

# The Mississippi Bar Litigation Section

## E-Newsletter

Summer 2016

### SPECIAL POINTS OF INTEREST:

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## Message from Chair – Meade Mitchell<sup>1</sup>

Dear Members of the Litigation Section,

It has been a distinct pleasure to chair the Litigation Section this year. The Section is involved in a wide range of activities of interest to the civil litigator, the general practitioner, and the bench. As a service to Mississippi attorneys, the Section sponsors the Mississippi Rules Annotated, which is published by Mississippi College. Also, through newsletters, email services, and CLE seminars, the Section analyzes, discusses, and provides methods and services designed to promote justice in our courts.

As we conclude the bar year, I am pleased to announce that the Litigation and the Appellate Practice Sections will co-sponsor an informative CLE program at the Mississippi Bar Convention. Three federal judges, including a member of the United States Advisory Committee on Civil Rules, will discuss the recent amendments to the federal rules. The program will take place on Friday, July 15, 2016 beginning at 10:15 am and concluding at 12:15 pm. We hope you can attend.

The Section was quite active during the 2015-2016 bar year. Along with the Young Lawyers Division of The Mississippi Bar, it sponsored the inaugural Deposition Academy on November 12-13, 2015 at the Bar Center. This CLE program was tailored to provide young lawyers practical and strategic skills and tools for conducting depositions of parties, witnesses and experts by learning from, and observing, the deposition techniques of seasoned trial attorneys. The two-day program provided 12 hours of CLE and was almost an immediate sell-out. The Deposition Academy will be a reoccurring event.

The Section routinely publishes newsletters and published several this year. If you are interested in submitting an article for the next newsletter, please inform Kelly Sessoms (ksessoms@dwwattorneys.com). Prior newsletters are available for your review at the following link. <http://www.msbar.org/inside-the-bar/sections/litigation.aspx>. Your Section also sponsored an edition of The Mississippi Lawyer this year, which was recently published. We hope the articles in this newsletter and prior Section publications are beneficial to your practice.

The Section continued its support of state law students by awarding four law school scholarships at Ole Miss and Mississippi College. Additionally, it continued to financially aid the Mississippi Volunteer Lawyers Project (MVLP), which has helped the needy of our state obtain legal services they otherwise could not afford since 1982. The Section also promotes and encourages personal interaction between members of the bar. In that vein, the Section hosted a social for its members in central Mississippi, along with the Capital Area Bar Association and the Jackson Young Lawyers, on April 28, 2016. Additionally, it conducted a social for its members with the Inns of Court in Gulfport on June 9, 2016. It expects to host similar socials in northern Mississippi.

Mississippi is the home of some of the best litigators in the country. The Litigation Section will continue to work to provide content, programs, and publications to help us all learn and improve. As the Section strives toward this goal, it welcomes ideas and participation. If you desire to assist or have ideas, please contact any member of the Section's Executive Committee.



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## Message from Incoming Chair - A. Kelly Sessoms III<sup>1</sup>

Dear Members of the Litigation Section,

Welcome to the Summer 2016 E-Newsletter of the Litigation Section of The Mississippi Bar.

I am honored to serve on the Litigation Section's Executive Committee and as its Chair for the 2016-2017 year. My plans are simple: to continue the momentum started by Current Chair, Meade Mitchell. As noted by Meade in his outgoing column, *supra*, the Litigation Section has been very busy this past year. I would like to thank Meade for his outstanding leadership. My goal will be to continue to support the programs and activities that will serve the bench, bar and public at large.



The Executive Committee and I look forward to serving you during the upcoming year. I encourage each of you to attend the Bar Convention scheduled for July 11-16, 2016 in Sandestin. Of course, should you have any suggestions or ideas on how to make your membership in the Litigation Section more meaningful, please do not hesitate to email or call.

Thank you for your participation in the Litigation Section, and best wishes for a safe and enjoyable summer.

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## Litigation Section donates to MVLP

The Litigation Section of The Mississippi Bar recently donated \$5,000 to the Mississippi Volunteer Lawyers Project (MVLP). Pictured at the presentation are Gayla Carpenter-Sanders, Executive Director/General Counsel of MVLP and Meade Mitchell, Chair of the Litigation Section. MVLP provides free legal assistance throughout Mississippi. To volunteer, donate, or learn more about MVLP visit <http://www.mvlp.net>



## Save the Date - CLE at the Annual Meeting

*Friday, July 15, 2016 - 10:15 am -12:15 pm*

**“Discussion from the Bench on the Recent Amendments to the Federal Rules of Civil Procedure”**

Presented By:

**Magistrate Judge Craig Shaffer**, United States District Court for the District of Colorado  
(Serving member on the US Advisory Committee on Civil Rules)

**Chief US District Judge Louis Guirola, Jr.**, United States District Court for Southern District of MS

**Chief US District Judge Sharion Aycock**, United States District Court for Northern District of MS

## Litigation Section Socials

The Section hosted a social for its members in central Mississippi, as well as, recent bar admittees, along with the Capital Area Bar Association and the Jackson Young Lawyers, on April 28, 2016. Additionally, it conducted a social for its members, in conjunction with the Inns of Court, in Gulfport on June 9, 2016.



## Section Awards Scholarships to Law Students

### University of Mississippi Law School

The Litigation Section awarded \$1000 scholarships to two outstanding law school students at the University of Mississippi in the Spring of 2016. Pictured below are the Litigation Section award recipients Mary Margaret Roark (left) and John Juricich (right), along with Section Executive Committee member, Brian Hyneman.



