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THE “WRITE” WAY: A JUDICIAL CLERK’S GUIDE TO WRITING FOR THE COURT

Jennifer Sheppard†

I. INTRODUCTION

So, you have landed your dream job, clerking for a judge. You are likely excited because you have been told that the clerkship will be a great learning experience. You cannot wait to obtain direct insight into the operation of the judicial process or for the practical experience that you will gain from learning how the court operates from inside the judge’s chambers. But mixed with this excitement is a little worry. One question looms before you—what exactly do judicial clerks do? What will the judge expect you to do during your time in chambers?

It is difficult to generalize about the role of a judicial clerk.¹ The duties of a judicial clerk are determined by each individual’s employing judge.² A judicial clerk’s duties are “best described as doing whatever the judge asks.”³ While individual judges vary greatly in what they ask of their clerks, some commonalities exist.⁴ Generally, judicial clerks conduct legal research, review the record before the court, verify citations to authority in the litigants’ briefs,

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1. Jefferson Lankford, *Judicial Law Clerks: The Appellate Judge’s “Write” Hand*, in LOUIS J. SIROCO, JR., *JUDGING: A BOOK FOR STUDENT CLERKS* 17, 17 (2002).
2. See Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 VAND. L. REV. 1197, 1200 (1973).
3. Lankford, *supra* note 1, at 17.
4. *Id.*

administer the docket,⁵ serve as a “sounding board[] for the judge’s ideas,”⁶ play devil’s advocate, and serve as the judge’s confidant.⁷ Furthermore, while not nearly as exciting as the clerk’s other duties, a judicial clerk may be asked to perform more mundane tasks, such as maintaining the chambers’ library or performing administrative work.⁸ Finally, and most importantly, clerks may also be asked to write the initial drafts of a judge’s decision.⁹

Thus, judicial clerks serve an integral role in the decision-making process. They “are the extra hands and legs, which, when coupled with an inquiring mind, are indispensable to a judge in the performance of his most difficult obligation,” issuing decisions.¹⁰ Given that a judicial clerk is essentially an extension of his or her judge, your actions reflect on the judge.¹¹ Thus, it is important that you act professionally in all matters and refrain from embarrassing the judge in any fashion during your time with the court. Judges often rely heavily on their clerks’ research and writing skills when issuing decisions, some of which are published in reporters and become binding precedent for future courts, or in drafting documents that become part of the court record and may be subject to appellate review. Consequently, legal research and drafting documents for the court are the tasks where the risk of embarrassing the judge is greatest. This means that your written work product should be beyond reproach. To that end, this article will examine the types of documents judicial clerks are most commonly asked to draft for a judge—opinions, bench memoranda, jury instructions, and orders. Keep in mind though that the documents a judge may ask a clerk to draft will vary depending on whether the clerk is at the trial or appellate level.

Part II of this article examines how to properly draft a judicial opinion. This part identifies what an opinion is and what its purposes and goals are. This part also provides tips regarding the steps to take when preparing to draft an opinion, and offering advice for drafting

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5. Gerald Lebovits, *Judges’ Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. ST. B.J. 34, 34 (July/Aug. 2004) [hereinafter *Judges’ Clerks Play Varied Roles*].
 6. Lankford, *supra* note 1, at 19.
 7. *Judges’ Clerks Play Varied Roles*, *supra* note 5, at 34.
 8. Frederick G. Hamley, *Sample Instructions to Law Clerks*, 26 VAND. L. REV. 1241, 1249 (1973).
 9. Lankford, *supra* note 1, at 18.
 10. Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1181 (1973).
 11. *Judges’ Clerks Play Varied Roles*, *supra* note 5, at 34.

the document, including identifying the tone a clerk should use and a format to follow when drafting an opinion. Part III of this article discusses how to properly draft a bench memorandum. This part identifies what a bench memorandum is and how the judge will use such a document. It also provides tips for preparing to draft a bench memorandum and offers advice for drafting the memorandum. Part IV addresses how to properly draft jury instructions, which only trial court clerks are asked to draft. This part explains what jury instructions are and offers tips on how to draft the instructions. Part V examines how to properly draft judicial orders by examining what the purpose of an order is and offering advice on drafting an order. After reading this article, you will be familiar with opinions, bench memoranda, jury instructions, and orders. Thus, when the judge asks you to draft one of these documents, you will be more confident in your ability to do so.

