By Issue: Starting in 1980, J. began to exhibit behavior that …. As a result of this behavior, by 1983 school authorities concluded that ….

By Witness: On the question of whether his present non-residential program has resulted in significant educational progress, Dr. Jones stated that ….

Mr. Smith, on the other hand, stated that ….

ORGANIZING FACTS: EXAMPLE #2

Before:

On August 4, 1983, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of I-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of I-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25 so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

After:

[FIRST, THE CONTEXTUAL FACTS] Jessica Hall was severely injured when a pickup truck driven by her mother, Wendy Hall, collided with a tractor trailer driven by John Jones.

[NEXT, THE GEOGRAPHY] The accident occurred at the intersection of exit 9 from I-84 with routes 6 and 25. At this point, routes 6 and 25 merge into one road as they are joined by the exit spur. According to Wendy Hall's testimony, the view from the exit spur is obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on routes 6 and 25.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 and proceeded east on the exit spur to routes 6 and 25. When she approached the intersection, she attempted to turn left to go north. She testified that because she could not see traffic traveling south, she inched her way onto the highway to obtain a view. She did not see Jones' tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck Wendy Hall's truck.

ORGANIZING FACTS: EXAMPLE #3

Appellant Hann was convicted of criminal trespass after taxiing his airplane from a hangar across part of an airport which the complaining witness, Hyde, leased and had posted with "no trespassing" signs. Appellant argues that two agreements signed as the airport changed ownership over the years constituted effective consent to his crossing of the property, or at least created reasonable doubt about his guilt.

Before:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on thirty-four acres of her land. She later bought more land northeast of the original tract and made additional improvements, including extensions to the runway and taxiways.

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion where the transient area is located. Part of the purchase price was carried by a note from Varner to Whyte and secured by a vendor's lien and deed of trust. In the deed to Varner, Whyte reserved certain easements and rights for access to the runway from her property located in the northeast corner of the airport. In 1982, Hyde-Way, Inc., owned by Hyde, acquired all of Varner's interest and assumed the note owed by Varner to Whyte.

Sometime prior to October 19, 1983, Hyde's corporation purchased 119 acres located west of the runway and referred to as the Northwest Development Addition. Misunderstandings and disputes arose between Whyte and Hyde concerning obligations, rights, and other matters pertaining to the airport. On October 19, 1983, a settlement agreement was entered into between Whyte and Hyde-Way, Inc. and Glen Hyde, individually, and by which Hyde agreed to convey to Whyte certain real property located on the Northwest Development Addition. This conveyance was apparently in payment of the balance owed to Whyte under the 1980 note from Varner. This conveyance also included ten hangars located on the land, one of which was being used by appellant as a tenant of Whyte at the time of his arrest. Whyte was then still the owner of the hangar and told the appellant that he had access to the runway across the transient area under the terms of the settlement agreement between Whyte and Hyde.

Under that agreement, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner:

> [E]xcept that Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport. Whyte agrees, however, that on the sale of any of the hangars granted to her in this agreement or purchased by her in the Northwest Development Addition she or her buyers will execute the Runway License Agreement now required by Hyde from purchasers in the Northwest Development Addition.

On February 5, 1987, Hyde sold whatever property he owned, including the transient area, to a Nevada mining corporation. At the time appellant was arrested for trespassing, on April 20, 1987, Hyde owned only a month-to-month tenancy under a verbal lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde over their airport transactions, and that they had been in civil litigation for over two years before appellant was convicted in this case. This litigation apparently did not involve the interpretation of the above quoted language from the settlement agreement insofar as it was determinative of appellant's right to cross the transient area on April 20, 1987. Appellant urges that as Whyte's tenant he had access across the transient area on that date by virtue of the easement rights which Whyte retained in her agreement with Varner and which she was authorized to convey under the settlement agreement with Hyde.

After:

[FIRST, THE CONTEXT]

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on her land. Over the years, parts of it changed hands several times. Throughout these changes, Whyte retained part of the property, some of which she leased to tenants such as Ham.

[NEXT, THE BACKGROUND NARRATIVE]

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion on which appellant allegedly trespassed. Part of the purchase price was carried by a note from Varner to Whyte.

In 1982, all of Varner's interest was acquired by Hyde-Way, Inc., owned by Hyde. Hyde-Way also assumed the note. Sometime thereafter, it purchased more land located west of the runway and referred to as the Northwest Development Addition.

On October 19, 1983, Hyde-Way, Inc., and Hyde individually entered into an agreement with Whyte in which, among other matters, Hyde agreed to convey to Whyte certain real property in the Northwest Development Addition, in payment of the balance owed under the 1980 note. This conveyance included ten hangars, including the hangar that appellant was renting at the time of his arrest.