### Mississippi College School of Law

On behalf of the Litigation Section, Clarence Webster, executive committee member, along with MC Dean Wendy Scott presented Jessica Terrill Pulliam and Blantley Elizabeth Walton with a \$1000 scholarship each. The scholarships were presented at the Law Day Awards Ceremony in the Spring of 2016. Pictured below are Dean Scott, Jessica Terrill Pulliam and Clarence Webster. Brantley Walton was unable to attend.



## Square Pegs and Round Holes: Discovery from the Perspective of Closing Argument

by Mark A. Dreher and Orlando R. Richmond<sup>1</sup>

In one scene from the 1995 Ron Howard film *Apollo 13*, NASA mission control learns that the damaged spacecraft and landing module is not adequately filtering carbon dioxide; unchecked, the onboard air will become toxic to the astronauts. A frantic team of engineers assembles in a workroom and empties a box of spare parts onto a table, as their spokesman explains the problem: “We gotta’ find a way to make *this* (holds up a square filter) fit into the hole for *this* (holds up a round filter), using nothing but *that* (surveys the material strewn on the table).” The engineers begin to sort through their options, while one engineer prepares for the inevitable all-nighter: “Better get some coffee going.”



Mark A. Dreher



Orlando R. Richmond

That scene is all too familiar to defense lawyers huddling in a cramped war room at a trial site in the late stages of the proceedings. The sensational closing argument has been scrapped, and the only way to land the client’s case safely is to clear the air by rigging the parts available: the discovery brought along from the beginning of the case, often years earlier. The problem? Despite a number of legitimate rationales and drivers, discovery is rarely pursued – particularly in complex matters or mass torts – anticipating the trial presentation.

### Why do we conduct discovery the way we do?

The mechanics of discovery are often influenced by the philosophical approach behind it. Further, the more sophisticated the client or law firm (or litigation), the more an approach to discovery may be governed by such “discovery philosophies.” Examples of competing approaches include:

- **Supporting purely legal defenses or settlement.** For some clients and lawyers, trial itself – even apart from verdict – is an unacceptable outcome. The relatively high costs of defense, risks of exposure, and inherent unpredictability of a trial dictate that discovery be had with one of two goals in mind: (1) to efficiently establish only those facts necessary to satisfy the elements of discrete legal defenses; or (2) to put the case in the most favorable posture for settlement.
- **Punitive discovery.** Other clients and their attorneys view the available tools of discovery as a means to harry and deter their opponents. The mindset towards the adversary is often to “make them pay” for engaging in the suit through discovery geared to draw off an opponent’s resources or to distract from the key issues.

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- ***No fact too small.*** In still other scenarios, lawyers view discovery as just that, and try to get as much information as they can, in the hopes of unearthing support for as yet undeveloped factual or legal theories. These lawyers occasionally run afoul of judicial prohibitions against “fishing expeditions,” or client complaints of churning a file.
- ***Malpractice “insurance.”*** Here, while the discovery may look similarly broad to other approaches, the underlying rationale is very different. That is, sometimes expansive discovery is conducted not to support theories or to find new facts, but to hedge against a client critique by eliminating any foreseeable gap. This unfortunate approach puts more stock in preserving the lawyer’s book of business than in advancing the case.

Given these discovery rationales, it should come as no surprise that defense trial counsel often find themselves cobbling together mismatched facts and sifting through mountains of irrelevant data to craft a trial presentation. This also explains why plaintiffs tend to do a better job at theming and storytelling at trial. To be sure, there are inherent advantages in the plaintiffs’ “you are here to right a wrong” posture to a jury; however, much of this success can also be attributed to a direct, uncluttered approach to discovery.

With some statistics reflecting that as few as five percent of filed cases are ultimately tried, there may be a tendency to discount a trial approach to discovery. However, the corollary benefits of the approach may serve other goals, in addition to better equipping the (rare) trial presentation.

### **Begin with the Endgame**

The notion of working backwards from a desired result is nothing new in management and development circles, but may be overlooked in the discovery context. Here are three practical avenues to consider:

- ***Jury instructions.*** How the judge instructs the jury on the law should inform how attorneys gather the facts. Writing proposed jury instructions when a suit is initiated helps to shape the ultimate issues and meaningful arguments throughout the life of the case. Instructions also help the attorney identify the elements to satisfy or reinforce through multiple sources of evidence.
- ***The “case law” paradox.*** Another familiar practice after the close of discovery is the scramble to distinguish the facts from the cases cited in opponents’ summary judgment papers. Rather than responding to “bad cases” after discovery has closed, consider finding “good cases” that support the client’s position, and use discovery to establish facts aligning the case with those holdings to reinforce the strength of the client’s case.
- ***Jury research.*** Often in high-stakes cases, clients will commission jury research exercises in which trial counsel may test themes or arguments with mock juries in advance of trial. The predictive value in these exercises need not be limited to established evidence; jury exercises before or during discovery can help attorneys identify what facts will likely be important or meaningful to the jury at trial, at a point when the attorneys may still be able to develop those facts.

Discovery conducted when employing one or more of these tactics may look very different from more conventional approaches.