II. OPINIONS

Given that a judge's most difficult obligation is in issuing decisions,¹² law clerks at both the appellate and trial levels are often asked to draft judicial opinions.¹³ An opinion is a statement of reasons explaining why and how the decision was reached¹⁴ and providing the authorities upon which the decision relies. This document tells the litigants, particularly the losing party, why the court reached the decision that it reached with regard to a particular motion or hearing, at the trial level or with regard to an appeal.¹⁵ Thus, a judicial opinion "tell[s] the parties why the winner won and the loser lost."¹⁶ In addition to justifying the decision to the losing party, an opinion also justifies the court's position to the public.¹⁷ Further, an opinion provides guidance to future litigants and to the courts,¹⁸ which are bound by *stare decisis*.

12. Wright, *supra* note 10, at 1181.

13. George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1203 (1973) [hereinafter Smith, *Opinion Writing for Law Clerks*].

14. RUGGERO J. ALDISERT, OPINION WRITING § 2.10, at 22 (1990) [hereinafter OPINION WRITING].

15. *Id.*

16. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, at 8 (2006), <http://law.bepress.com/expresso/eps/1743> [hereinafter *Ethical Judicial Opinion Writing*].

17. *Id.*

18. *Id.* at 9.

“[O]pinions are simply explanations for judgments—essays written by judges explaining why they recorded the judgment they did.”¹⁹ However, opinions written at the trial and appellate stages have slightly different purposes. At the trial stage, the purpose of an opinion is to justify the judge’s decision on a motion or the outcome of the case at a bench trial.²⁰ At the appellate stage, on the other hand, judges write opinions to resolve controversies in their jurisdiction or to correct an erroneous trial court opinion.²¹

A. *Preparing to Draft the Opinion*

When a judge assigns you a case, the judge may require you to draft a memorandum for the judge to use in drafting an opinion or the judge may require you to produce a first draft of the opinion. Let’s assume the judge asks you to produce a first draft of the opinion. When the judge assigns the case, the judge’s instructions may be very broad.²² The judge may simply hand the case file and the briefs to you and instruct you to produce a first draft of the opinion.²³ In this situation, you are expected to review the case and work through the issues yourself.²⁴ Once you have reviewed all the pertinent documents, draft the opinion.

On the other hand, at the time the judge assigns the case, the judge may conference with you to provide some guidance on the matters to be resolved. During this conference, the judge may identify the issues to be decided and emphasize salient points that he or she believes to be of particular importance.²⁵ When this conference concludes, you ought to have some idea of how the issues are to be resolved, even if you are not certain how to legally justify those results.²⁶ You must resolve for yourself the problem of how to justify the results.²⁷ If the judge discusses the case with you, this conference should be the basis for the opinion that you draft.²⁸ However, if you discover that the judge was mistaken on either a factual issue or a

19. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993).

20. Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 58-59 (2002).

21. *See id.* at 59.

22. Wright, *supra* note 10, at 1190.

23. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1203; Wright, *supra* note 10, at 1190.

24. Wright, *supra* note 10, at 1190.

25. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1204.

26. *Id.*

27. *Id.*

28. *Id.* at 1203.

point of law, it is imperative that you bring the matter to the judge's attention.²⁹ While the judge has the final choice on an issue, it is your duty to prevent the judge from making a mistake.³⁰

Regardless of the depth of the judge's instructions at the time the case is assigned, you must complete certain tasks when preparing an opinion. You should begin by reviewing the briefs of the litigants and gaining a clear understanding of the issues. The first step in preparing to draft an opinion is to read the litigants' articulation of the issues.³¹ Once you have identified the issues as presented by the litigants, you must read the analysis section of the briefs and determine for yourself if the issues as articulated by the litigants are, in fact, the issues or if the issues are different. Sometimes, the issues will be fairly close to those identified by the litigants. At other times, the issues will be completely different. It is important that you determine for yourself what the issues are. If your thinking is fuzzy regarding the issues, this will negatively impact the rest of the process.

Once you have a clear grasp of the issues, the second step you should take when preparing to draft an opinion is to review the record to determine which facts are relevant.³² The facts should be obtained from the record itself, never from the litigants' briefs.³³ While the adversary process often skews counsel's rendition of the facts in favor of his or her client, the court's opinion should show no trace of partisanship.³⁴

After the pertinent facts have been gathered from the record, the third step you should take is reviewing the authorities relied upon by counsel for the litigants to determine whether they were accurately interpreted by counsel.³⁵ You should also update the authorities to ensure that they remain good law and that no other applicable authorities have been issued since the briefs were filed. Furthermore, you should conduct some additional legal research to determine that counsel for the litigants did not overlook any applicable authorities.³⁶

29. *Id.* at 1204.