On February 5, 1987, several weeks before the arrest, Hyde sold his airport property to a Nevada mining corporation. On the day of the arrest, he owned only a month-to-month tenancy under an oral lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde. The 1983 agreement between them was intended to settle these disputes, but they had been in civil litigation for over two years before appellant was convicted in this case. The litigation, however, did not address the issues raised by this appeal.

[NEXT, THE FACTS ON WHICH THE CASE TURNS]

Appellant relies on the terms of Whyte's 1980 sale of the airport to Varner, Hyde's predecessor, and of Whyte's 1983 agreement with Hyde. Based on those agreements, appellant argues, there is sufficient reason to believe that he had effective consent to enter Hyde's property so that the trial court could not have found him guilty beyond a reasonable doubt.

In 1980, when Whyte sold part of her land to Varner, the deed reserved to Whyte certain easements and rights for access to the runway from her property. In relevant part, the deed states:

[NOTE: IN THIS FORM OF ORGANIZATION, IT BECOMES CLEARER THAT A CRUCIAL ITEM—THE RELEVANT LANGUAGE FROM THE 1980 DEED—IS MISSING.]

Under Whyte's 1983 agreement with Hyde, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner, with the following exceptions:

> Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport.

ORGANIZING FACTS: EXAMPLE #4

MORISSETTE v. UNITED STATES, 342 U.S. 246, 72 S. Ct. 240 (1952)
OPINION: MR. JUSTICE JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger—Keep Out—Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 U. S. C. Sec. 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $200. The Court of Appeals affirmed, one judge dissenting.

EDITING EXERCISE: CORPORATE LETTER MEMO

Smith, Jones, Roberts & Green

John F. Green
(222) 555-6666

February 16, 1987

James S. Client
Senior Vice President
Apex Investment Corp.
3333 Main Street
Metropolis, Maine 01111

Re: Amendment of Rule 10b-6

Dear Jim:

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

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

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

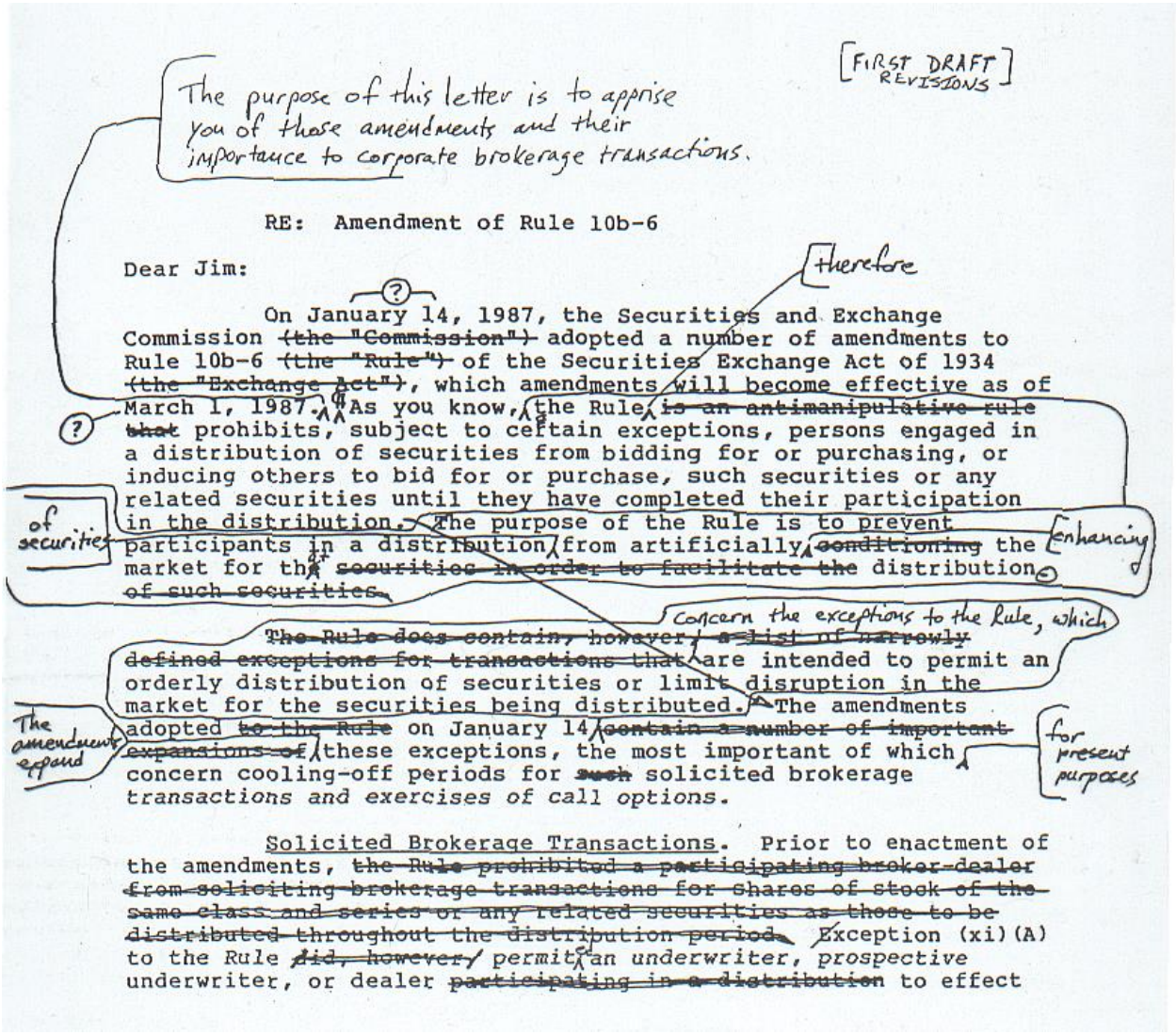
[THREE PAGES OF TEXT OMITTED]