## Written Discovery

Traditional law practice often delegates the preparation of discovery requests to young associates instructed not “to reinvent the wheel.” These young lawyers typically reformat existing sets of discovery from similar matters or prior sets prepared for the same client. Yet the early efficiencies gained from block-and-copy word processing can be costly at trial when discovery is incomplete or off-target. Further, with proposed changes to the Federal Rules of Civil Procedure affecting the proportional scope of discovery and the number and type of discovery requests, attorneys will be forced to conduct discovery more strategically, which dovetails perfectly with trial-guided discovery.

For interrogatories, it is important to consider a balance between broad inquiries and narrowly focused requests. An effective set of interrogatories should include both. Additionally, do not neglect the effect interrogatories have in signaling to your opponent your strategic thinking about the case. There may be instances, for example, when it is advisable to withhold some interrogatories until after certain depositions have been conducted, both to preserve the ability to follow up on newly discovered facts and to prevent opposing counsel from using the interrogatories as a “playbook” from which to prepare the deponent.

Requests for admission are also under-utilized as a discovery device. Too often, “RFAs” are considered requests for *admissibility*, not requests for *admission*. A well-crafted RFA can lead not only to a highlight in front of a jury (both atmospherically and substantively), but can often impact or limit your opponent’s litigation choices relatively early in the proceedings.

Finally, when it comes to discovery in general, we have all heard lawyers instructing the jury at the outset of a trial: “Don’t check your common sense at the door.” That is also sage advice for lawyers in discovery. Well-crafted written discovery should include good questions that will prevent “loophole” deflections or responses without bogging down in indecipherable legalese.

## E-Discovery

For clients and lawyers alike, the term “e-discovery” may evoke apprehension and fear. The generational divide between older clients and attorneys and the technological changes to both the corporate business model and the practice of law is rarely more evident than with the question of navigating e-discovery. However, there are two practical solutions for lawyers and clients facing e-discovery issues:

- ***Find an expert.*** E-discovery is now so much a part of litigation that companies have protocols and law firms have developed specialized practices to field e-discovery issues. The implications of mishandled e-discovery are too great to “wing it.” Where clients and lawyers lack the specialized skill set to deal with e-discovery, it is critical to partner with someone who does.
- ***Be an expert.*** Forward-thinking firms are also building internal systems to tackle e-discovery issues head-on. Task forces and working groups of lawyers are pursuing training and certification in e-discovery issues, while corporate clients have developed document retention and collection systems to avoid discovery problems.

## Depositions

While written and e-discovery can make or break a case, depositions are the backbone of trial-guided discovery. Tactical approaches to depositions require analysis from two perspectives.

- ***The witness perspective.*** Witness testimony at deposition has a lasting, binding effect on the case, and sets the bounds for the approach to the trial. One quote can make the difference in whether the witness is called or not, while – particularly in lengthy, complex litigation – the deposition may outlive the witness (both literally and figuratively). Lawyers must approach the deposition with clearly articulable goals to elicit testimony (what testimony do I need from this witness) and to fix that testimony (what can I do to prevent my opponent from distinguishing or distancing the witness from the testimony I need). Further, given the tension between a “perpetually available” deposition transcript or video and the dynamics of trial schedules and witness availability, lawyers should take a hard look at the conventional wisdom of deferring questions for friendly witnesses. That is, given the risk the witness may not appear at trial, lawyers may not want the only voice or questions a jury hears with a witness to be their opponents’.
- ***The lawyer perspective.*** As important as the “what” of a witness’ testimony is the “how” and “when” of the lawyer’s questions. The way a lawyer crafts and orders a deposition outline can directly influence the answers the witness gives. Situational awareness is critical to determine the appropriate instances to ask open-ended, narrow, or leading questions. Further, while the goal should be fixed testimony where it is helpful, “bad answers” need not be set in stone; lawyers should consider options to rehabilitate testimony at the deposition or even to leverage that testimony for some other purpose (like an alternate legal claim or defense). Finally, plaintiffs’ counsel often approach depositions with the goal of collecting soundbite testimony to be natural highlights of a trial presentation. Too often, defense counsel view such efforts as unseemly or misleading. For trial-guided discovery, however, “soundbite” is not a dirty word. Short, direct, memorable testimony is a powerful tool in a trial presentation; defense counsel would be wise to adopt it as one weapon in the arsenal for trial.

## Experts

When it comes to experts (particularly opposing experts), trial-guided discovery may not differ too significantly from other-purposed discovery. For example, it is a universal goal to establish limits to the scope of an opposing expert’s expertise and opinions. Some trial-guided tactics, however, may seem otherwise counter-intuitive:

- ***Establish points of agreement.*** Any valid opposing expert will offer opinions diametrically opposed to the client’s view of the case. But short of these “ultimate” opinions, there should be available common ground. Memorializing these agreements – as to objective standards or benchmarks in the field of expertise, *e.g.* – can provide a launching point for a trial cross-examination, with a simple jury assumption that trial counsel is “winning” the exchange.
- ***Do not avoid “bad testimony.”*** One mistake lawyers often make is to conflate their approach to depositions between party witnesses and experts. One goal in party witness depositions is to avoid, limit, and rehabilitate bad testimony; however, with experts, bad

testimony is expected. The goal of an expert deposition should not be to avoid bad testimony but to exhaust it, in order to fix the limits of that testimony at trial.