30. *See id.*

31. *See id.*

32. *See id.*

33. *Id.*

34. *Id.*

35. George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 201 (1968) [hereinafter Smith, *Opinion Writing for New Judges*].

36. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1205.

After reviewing the briefs, the issues, the facts, and the governing law, only one step remains before you are prepared to begin drafting the opinion—creating an outline.³⁷ An outline is the best way for you to organize your thoughts and to ensure that nothing relevant is unintentionally omitted from the opinion.³⁸ The outline, which gives you a format for drafting the opinion itself, must be more than a skeletal outline that simply identifies the order in which the issues will be discussed. In order for the outline to be an effective tool, it must be fairly detailed.³⁹ The outline should not only identify the issues, but should also identify the pertinent authorities that relate to each issue and the relevant facts from the case currently before the court. In addition, it should briefly state or summarize the reasoning that supports the conclusions reached with regard to the issues.

Do not make the mistake of skipping this step in the process to save time. Drafting an outline forces you to organize the materials in a very detailed manner. While transferring the information floating around in your head to paper or a word processor, any problems with organization will become clear. It will be much easier to adjust your thinking and organization at the outline stage than while revising the text of the opinion itself. Once a writer puts words in print, he or she often becomes wed to those words, even when they are problematic due to organization or substance. By dealing with this same problem at the outlining stage, rather than the revision stage, you will not only save yourself time, but also some grief.

B. *Drafting the Opinion*

1. Format of the Opinion

Once you have completed the necessary preparatory steps, you are ready to begin drafting the opinion. It is important to remember that the purpose and style of a judicial opinion is different from that of a memorandum, brief, law review article, or seminar paper for law school.⁴⁰ An opinion is not an essay that covers the subject in minute detail or that discusses the entire breadth of the legal issues

37. FED. JUDICIAL CTR., CHAMBERS HANDBOOK FOR JUDGES' LAW CLERKS AND SECRETARIES § 7-2(F)(7), at 159 (4th prtng. 1994) [hereinafter CHAMBERS HANDBOOK].

38. *Id.* § 7-2(A), at 143.

39. *See id.*

40. Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, JUDGES' J., Summer 1995, at 33.

involved.⁴¹ An opinion is merely intended to inform the litigants and general public why the court acted in the manner that it did.⁴²

Before actually putting pen to paper (or fingers to keys), you should ask the judge or a co-clerk for a sample opinion written by the judge. A sample opinion will provide you with a template that the judge previously found acceptable. If the judge is unable to produce a sample opinion, do not panic. While the format of an opinion may vary depending on the court or the case itself, generally an opinion includes a caption, an introduction to the case, a statement of the facts, a statement of the issues in contention, a discussion and analysis of the governing law, and a conclusion.⁴³ Each of these sections is described in detail below.

a. Caption of the case

Begin the opinion with the full caption of the case. The caption of the case identifies the case before the court, including the name of the court, the docket number, the names of the parties, the name of the judge assigned to the case, and the title of the document (“Opinion”).

An example of the caption of the case is below:

<p>IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT</p> <p>MAJOR LEAGUE BASEBALL, INC., Case No. 07-1235</p> <p>Appellant,</p> <p>v.</p> <p>KATIE PRESTON,</p> <p>Appellee.</p> <p style="text-align: center;">OPINION</p>

b. Introduction

The introduction follows the caption of the case. The purpose of the introduction is to provide a context for the reader by identifying the “who” and the “what” of the case.⁴⁴ It should identify the parties,

41. OPINION WRITING, *supra* note 14, at 22.

42. *Id.* at 22-23.

43. Smith, *Opinion Writing for New Judges*, *supra* note 35, at 204.

44. Wanderer, *supra* note 20, at 56.

the claims filed by the parties, and why the case is presently before the court (on a specific motion or on appeal). The introduction to the case generally is not more than one or two paragraphs.⁴⁵ Despite its brief length, the introduction must provide the reader with enough information to understand the opinion as he or she reads through it.⁴⁶

The opening paragraph should begin by identifying the parties to the lawsuit by name and identifying who each party is in terms of the litigation (e.g., plaintiff or defendant, appellant or appellee). The introduction should also establish how the court will refer to the parties.⁴⁷ Rather than using generic identifiers for the parties like plaintiff and defendant or appellant and appellee,⁴⁸ you should use the names of the parties or functional designations like "Landlord."⁴⁹ Identifying the parties by their names or functional designations lessens the burden on the reader to remember which party is which. Furthermore, use of the less specific means of identification can be confusing when there are many parties, including plaintiffs, defendants, cross-claimants, counter-claimants, etc.⁵⁰