Sincerely yours,

John F. Green

EDITING EXERCISE

CORPORATE LETTER MEMO: HAND EDITS



[FIRST DRAFT REVISIONS]

The purpose of this letter is to apprise you of those amendments and their importance to corporate brokerage transactions.

RE: Amendment of Rule 10b-6

Dear Jim:

therefore

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

of securities

enhancing

concern the exceptions to the Rule, which

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

The amendments expand

for present purposes

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

EDITING EXERCISE: CORPORATE LETTER MEMO (revision #1)

Smith, Jones, Roberts & Green

John F. Green
(222) 555-6666

February 16, 1987

James F. Client
Senior Vice President
Apex Investment Corp.
3333 Main Street
Metropolis, Maine 01111

Re: Liberalized Amendments to Rule 10b-6

Dear Jim:

On January 14, 1987, the Securities and Exchange Commission adopted a number of amendments to Rule 10b-6 of the Securities Exchange Act of 1934, which amendments will become effective on March 1, 1987. The purpose of this letter is to apprise you of those amendments and their importance to corporate brokerage transactions.

As you know, the purpose of the Rule is to prevent participants in a distribution of securities from artificially enhancing the market for that distribution. The Rule therefore prohibits, subject to certain exceptions, persons engaged in a distribution of securities from bidding for or purchasing, or inducing others to bid for or purchase, such securities or any related securities until they have completed their participation in the distribution. The amendments adopted on January 14th concern the exceptions to the rule, which are intended to permit an orderly distribution of securities or limit disruption in the market for the securities being distributed. The amendments expand these exceptions, the most important of which for present purposes concern cooling-off periods for solicited brokerage transactions and exercises of call options.

Solicited Brokerage Transactions. Before the amendments were enacted, exception (xi)(A) to the Rule permitted an underwriter, prospective underwriter, or dealer to effect . . . .

[THREE PAGES OF TEXT OMITTED]

Sincerely yours,

John F. Green

Revision #2:

Dear Jim:

The Securities and Exchange Commission recently adopted a number of amendments to Rule 10b-6 of the Securities Exchange Act of 1934. These amendments, which become effective as of March 1, expand the exceptions to the Rule's general prohibition against persons engaged in a distribution of securities entering the market for them. Because these changes will affect your firm's work, we are providing the following analysis of their impact.

Among the changes, these are the most important for your firm:

1. . . . .
2. . . . .
3. . . . .

Background. The changes do not alter the Rule's purpose of preventing persons engaged in a distribution from artificially enhancing the market for the securities to facilitate their distribution. In general, the Rule prohibits these persons from bidding for or purchasing the securities or related securities, or inducing others to bid for or purchase them. The prohibition extends for as long as a person continues to participate in the distribution.

Before the January14 amendments, however, the Rule contained only some narrow exceptions to these prohibitions, for transactions intended to permit an orderly distribution of securities or to limit disruption in the market for them. The amendments have significantly expanded the exceptions.

Solicited Brokerage Transactions. . . . .

Revision #3:

Dear Jim:

Good news! The Securities and Exchange Commission has finally adopted amendments to Rule 10b-6 of the 1934 Act that will directly benefit your firm's work . . . .

Revision #4:

Dear Jim:

The SEC recently liberalized the stabilizing rules that govern Apex's activities when it participates in an underwriting. Previously prohibited trades will now be legal. For example, the cooling off periods for solicited brokerage transactions are much shorter and open call option positions can be exercised sooner.

I have enclosed a chart that summarizes the rule's impact: what stays the same, what has changed. As a result of these rule changes, you may want us to meet with Allison Straightarrow and any of her Compliance Department staff that you designate to go over possible changes to Apex's compliance procedures.

In the mean time, call me if you have any questions about what the SEC has done.

Sincerely yours,

John F. Green

Attachment