- ***Go right at 'em.*** Similarly, many lawyers attempt to contest opposing expert admissibility and testimony by attacking discrepancies in the expert's peripheral opinions or methodology. However, "nibbling at the edges" of an opposing expert's opinions has little effect at trial; the jury wants to focus on the big, determinative issues. Particularly when dealing with professional or well-seasoned expert witnesses, it is important to understand and establish specifics of the expert's opinions; otherwise, lawyers risk general and dynamic critiques at trial that are difficult to rebut.

### **Conclusion**

We've all seen brilliant "extemporizing" in closing arguments from movies or TV shows ranging from *To Kill a Mockingbird* to *Law and Order* or *Boston Legal*. Some of us have been fortunate enough to witness a few in "real life." These elegant arguments are scripted, of course; whether factual or fictional, they are bounded by the limits of available discovery and evidence. Viewing discovery through the lens of closing argument should not discourage the approach in other contexts, though. Trial-guided discovery can favorably shape an approach to the resolution of a case from motion practice to settlement; it just happens to have the added benefit of a trial presentation that doesn't attempt to fit square pegs into round holes.

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## **Ethics in Deposition Practice**

Last year, the Professionalism Committee of the Mississippi Bar Association, after seeking comment from various groups, including the Litigation Section, published guidelines on deposition of courtesy, civility and practice. The Mississippi Bar encourages its members review and adhere to the following tenants:

[Board of Commissioners Adopt Deposition Guidelines](#)

# Trends In Brief Writing: Sounding Less Like A Lawyer In Documents Designed To Be More Readable

by Professor Victoria A. Lowery



**Victoria A. Lowery**

“[G]ood legal writing does not sound as though it was written by a lawyer. Good legal writing, like good writing in general, is writing that keeps the reader’s interests foremost.”<sup>1</sup>

--William Eich, former Chief Judge, Wisconsin Court of Appeals

## Introduction

Today’s lawyers are learning to create legal writing that does not sound—or necessarily look—like it was written by a lawyer. Legal writers are making a conscious effort to write prose that a judge (and most importantly, a judge’s clerk) will want to read. They are becoming more proficient at designing documents that look less like legal documents and more like the books and web pages that we routinely read.

## Document Design

Legal writers are concerned not only with the words they use in appellate briefs but also the design of the documents themselves. While an appellate brief must often conform to the strict requirements of the appellate court’s rules, it is possible to increase a document’s readability in subtle ways. In fact, doing so indicates to the court the lawyer’s respect for the judge’s time limitations.

Many legal writing scholars—including Bryan A. Garner, Ross Guberman, and Matthew Butterick—regularly emphasize in their books and articles the importance of modern lawyers becoming proficient in document design. This article presents ideas from these leading legal writing experts for increasing the readability of appellate briefs, as well as, concrete examples from appellate briefs actually filed.

## Fonts

“Bah,” an attorney-friend balked when I suggested that many courts are recommending and requiring fonts other than Times New Roman. “But Times New Roman is standard,” he replied. At best, it is a standard bad habit.

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<sup>1</sup> ROSS GUBERMAN, POINT MADE. HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 278 (Oxford University Press, 2011).

According to Matthew Butterick, “[o]bjectively, there’s nothing wrong with Times New Roman. It was designed for a newspaper, so it’s a bit narrower than most text fonts.”<sup>2</sup> The use of Times New Roman, however, suggests indifference. It was designed in 1929 for the *Times* of London and became the standard font of both Mac and Windows in the ‘80’s and ‘90’s.<sup>3</sup> Butterick implores that “[i]f you have a choice about using Times New Roman, please stop.”<sup>4</sup>

Butterick is not alone in his distaste for Times New Roman. The Seventh Circuit also suggests avoiding Times New Roman: “Briefs are like books rather than newspapers.”<sup>5</sup> As noted above, Times New Roman was designed for readers of newspapers, not for readers of complicated legal documents.<sup>6</sup> Parsing legal documents requires careful attention, while newspapers are designed to be scanned.<sup>7</sup> As such, the typeface in briefs should be set with the goal of enhanced--not lessened--readability.<sup>8</sup>

So what fonts should be used to make briefs more readable? Butterick provides a chart of fonts graded as A, B, C, and F. Many of the suggested fonts do not exist in the list of standard system fonts on Microsoft Office 2007.<sup>9</sup>

<p><b>A List:</b> Book Antigua Garamond</p>	<p><b>B List:</b> Calibri Century Constantia Corbel Segoe UI</p>
<p><b>C List:</b> Cambria Century Gothic Consolas Courier New Georgia Lucidia Console Lucidia Handwriting Lucida Sans Unicode Plantagenet Cherokee Times New Roman</p>	<p><b>F List:</b> Arial Bradley Hand ITC Bookman Old Style Comic Sans Freestyle Script French Script Gabriola Mistral Papyrus Tempus Sans ITC Trebuchet MS Verdana</p>

<sup>2</sup> MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS* 110 (Jones McClure Publishing, 2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 111.

<sup>5</sup> United States Court of Appeals for the Seventh Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers* 3, <http://www.ca7.uscourts.gov/Rules/type.pdf> (last visited June 1, 2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Fonts listed in this section appear in the standard system fonts on Microsoft Office 2007. The complete list of fonts can be found in MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS* 79.

