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EFFECTIVE WRITTEN ADVOCACY

THOUGHTS ON PRESENTING WELL CONSIDERED WRITTEN LEGAL ARGUMENT

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WHY YOUR WRITING MATTERS

“Lawyers possess only one tool to convey their thoughts: language.”

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 61 (4th ed. 2008)

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THE IMPORTANCE OF THE WRITTEN PRODUCT



You have the Court's attention - - no pressure

“When I read a brief, **the first thing I'm judging is the person who wrote it.** How careful is this lawyer? How competent? How candid? The answers to these questions will enhance or diminish the force of the lawyer's arguments. For in judging, as in other areas of life, it makes sense to consider the source.”

- Judge Raymond Kethledge

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KNOWING YOUR AUDIENCE

Know the relevant prior rulings and recent direction

Frame your argument to align with recent analysis and concerns

Take measured stances when doing so can be effective – do not set the bar higher than needed

Demonstrate understanding and respect for the Court's role and its own limitations



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ANALYZE THE ISSUES AS A COURT WOULD

There is Nothing New Under The Sun

Read relevant cases not only for substance but for structure and style. How has the Court analyzed the issue before? How has the argument been structured?

Use Clear and Concise Language

Courts are rarely verbose – that is intentional. Clear words and concise sentences help readers grasp complex legal issues without oversimplification or confusion.

Respect the Reader's Time

Presenting information selectively and efficiently enhances credibility and ensures important arguments are understood and not overlooked.



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DECORUM MATTERS

Respect the Tribunal

"The Court" or "The District Court" not "the Judge" "Judge Doe," or "The Lower Court"

Respect the Opposition

"The Government" or "The United States" not "The Prosecutor," "Prosecutor Doe," or "Mr. Doe"

Be Serious to be Taken Seriously

Disrespectful language or casual language can undermine arguments and distract from legal issues.

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"It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief. Those are just distractions. You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side. . . . If the other side is truly bad, the judges are smart enough to understand that; they don't need the lawyer's aid."

– JUSTICE RUTH BADER GINSBURG

Arguments like these—which casually impugn the motives of the district court or, more commonly, opposing counsel—are regrettably common of late. So we think it worthwhile to comment on them. In our view, a party should think twice about questioning the district court's integrity or that of opposing counsel. That two persons disagree does not mean that one of them has bad motives. And even in the worst cases, the better practice is usually to lay out the facts and let the court reach its own conclusions.

BIG DIPPER ENT., LLC V. CITY OF WARREN, 641 F.3D 715 (6TH CIR. 2011)

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HAVING A POINT: THEME, STRUCTURE, AND RELIEF



Introduction as Roadmap

The introduction previews the argument and relief, guiding the court on the brief's direction and importance



Theme as Unifying Idea

A theme provides a unifying idea explaining why the error matters and justifies the requested relief



Clear Request for Relief

Clearly asking for specific relief tied to the identified error makes courts more receptive to the brief

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CONTINUE TO DEFEND

Admit Nothing New

If a trial – focus on testimony or “jury found”

If a plea – stick to the statement of facts

Effective Story Structure

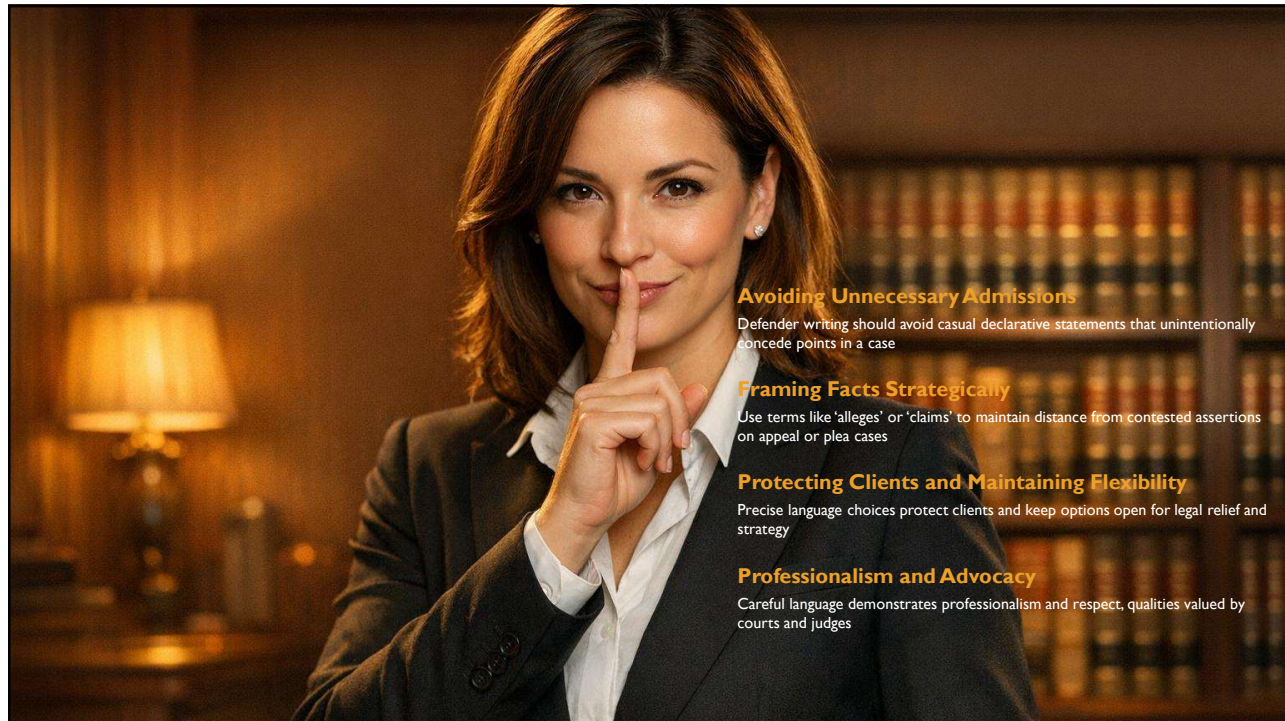
Assist the Court to undo the wrong done to your client by addressing what happened in the context of the error you have identified