After identifying the parties, you should summarize the facts of the case in a sentence or two.⁵¹ The introduction should then set forth the procedural history of the case, explaining the nature of the action and how it came to be before the court and identifying the issue or issues that the court must decide.⁵² In an appellate opinion, the introduction should also identify what agency or court decisions are under review.⁵³ Finally, the introduction should conclude with the holding (e.g., "AFFIRMED" or "the court finds for the defendant") and state, if possible, the rule of law that the case reaffirms or establishes.⁵⁴ By setting forth this information, the introduction provides the reader with context for the information that follows and allows the reader to better understand the opinion.⁵⁵

An example of an introduction is below:

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45. Erik Paul Belt, *Concerned Readers v. Judicial Opinion Writers*, 23 U. MICH. J.L. REFORM 463, 466 (1990).
 46. Smith, *Opinion Writing for New Judges*, *supra* note 35, at 205.
 47. Wanderer, *supra* note 20, at 56.
 48. Klein, *supra* note 40, at 33.
 49. *Id.*
 50. *Id.*
 51. Belt, *supra* note 45, at 466.
 52. Wanderer, *supra* note 20, at 56; Belt, *supra* note 45, at 466.
 53. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(7), at 159.
 54. Belt, *supra* note 45, at 466.
 55. Smith, *Opinion Writing for New Judges*, *supra* note 35, at 205.

Edward Richter, Circuit Judge

Major League Baseball, Inc. ("MLB"), the appellant, owns the copyright of the image known as "Chief Wahoo" (R. at 26), the mascot of the Cleveland Indians baseball team (R. at 27). MLB filed a copyright infringement claim against Katie Preston, a cartoonist, for her use of the Chief Wahoo image in her alternative comic book *The Unauthorized Biography of Wilbur Wahoo*. (R. at 2.) Preston moved for summary judgment on the ground that her use of the Chief Wahoo image was a fair use under 17 U.S.C. § 107. (R. at 7.) The U.S. District Court for the Northern District of Ohio held in favor of Preston, reasoning that she did not infringe MLB's copyright interest because her use of the copyrighted Chief Wahoo image was a fair use. (R. at 10.) MLB appeals that decision, claiming that the district court erred when it held that Preston's use of the copyrighted image was fair.

This Court concludes that Preston's use of MLB's copyrighted image of Chief Wahoo constitutes fair use and affirms the district court's grant of summary judgment.

c. *Statement of the facts*

The statement of the facts follows the introduction. The statement of the facts is the story of the parties; therefore, it should be told in narrative form.⁵⁶ This section should not include all the facts, but only those that are legally significant or necessary to establish the context of the events that occurred.⁵⁷ Legally significant facts are those that are relevant to the issue before the court and will be relied on by the judge when deciding that issue. Thus, legally significant facts are determinative of the outcome of the case. For example, in a negligence action, any facts that the court would rely on to determine whether the defendant owed a duty to the plaintiff, whether the defendant breached that duty, whether the plaintiff suffered injury, and whether the defendant's breach of duty was the legal cause of that harm are legally significant facts that must be mentioned in the statement of the facts in an opinion.

To ensure accuracy, you should always procure the facts directly from the record, not from the briefs of the parties.⁵⁸ However, while

56. Wanderer, *supra* note 20, at 56.

57. *Id.*

58. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1204.

you should obtain the facts from the record, this does not mean that the statement of the facts should simply reproduce the record or include verbatim quotations from depositions, trial transcripts, the text of pleadings, or motions.⁵⁹ Rather, the statement of the facts should be a brief summary of the facts, just a couple paragraphs.⁶⁰ While most cases will require only a couple paragraphs, in a complicated case, the statement of the facts may need to be longer for the reader to understand what happened in the case.

Regardless, the facts should be limited to those facts necessary to understand the court's decision regarding the legal issue.⁶¹ Importantly, the statement of the facts should include *facts*, not legal conclusions.⁶² A legal conclusion is just what it sounds like—a conclusion of law. When you include a legal conclusion, you have examined what actually occurred (e.g., running a red light) and applied the law to that fact to reach a conclusion (e.g., that the defendant was negligent). Stating that the defendant was negligent is a legal conclusion because negligence is a concept defined by law, and you can only determine that a defendant was negligent by consulting one or more laws.⁶³ Because the statement of facts in a judicial opinion presents the facts of the case in a neutral, objective manner, you should avoid legal conclusions.