The judges of the Seventh Circuit have given a lot of thought to how to make a brief look good—and “thus more likely to be grasped and retained.”<sup>10</sup> Here are some of the court’s recommendations:

- Use proportionately spaced fonts designed for books such as Book Antiqua, Calisto, Century, Century Schoolbook, and Bookman Old Style (noting that the Supreme Court and Solicitor General use Century).
- Consider avoiding Garamond and Times New Roman.
- Use italics, not underlining, for case names and emphasis.
- Use “smart quotes” and “smart apostrophes” (the curly kind, not the straight kind).
- Use one space after periods, not two.
- Avoid all-caps for headings. Use title case instead.<sup>11</sup>

### Bullet Points and Lists

Using the right font improves readability; however, making a document look good requires a bit more. A number of those who publish in the area of legal writing encourage practitioners to make points clearly and concisely by creating bulleted points or lists.

Bryan A. Garner suggests “[w]hen you don’t mean to imply that one thing is more important than another—that is, when you’re not signaling that there is a rank order—and there is little likelihood that the list will need to be cited, you might use bullet dots. They draw the eye immediately to the salient points and enhance readability.”<sup>12</sup> Tip 61 in Garner’s *The Winning Brief*<sup>13</sup> includes some guidelines:

- Ensure that the size of your bullets is proportional with the size of your type. You do not want overpowering bullets. The best bullets are typically just smaller than a lowercase “o” filled in with ink.
- Adjust your tab settings so you’ll have a small tab between the bullet and the text. Space them about the way you see them throughout Garner’s book—about .15 inch from the text that follows. Use a larger space for a paragraph indent.
- Always use a hanging indent. That is, do not allow the text to wrap under the bullet; instead, leave the bullet hanging out to the left. Learn what keystroke to use with your software.
- Single-space the bulleted text. If you have longish points, though, double-space between them [as here]. But do not ever make your bulleted items too long; you don’t want to raise suspicions that you’re playing with the text to sidestep page limits.

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<sup>10</sup> Seventh Circuit Court of Appeals, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 290 (Oxford University Press, 2d ed. 1995).

<sup>13</sup> BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 289-90 (Oxford University Press, 2d ed. 2004).

- Capitalize the first word in each bulleted item if that item ends with a period. Otherwise, lowercase the first word and put a semicolon at the end of each one (except the last, which should end with a period).
- Keep your items grammatically parallel.
- End your introduction to the bulleted list with a colon. It serves as a bridge.
- Resist the temptation to play with computer-generated boxes, arrows, check marks, and other eye-catchers. Nothing else works quite as well as a bullet.

Ross Guberman, likewise, recommends using bullet points or lists for any of these six purposes<sup>14</sup>:

- relay procedural history;
- present evidence;
- establish a witness's qualifications;
- describe your opponent's conduct;
- present your own argument; and
- contrast your opponent's argument with your own.

To provide an effective example, Guberman points to Walter Dellinger's use of bullets to sharpen Petitioner's argument in the punitive damages case involving the Exxon Valdez fiasco<sup>15</sup>:

The ultimate question is therefore, whether judges should impose common-law punishment for a maritime oil spill in the form of punitive damages awards. And that question must be answered in light of the relevant considerations already discussed.

- Congress has already and **repeatedly addressed** the federal regulatory interest in this issue.
- Congress has **never considered** punitive damages an appropriate enforcement device in maritime policy.
- Punitive damages have **rarely been awarded** in maritime cases, and never for an unintentional discharge of oil or other hazardous substance.
- Maritime law seeks to protect maritime commerce and generally **disfavors expanded liability**.
- Punitive damages are a **blunt and arbitrary mechanism** for punishing and deterring certain conduct, and may well overdeter useful conduct.

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<sup>14</sup> GUBERMAN, *supra* note 1, at 228.

<sup>15</sup> *Id.* at 232 (citing Brief for Petitioners, at 42, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (No. 07-219) (emphasis added)).

Attorneys can choose whether to use bullets as a visual device or numerals as a ranking device. As an example of using numbers rather than bullets, Guberman refers us to Nancy Abell's appellate brief for Microsoft in a \$5 billion race-discrimination case:<sup>16</sup>

[T]he only question on appeal is whether the district court abused its discretion by dismissing Jackson's claims after three days of evidentially hearings revealed that Jackson had:

(1) **lied** about his involvement in the theft of his manager's password-protected computer e-mail file which contained over 10,000 documents, many proprietary or trade secrets (in which strategies for competing with Jackson's new employer), and many attorney-client privileged documents (in which Microsoft managers and Company attorneys discuss strategies for responding to some of Jackson's allegations in his lawsuit);

(2) **paid** the supposed their \$1,000 "in appreciation" for hacking the manager's computer and stealing the data;

(3) **reviewed** Microsoft's attorney-client privileged information about his own claims;

(4) **distributed** Microsoft's attorney-client communications pertaining to his claims (documents Jackson himself considered valuable) to his counsel;

(5) **accessed** Microsoft's attorney-client communications anew, even after being expressly cautioned that the material was privileged.

Attorneys routinely use short lists in the facts, the argument, and most of all, in the introduction. Guberman has his own "short list" of reasons to favor lists<sup>17</sup>:

1. Most disputes are won or lost on no more than four main points.
2. Generating these points—60 seconds' worth of talking—is more rewarding and less intimidating than facing a blank screen.
3. Once you settle on those points, your argument section will start to write itself.