Identify the Red Herrings

The record is likely littered with things that make your client look bad but are not germane to the issue at hand, especially if the government argues from them in response



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SKIP THE 100-LEVEL CLASS

The Court has the basics covered
You do not need to explain the importance of Wong-Sun; It has been 20 years since Booker/Fanfan

Banal legal discussion is ineffective
Wasting time and attention on well-trodden and understood blackletter law detracts from your argument and invites one to wonder whether you have nothing meritorious to say about your particular case

Develop fully the law or facts that suit your case
If your case has good facts, spend time on them – If the law happens to list in your favor, fully develop how that is so

Avoid string citations
"An unruly conglomeration of surnames, numbers, abbreviations, and dates is not the same thing as legal analysis. If you think it's essential to use a string cite, use it to buttress a solid analysis of the law, not to supply your analysis . . . [C]ourts have reacted harshly to briefs written as if long string cites can replace a meaningful discussion of the relevant law and how it applies to the facts. Professor Mark Cooney

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UNDERSTAND THE LAW FROM THE COURT'S PERSPECTIVE

Always evolving

Remain current in your research and your understanding of how the Court is addressing your issue. Rely on up-to-date cases and acknowledge changes affecting older rulings to maintain credibility

Balancing trust and advocacy

Strategic acknowledgment of bad facts or contrary law is necessary to maintain trust. Choose a few strong cases and clearly explain their importance and continued relevance

Accurate quotations

The Court will read the opinions (and likely wrote them) – get it right



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And I will strike down upon thee with great vengeance and furious anger ...

- USCA for the Federal Circuit affirmed the reprimand of a DOJ attorney for “misquoting and failing to quote fully from two judicial opinions in a motion for reconsideration she signed and filed.”
- “[The attorney] was sanctioned not for failure to discover pertinent precedents or to cite adverse decisions. She violated Rule 11 because, in quoting from and citing published opinions, she distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them.”
- *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1357 (Fed. Cir. 2003)



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SET A DIRECTION AND STAY THE COURSE

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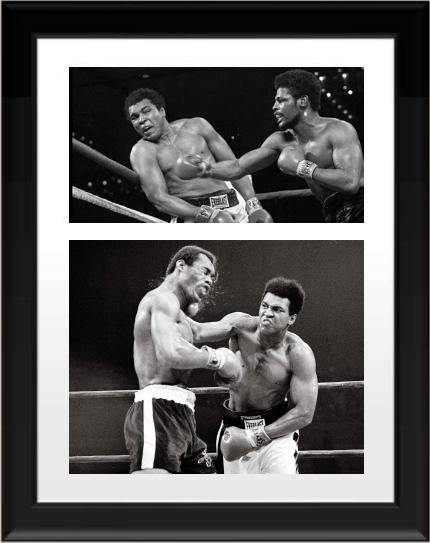
Good argument has a clear objective
Have a point and stay on course

Avoid side trips or stops along the way
It can be enticing to take shots at weaknesses in the record or faulty arguments that do not change outcomes – be wary of this siren call

You are not required to fill the space
The Court is not looking for more to read - write what is necessary to build and support your argument and get out

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R3PLY BRIEFS MATTER



Dodge Incoming Attacks on Your Argument
Reply briefs serve to directly respond to opposing arguments and clarify issues for judicial understanding

Critical Review of Citations
Effective replies verify citations and caselaw, identify errors, and distinguish unfavorable precedents to strengthen the case

Counterpunch
Filing a reply is essential to clarify arguments and reinforce the basis for relief, ensuring no persuasive points are left uncontested

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EDITING AS A CORE ADVOCACY SKILL

Importance of Multiple Edits

Multiple rounds of editing enhance clarity and persuasion beyond just initial drafts

Editing Beyond Mechanics

Editing is where good briefs become effective ones. No court should receive a first draft. Allowing time for multiple rounds of editing is essential to clarity and persuasion. Editing should address structure, focus, word choice, and accuracy, not just spelling and citations.