While legal conclusions are not properly included in a statement of facts, you may include logical conclusions of fact or inferences.⁶⁴ Logical conclusions of fact are not facts, but are conclusions that are reasonably inferred from the evidence presented by the litigants.⁶⁵ An example of an inference or conclusion of fact is below:

Although the Hearing Officer did not make an explicit finding of unavailability, that finding must be inferred from the Hearing Officer's determination that Adams was entitled to benefits pursuant to subsection 55-B for 100% partial incapacity.⁶⁶

59. Wanderer, *supra* note 20, at 56.

60. Klein, *supra* note 40, at 33.

61. Wanderer, *supra* note 20, at 56.

62. *Id.* at 57.

63. Cf. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE § 14.1, at 183 (4th ed. 2001) (explaining that battery is a conclusion of law because it “is a concept defined by the law”).

64. Wanderer, *supra* note 20, at 57.

65. *Id.*; NEUMANN, *supra* note 63, § 14.1, at 184.

66. Wanderer, *supra* note 20, at 57 (quoting Adams v. Mt. Blue Health Ctr., 735 A.2d 478, 484 n.5 (Me. 1999)).

Subsection 55-B requires a finding of unavailability in order to award benefits to a claimant. The fact that the Hearing Officer awarded benefits to Adams leads to the logical conclusion that the officer must have made a finding of unavailability. When including conclusions of fact in your statement of facts, be careful not to make inferences based on the law. Only include inferences that you have drawn from the facts themselves.

Furthermore, “[t]he nonexistence of a fact can itself be a fact”⁶⁷ worth noting. Pointing out the absence of specific evidence or the absence of an allegation may be important depending on the matter before the court and the governing law.⁶⁸

You should generally present the facts in chronological order and in the past tense.⁶⁹ Chronological order is ideal because it gives the statement of the facts a narrative flow by setting forth the chain of events that occurred. However, in rare instances, relating the facts in chronological order will be confusing to the reader. Confusion occurs when there are many different claims and many facts that relate only to specific claims. When relating the facts in chronological order is confusing, use a topical organization. For example, in a case where a plaintiff claimed that his employer had discriminated against him in violation of the Americans with Disabilities Act and claimed multiple disabilities, such as morbid obesity, diabetes, hypertension, and sleep apnea, it might be easier to group together the facts relating to individual disabilities rather than relating all the facts as they occurred in time. Thus, all the facts relating to the plaintiff's claim of discrimination based on his morbid obesity would be discussed; next, the facts relating to his claim of discrimination based on his diabetes would be discussed, and so on.

You may present the facts differently depending on the motion that is being or has been decided. When dealing with a motion to dismiss, the court must assume that the plaintiff's factual assertions are true.⁷⁰ Additionally, when resolving a motion for summary judgment, the court does not serve as a fact finder.⁷¹ Because summary judgment is not warranted if a material fact is in controversy, evidence that both supports and contests the motion must be set forth in the statement of the facts.⁷²

67. NEUMANN, *supra* note 63, § 14.1, at 185.

68. *See id.* § 14.1, at 185-86.

69. Wanderer, *supra* note 20, at 56.

70. *Id.* at 57.

71. *Id.* at 58.

72. *Id.*

Finally, when the opinion is complete, be sure to review the statement of the facts. Make certain that it includes all the facts relied on by the judge.⁷³ Additionally, you must provide a citation to the record for each fact mentioned in the statement of the facts. An example of a statement of the facts is below:

Facts

Chief Wahoo is the mascot for the Cleveland Indians baseball team. (R. at 27.) The copyrighted image is a three-quarter view of a red cartoon face with a broad wide-toothed grin, a prominent nose, triangular shaped eyes, pointed eyebrows, black hair parted in the center, and a red feather over the right ear. (R. at 27.) Chief Wahoo's image appears on team uniforms, souvenirs, programs, and many products licensed by the copyright holder. (R. at 28.)

Preston created her comic book, *The Unauthorized Biography of Wilbur Wahoo*, to criticize the use of racial stereotypes by corporate America. (R. at 47.) Preston used the Chief Wahoo image in developing Wilbur Wahoo, the protagonist in her comic book. (R. at 40.) Although MLB did not give Preston permission to use the Chief Wahoo image in her comic book (R. at 30), Wilbur Wahoo shares the same red face, triangular eyes, prominent nose, pointed eyebrows, black center-parted hair, broad grin, and red feather as the copyrighted image (R. at 31). While Preston's protagonist shares the same features as Chief Wahoo, Preston added limbs and a body to Wilbur Wahoo and gave him multiple facial expressions. (R. at 42.) Furthermore, Preston depicted Wilbur Wahoo from different angles throughout the comic book. (R. at 42.)