According to Guberman, of all the top advocates discussed in his book, Maureen Mahoney is one of the best at using lists throughout her briefs. For example, in *Grutter v. Bollinger*, Mahoney defended the University of Michigan Law School against a challenge to its affirmative-action admissions plan. In her Statement of the Case, Mahoney lists three specific factual, legal, and policy reasons to leave the plan intact<sup>18</sup>:

**First**, the academic selectivity and student body diversity, including racial diversity, are both integral to the education mission of the Law School.

**Second**, the Law School successfully realizes both goals through an admissions program that is "virtually indistinguishable from the Harvard plan that five Justices approved in *Bakke*. It evaluates the potential contributions and academic promise of every individual and does not employ quotas or set-asides.

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<sup>16</sup> *Id.* at 230 (citing Brief for Appellee, at 1, *Jackson v. Microsoft Corp.*, 78 Fed. App'x 588 (9th Cir. 2003) (No. 02-35326) (emphasis added).

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.* at 13 (citing Brief for Respondents, at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (emphasis added).

**Third**, no honestly colorblind alternative could produce educationally meaningful racial diversity at present without enrolling students who are academically unprepared for the rigorous legal education that the Law School offers.

As Guberman explains, the way Mahoney sets up the dispute, “you can’t win unless you deny that selectivity and diversity are legitimate educational values, prove that the Michigan program was materially different from the plan approved decades before in *Bakke*, and explain how the university could attain racial diversity without the plan and without enrolling students who weren’t up to the task. If you can’t, game over. And it was over indeed: Mahoney’s side won.”<sup>19</sup>

Here is another example from Guberman, this one from *Christian Legal Society v. Martinez*, a dispute about whether a public law school could require student groups to admit any student who wants to join.<sup>20</sup> A Christian student group at Hastings College of Law allowed anyone to attend its meetings, but it required members to sign a statement of faith. After the law school refused to fund the group, the group sued. Here Mahoney and former Solicitor General Greg Garre explain why the law school had the better constitutional argument (and the Supreme Court later agreed):

**First**, this case does not concern any “force[d]” intrusion into the internal affairs of an expressive association.

**Second**, Hastings’ policy does not discriminate on the basis of viewpoint—so this case is far afield from the prototypical viewpoint discrimination cases on which petitioner grounds its argument.

**Third**, Hastings’ policy does not impose any “severe burden” on student groups, much less threaten their very existence.

**Fourth**, petitioner is not seeking—and by no means has been denied—*equal* access to Hastings’ programs and activities. It seeks a favored status: the fund and benefits that go along with school recognition *plus* an “exemption” from the rules that apply to every other group seeking such benefits.

### Diagrams, Photographs, and Other Visual Aids

Some information is more easily conveyed not through words, but through pictures or graphics. A great way to add interest and streamline information is to include charts, diagrams, maps, tables, photographs, and other visual aids— even within the text of the traditional hard copy of a brief. Judge Posner of the United States Court for the Seventh Circuit offers this advice:<sup>21</sup>

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<sup>19</sup> *Id.* at 13-15.

<sup>20</sup> *Id.* at 14-15 (citing Brief for Respondents, at 1-2, *Christian Legal Soc’y Chapter of Univ. Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371) (emphasis added).

<sup>21</sup> Hon. Richard A. Posner, *Effective Appellate Brief Writing*, LITIGATION NEWS, available at [http://apps.americanbar.org/litigation/litigationnews/trial\\_skills/appellate-brief-writing-posner.html](http://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html) (last visited July 27, 2012) (emphasis in original).

Wherever possible, use pictures, maps, diagrams, and other visual aids in your briefs. Some lawyers seem to think a word is worth a thousand pictures. The reverse, of course, is true. *Seeing* a case makes it come alive to judges. Many years ago I was on the panel that heard an appeal in a trademark dispute between the Indianapolis Colts and the Baltimore CFL Colts. The briefs described the trademarked products (such as hats and T-shirts) but did not include pictures. At the oral argument, one of the judges (OK, I confess—it was I) asked the lawyer for the Indianapolis Colts whether he had any of the products with him. He was a little startled but went to his briefcase and pulled a pair of hats, one an Indianapolis Colt hat and the other a Baltimore CFL Colt hat. The hats looked identical. He won his case at that moment. He was lucky that he was asked that question. He would not have needed luck had he included a photograph in his brief.

### Looking Forward

In the not-so-distant future, Theodore Forrence predicts that more than a few judges will be reading briefs on portable electronic devices with hyperlinks to interactive timelines, videotaped trial testimony, and other evidence.<sup>22</sup> Changes in the way we read appellate briefs are changing how lawyers draft them.

Robert Dubose, author of *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World*,<sup>23</sup> warns that our brains are “being rewired” by technological advances such as the Personal Computer (PC) and electronic tablets. And this “rewiring” is changing how we read documents.

When reading text on paper, our eyes move from left to right, moving line by line from top to bottom. But usability studies focused on eye-tracking patterns indicate that when we read text on a screen, we read in an “F-pattern.”



<sup>22</sup> Theodore C. Forrence, *Using Timelines, Dispute Charts and Pictures to Enhance Statements of Facts*, APPELLATE ISSUES (Spring 2012), at 20.  
[http://www.americanbar.org/content/dam/aba/publications/appellate\\_issues/2012sprng\\_ai.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2012sprng_ai.authcheckdam.pdf).

<sup>23</sup> ROBERT DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD 37-40 (Texas Lawyer: An ALM Publication 2010).