Editing to Reveal the Detail of Argument

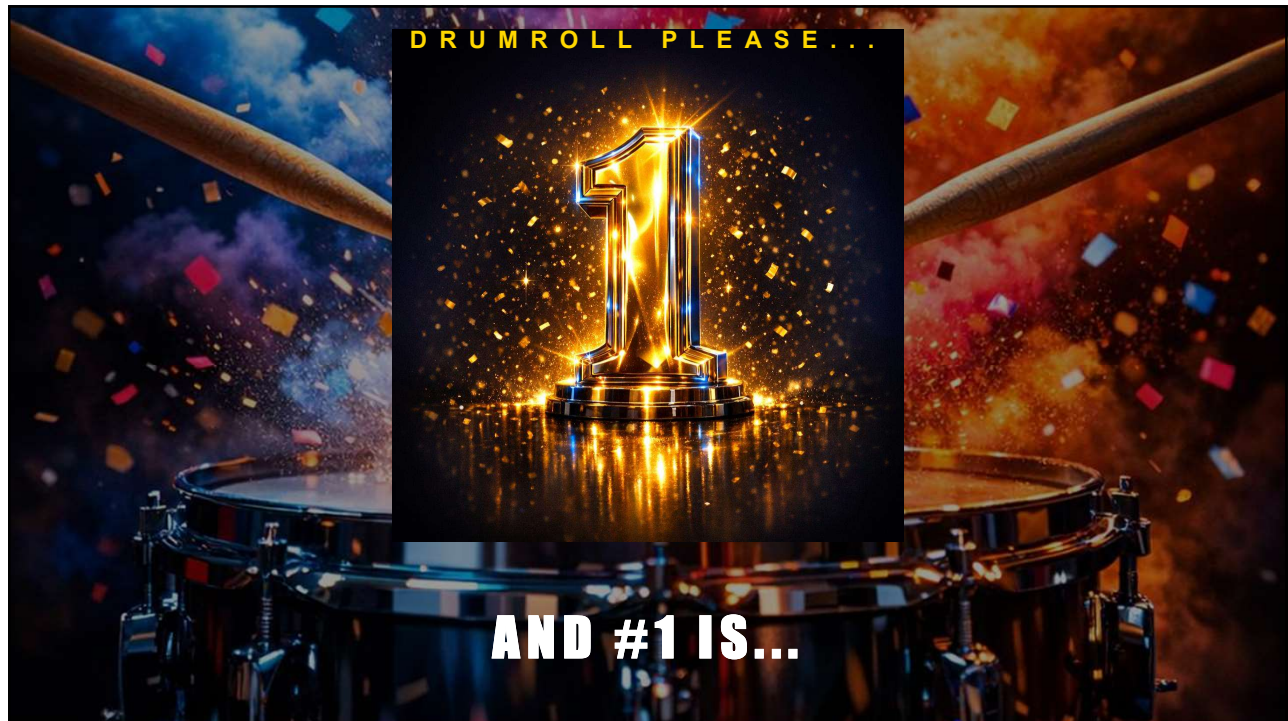
Careful editing reveals the important detail of the argument beneath the rough exterior

Tools for Editing

Peer review, spellcheck, and specialized or artificial intelligence powered software assist must not replace judgment in editing



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STARTING AND ENDING AT 35,000 FEET

Big-Picture Framing

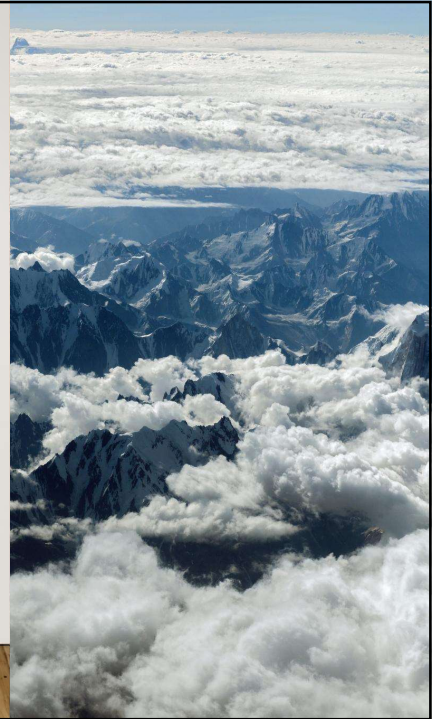
Starting at a high level frames the issue around the importance of the error, not just its occurrence

Focus on Significance

Courts consider whether error justifies reversal or other relief not just that error occurred

Understand the Significance of the Task

"The chances of a district court committing an error in a case are fair. That error being worthy of overturning the case, probably less so. The chances of the district court committing two reversible errors is far less likely. If you really think the district court made eight reversible errors in the same case, perhaps you should be filing articles of impeachment, not a notice of appeal. A high number of claimed errors in an appeal tells the reader more about the quality of the appellate attorney than the quality of the trial judge." - Chief Judge Jeffrey S. Sutton



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THANK YOU AND
GOOD LUCK

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