In addition to altering the appearance of Chief Wahoo, Preston's comic book relates the life story of Wilbur Wahoo. On the cover of the comic book, Preston has depicted Wilbur Wahoo wearing a T-shirt with the slogan "Freedom Now" printed on the front and raising a fist in a salute. (R. at 43.) Jacobs Field baseball stadium, the home of the Cleveland Indians, is prominently featured in the background and a caption appears on the cover stating that Wilbur Wahoo "flees his corporate captors to find his own way in the world." (R. at 43.) Preston's comic book goes

73. JUDICIAL ADMIN. DIV., ABA, JUDICIAL OPINION WRITING MANUAL 33 (1991) [hereinafter JUDICIAL OPINION WRITING MANUAL].

on to detail the adventures of Wilbur Wahoo after his escape from his “corporate captors.” (R. at 43.) He crosses paths with and frees other racial stereotypes used by corporate America, such as Aunt Jemima and Uncle Ben. (R. at 44.)

Preston sold the comic book in various comic book stores in the Cleveland area and on Web sites specializing in alternative comics. (R. at 46.) She also sold the comic book from a stand outside Jacobs Field before home games for the Cleveland Indians. (R. at 46.) She has earned approximately five hundred dollars from sales of the comic book. (R. at 46.)

d. Issues in contention

After the statement of facts, the opinion must clearly articulate the specific legal issues to be decided by the court.⁷⁴ Although you may have briefly identified the issues in the introduction, it is important that you set forth the legal issues in more detail just before articulating the determination of those issues.⁷⁵ Consolidating the issues in one paragraph, rather than scattering them throughout the opinion, is the better organizational strategy.⁷⁶ The reader will be able to easily find the issues in contention and will not have to scour the entire opinion searching for them.⁷⁷ When there is only one legal issue, the issue in contention may be situated at the start of the discussion of the issue.

In law school, you may have learned to articulate the issues using a “whether-when” or “under-does-when” formula. While such a formula may have been helpful when writing an office memorandum or brief, judges tend to draft issues in a more sophisticated, less rote manner. When drafting the issues in contention, begin with language similar to the following: “The issue in this case is” Be sure to identify the legal question and briefly include the legally significant facts. An issue has little meaning without the relevant facts. An example of this section is below:

This Court addresses the question whether the district court erred in granting Preston’s motion for summary judgment

74. Wanderer, *supra* note 20, at 58.

75. *Id.*

76. *Id.*

77. *See id.*

on the ground that she had a fair use defense to MLB's claim of copyright infringement.

e. Discussion of the issues

The next section of the opinion sets forth the court's determination of the issues and is the "heart of the opinion."⁷⁸ This section provides not only the court's resolution of the issues, but also the reasoning supporting its decision.⁷⁹ This section sets forth the applicable legal principles, including the applicable standard of review, and applies them to the matter currently before the court.⁸⁰ However, it is important to remember that "[a] judicial opinion should resolve only the pertinent controversy" before the court "and not discuss superfluous matters."⁸¹

i. Standards of review

In a judicial opinion, the standard of review follows the heading for the determination of the issues section and precedes the analysis of the substantive issues.⁸² The standard of review precedes the analysis of the substantive issues because it significantly affects the analysis of the issues and the outcome of the case. The standard of review creates the framework for how the court views the facts and discusses the analysis. Different standards can lead to vastly different results. For example, an "error that may be a grounds for reversal under one standard of review may be insignificant under another."⁸³ Thus, because the standard of review affects the outcome, it is essential that you have a basic understanding of the various standards and how they operate.

The term "standard of review" means something slightly different at the trial level than it does at the appellate level.⁸⁴ At the trial level,

78. *Id.*

79. *See id.*

80. *Id.* at 59.

81. *Ethical Judicial Opinion Writing*, *supra* note 16, at 20 (citing JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 242 (4th ed. 2000)).

82. NEUMANN, *supra* note 63, § 29.3, at 392-93. When there is more than one issue, each with a different standard of review, the standard should be discussed prior to the analysis of the substantive issue. *See* JOSEPH L. LEMON, JR., FEDERAL APPELLATE COURT LAW CLERK HANDBOOK 28 (2007).

83. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 5.2, at 57 (rev. 1st ed. 1996) [hereinafter WINNING ON APPEAL].