The “heat patterns” visible in the photo above depicts where screen readers most frequently look at certain parts of the page (red areas)—a few horizontal lines across the top of the main text, the headings, the first sentences of some paragraphs, and a line running down the left side of the main text. With slightly less frequency, screen readers also read some of the surrounding areas (shown in yellow) located toward the top and left sides of the main text. By contrast, some words on the page were not viewed by *any* screen readers who were subjects of the study. These words were located toward the bottom right of the page.

In an environment of multitasking, frequent interruptions, and fast communication like e-mail, legal readers are now “skimming” more than we are “studying.” And what’s more, screen reading is literally changing how we read documents including appellate briefs.

In order to cope with the changes in how briefs are being read, Dubose offers ten tips for appealing to the rewired reader.<sup>24</sup>

1. Help readers work less (connect the dots for readers, make the logical structure obvious and intuitive).
2. Use effective headings (frequent headings aid in skimming, need headings typically every one to three pages).
3. Use numbered lists and bullet points.
4. Use outlines (visual structure is critical).
5. Use effective summaries (write summaries of documents, summaries of a section of a larger document, paragraphs, etc.)
6. Omit words (shorter reading time).
7. Keep it simple (simplicity in document design, language, and logic).
8. Use white space effectively (white space helps readers).
9. Use visuals (text, charts, photographs, etc.).
10. Focus on readers: testing and editing (e.g., edit from the reader’s perspective).

### Narrative Techniques

Appellate brief writers are increasingly using techniques from the world of prose to capture the reader’s attention and to paint compelling narratives. Ross Guberman describes this principle in his book *Point Made: How to Write Like the Nation’s Top Advocates*: “the facts in a brief should read like narrative non-fiction, a bit like something you’d read in *The Atlantic* or the *New*

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<sup>24</sup> *Id.*

*Yorker*.”<sup>25</sup> As attorneys heed the writing advice of our grammar school teachers to “show me, don’t tell me,” the line between great prose and great legal writing may be blurring.

Before becoming the Chief Justice of the U.S. Supreme Court, John Roberts was an attorney who employed powerful techniques when advocating before the Court he would eventually be selected to lead. His skill as a lawyer so impressed the Court that when Roberts was nominated to join it, Justice Ruth Bader Ginsburg identified Roberts as the best advocate to come before the Supreme Court.<sup>26</sup> Roberts’ writing style shows the powerful effect a narrative passage can have in persuading the reader.

When Roberts represented Alaska against the EPA before the Supreme Court, he used a narrative style to humanize the subject of the controversy, a remote mine in the mountains of Alaska:

For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange and red-stained creek beds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creek beds of a wide valley in western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted “Red Dog” Creek.<sup>27</sup>

Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Atlantic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. The vast majority of the area’s residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. The region offers only limited year-round employment opportunities, particularly in the private sector; in the two years preceding Alaska’s permit decision, the borough’s unemployment rate was the highest in the State. . . . Prior to the mine’s opening, the average wage in the borough was well below the state average; a year after it’s opening, the borough’s average exceeded that of the State.<sup>28</sup>

From Roberts’ carefully chosen words, the reader understands that the Red Dog Mine is an important feature of both an Alaskan community’s economic future and of that community’s heritage. Roberts’ language suggests the consequences of the court ruling against his client and the human context of the case. This narrative strategy accomplishes the traditional objectives of fact writing.

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<sup>25</sup> GUBERMAN, *supra* note 1, at 50.

<sup>26</sup> *Id.* at 52.

<sup>27</sup> *Id.* at 51 (citing Brief for Petitioner, at 7-8, *Alaska Dep’t of Env’tl. Conservation v. E.P.A.*, 540 U.S. 461 (2004) (No. 02-658)).

<sup>28</sup> *Id.* at 52 (citing Brief for Petitioner, at 9, *Alaska Dep’t of Env’tl. Conservation v. E.P.A.*, 540 U.S. 461 (2004) (No. 02-658)).

Steven Shapiro of the ACLU has used a narrative style to great effect in his appellate briefs. In his brief to the Supreme Court in *Hudson v. Michigan*, Shapiro tells the facts of the case not as a dry summary of the record, but as a persuasive story:<sup>29</sup>

On the afternoon of August 27, 1998, approximately seven Detroit police officers arrived at the home of Petitioner Booker T. Hudson, Jr., to execute a search warrant for narcotics. There is no evidence in the record that the officers had any reason to believe that anyone in the home would attempt to destroy evidence, escape, or resist the execution of the warrant. Officer Jamal Good, the first member of the raiding party to enter the house, testified that he did not see or hear any activity inside the home as the officers approached the door. Upon arriving at the door to Petitioner's home, some of the officers shouted, "Police, search warrant." The officers did not knock, and they waited only three to five seconds before opening the door and entering. Officer Good explained that the brief delay between the announcement and his entry was "[a]bout how long it took me to go in the door," and he characterized the entry after the announcement as "[r]eal fast." Officer Good confirmed that the officers did not wait to see if anyone would answer the door."

Shapiro masterfully illustrates the facts in such a way that the reader cannot help but think the police may have been too hasty. Just as a great novelist implicitly suggests themes by the content of their stories, Shapiro shows us that a great legal writer can use a narrative style to communicate a conclusion while making the reader feel she reached it on her own. Narrative legal writing can be useful to shift the reader's focus from evaluating the credibility of the attorney to thinking critically about the facts.