84. *See* MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 12 (2d ed. 2006).

think of the standard of review as the standard, or *test*, that the court uses to decide a motion. For example, Rule 56(c) of the Federal Rules of Civil Procedure allows a trial court to grant a motion for summary judgment only when the evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.⁸⁵

On the other hand, at the appellate level, the standard of review refers to the level of deference the appellate court gives to the trial court's findings.⁸⁶ The standard of review governs how closely the appellate court will scrutinize the ruling of the trial court, and the extent to which its own independent judgment should control the outcome. Thus, the standard of review serves as the appellate court's "measuring stick"⁸⁷ for determining "how 'wrong' the lower court has to be before it will be reversed."⁸⁸ The standard of review is a hurdle that the appellant must overcome to win the appeal; the more deference, the higher the hurdle.

The standard of review is different with regard to appeals of questions of law,⁸⁹ questions of fact,⁹⁰ and discretionary matters.⁹¹ Appellate courts give little deference to the trial court with regard to questions of law because appellate courts are as well suited, if not better suited, to determine these issues. In contrast, appellate courts extend great deference to trial court decisions regarding questions of fact because the trial judge was in a position to see the witnesses and evidence firsthand.⁹² Appellate courts also defer to the trial court's decision on discretionary matters because the trial judge is presumed to be an expert on equitable and procedural issues.⁹³ Thus, with the

85. FED. R. CIV. P. 56(c).

86. BEAZLEY, *supra* note 84, at 12.

87. TERESA J. REID RAMBO & LEANNE J. PFLAUM, LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS § 22.2, at 375 (2001).

88. BEAZLEY, *supra* note 84, at 12.

89. A question of law is just that—it is a question of what the law *is* or *what it requires*. Examples of questions of law include whether the jurisdiction recognizes a particular cause of action, how long the statute of limitations is for a particular claim, or whether a will must be signed in order to be valid. These questions can be answered without reference to the facts of the case. NEUMANN, *supra* note 63, § 29.3, at 391. Indeed, the facts are irrelevant to the resolution of the issue.

90. Unlike questions of law, questions of fact are decided on the evidence without reference to the law. With regard to such questions, what the law is or is not and how it applies are irrelevant.

91. Discretionary matters include equitable and procedural matters. NEUMANN, *supra* note 63, § 29.3, at 391.

92. BEAZLEY, *supra* note 84, at 12.

93. *See id.* at 15; *see also* NEUMANN, *supra* note 63, § 29.3, at 391.

exception of an appeal of a question of law, it is difficult for an appellant to overcome the hurdle presented by the standard of review.

The four most commonly used standards of review are discussed briefly below:

First, the *de novo* standard of review applies to questions of law, including many constitutional issues.⁹⁴ Under the *de novo* standard, the appellate court gives no deference to the trial court's or jury's decisions, but independently reviews the matter and substitutes its judgment for that of the trial court.⁹⁵ When drafting an opinion where the *de novo* standard applies, the standard will have almost no impact on the analysis of the matter.⁹⁶ You should draft the opinion as if the matter is being heard for the first time.⁹⁷ Reference need only be made to the trial court's decision when discussing the procedural history of the case on appeal and at the end of document, where the appellate court either affirms or reverses the decision below.

The *de novo* standard is also used with regard to some mixed questions of law and fact,⁹⁸ which concern the application of a given law to a given set of facts.⁹⁹ While some mixed questions of law and fact warrant *de novo* review, other mixed questions warrant review under the *clearly erroneous* standard.¹⁰⁰ The appropriate standard depends on whether facts or law predominate;¹⁰¹ however, in most cases involving mixed questions of law and fact, appellate courts apply the *de novo* standard.¹⁰²

Second, the *substantial evidence* standard of review is used with regard to questions regarding findings of fact made by both juries and administrative agencies. While "substantial evidence" means something "more than a mere scintilla" of evidence,¹⁰³ it "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"¹⁰⁴ Thus, appellate courts are extremely

94. BEAZLEY, *supra* note 84, at 15.

95. *Id.*

96. *See id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 282 (4th ed. 2006); *see also infra* text accompanying notes 105–110.

101. *Id.*

102. *Id.*

103. *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

104. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consol. Edison Co.*, 305 U.S. at 229).

deferential to findings by juries and administrative agencies, and the court will not substitute its judgment for that of the jury or the administrative agency.