Some advocates have gone so far as to use this narrative style to describe the issues or questions presented in their case. This narrative style in the introduction to a brief is what Bryan Garner, editor-in-chief of *Black's Law Dictionary*, might call a "deep issue statement." Garner defines a deep issue as "the ultimate, concrete question that a court needs to answer to decide a point your way."<sup>30</sup> Instead of creating the traditional issue statement that begins with the word "whether," Garner instructs the brief-writer to put the statement up front, break it into sentences and weave in key facts.<sup>31</sup>

Although breaking from Garner's formula somewhat, Kannon Shanmugam employs a similar approach to great effect at the beginning of his brief to the U.S. Supreme Court in *Smith v. Cain*.<sup>32</sup>

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the only person brought to trial. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney's office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants.

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<sup>29</sup> *Id.* at 57 (citing Brief for Petitioner, at 2, *Hudson v. Michigan*, 547 U.S. 586 (2006) (No. 04-1360).

<sup>30</sup> GARNER, *supra* note 16, at 56.

<sup>31</sup> *Id.* at 55.

<sup>32</sup> David J. Perlman, *How to Write an Introduction*, *APPELLATE ISSUES* (Spring 2012), at 5, [http://www.americanbar.org/content/dam/aba/publications/appellate\\_issues/2012sprng\\_ai.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2012sprng_ai.authcheckdam.pdf) (citing Brief for Petitioner, at 1, *Smith v. Cain*, 132 S.Ct. 627 (2012) (No. 10-8145)).

Petitioner was linked to the crime solely on the basis of an identification by one of the survivors. At trial, the witness testified he was certain about his identification. But materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other subsequently disclosed materials included statements by other witnesses casting doubt on the witness' testimony; a statement by an apparent perpetrator seemingly denying petitioner's involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual. The question presented is as follows:

Whether the failure of the Orleans Parish district attorney's office to produce the foregoing information before petitioner's trial violated his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, because the information was material to the issue of guilt.

In just a few short sentences, Shanmugam powerfully convinces the reader that his client's conviction should be reversed. This storytelling approach is memorable to judges and clerks who are constantly reading stacks of briefs.

Although the practice of employing narrative to tell the story of your case may be unorthodox in some circles, the examples above demonstrate that this technique can be highly persuasive. As legal writers work to be more effective in their advocacy, the key to victory may be telling the most compelling narrative.

### Conclusion

Robert Dubose suggests that Google is a metaphor for effective legal writing.<sup>33</sup> He explains that:

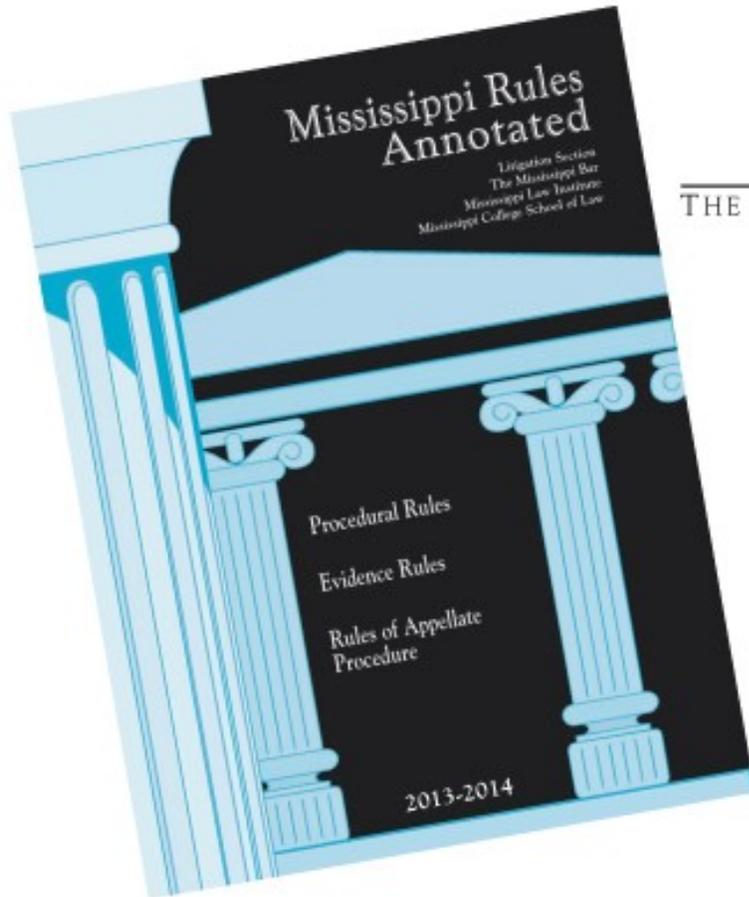
That is not to say that a legal document should look like Google. Nor can most legal documents be written in 30 words or less. But the goal of legal writing should be to be more like Google. We should strive to create documents that address complex legal issues, yet are simple and useful.

Legal writers *are* striving to make briefs more user-friendly and easily readable. In order to do this, legal writers are thinking of their work as more creative and inventive. They are embracing narrative techniques long accepted by other writing professionals such as journalists and novelists. They are learning to be more proficient with document design, drawing from the experiences of book and internet publishers. Legal writers are also thinking more about the readability of their briefs in an era of PC computers and electronic tablets.

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<sup>33</sup> DUBOSE, *supra* note 29, at 104.

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