Third, the *clearly erroneous* standard of review applies to findings of fact made by a trial judge. "Clearly erroneous" means "more than just maybe or probably wrong."¹⁰⁵ An appellate court can reverse a trial judge's finding of fact only if it has "the definite and firm conviction that a mistake has been committed."¹⁰⁶ Therefore, the appellate court gives the trial judge's decisions great deference and cannot substitute its judgment for that of the trial court.¹⁰⁷

When drafting an opinion in a case where the clearly erroneous standard is applicable, the standard will have a significant impact on the analysis of the matter.¹⁰⁸ The standard of review must be incorporated into the analysis of the issue. For example, if you conclude that the trial court's finding of fact was clearly erroneous, you must identify the erroneous finding and show how the evidence demonstrates that the finding was clearly erroneous.¹⁰⁹ Additionally, you must demonstrate how the clearly erroneous finding of fact altered the outcome of the case.¹¹⁰

Fourth, the *abuse of discretion* standard of review is used with regard to equitable and procedural matters.¹¹¹ Appellate courts give great deference to the trial court on such matters. Great deference is given to trial judges on discretionary matters because they are presumed to be experts on such matters.¹¹² An appellate court will reverse a trial court's exercise of discretion only where the judge's discretion is exercised in a manner not justified by the evidence, and the trial court has consequently exceeded its discretion by committing a clear error in judgment.¹¹³ In drafting an opinion where the abuse of discretion standard is applicable, if you decide that the trial court abused its discretion, you must identify the specific decision the judge made in error, use the appropriate authorities to explain why that decision was incorrect, and specify why and how that error altered the outcome of the case.

105. *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

106. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

107. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

108. *See* BEAZLEY, *supra* note 84, at 17.

109. *Id.*

110. *Id.*

111. NEUMANN, *supra* note 63, § 29.3, at 391.

112. *See* BEAZLEY, *supra* note 84, at 15.

113. RAMBO & PFLAUM, *supra* note 87, § 22.4, at 379.

Those are the four most commonly used standards of review. Standards of review may seem deceptively simple. However, selecting the appropriate standard can be tricky, particularly with mixed questions of fact and law. When trying to determine the appropriate standard of review for a given case, you must conduct research in the governing jurisdiction¹¹⁴ because motion standards are specific to particular motions and appellate standards of review vary from state to state and between the states and the federal government.¹¹⁵ Before researching the standard of review, you should determine whether the judge's chambers has on file boilerplate language for standards of review.¹¹⁶ If so, be sure to update the law to make sure that it has not changed.¹¹⁷ If the judge does not have such boilerplate on file, research the relevant rules and authorities in the governing jurisdiction.¹¹⁸ You will often be able to use the court's language to describe the standard of review. Also, regardless of whether you use boilerplate from the judge's files or language from a case, you must provide citations to authority.

An example of the standard of review section is below:

Discussion

We review de novo a district court's order granting summary judgment. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). We will affirm a grant of summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the district court's decision to grant summary judgment, we will view all evidence in the light

114. NEUMANN, *supra* note 63, § 29.3, at 391-92.

115. *Id.* at 391.

116. *See* CALVERT G. CHIPCHASE, FEDERAL DISTRICT COURT LAW CLERK HANDBOOK 39 (2007).

117. *Id.*

118. Generally, with regard to a motion, you should start research for the governing rule in either the civil or criminal rules of procedure and then research cases in which the courts have applied the standard. *See* BEAZLEY, *supra* note 84, at 23. The courts in those cases may have opined on the meaning of the standard, and those elaborations on the standard's meaning may become part of the standard of review. *See* RAMBO & PFLAUM, *supra* note 87, § 22.2, at 374 n.2. With regard to appellate standards of review, the best place to start researching is the law regarding the substantive issues in the case. *See id.* Often, case law regarding the substantive issues identifies the applicable standard and explains what the standard means and how it operates. *See* NEUMANN, *supra* note 63, § 29.3, at 392.

most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where material facts are not in dispute, fair use is appropriately decided on summary judgment. *Harper & Row, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

ii. Analysis of the issues

After identifying the relevant standard of review, the opinion must then resolve the issues on appeal. The opinion should clearly explain the law governing the substantive areas in question and its application to the facts of the case in order to avoid any ambiguity.¹¹⁹ Ambiguity in an opinion, particularly an appellate decision, will likely lead to further litigation in an attempt by lawyers and litigants to determine the precise meaning of the opinion.¹²⁰ In the opinion, to avoid ambiguity, you must be sure to set forth the facts that drive the outcome and to articulate why those facts, when considered in regard to the governing rule of law, lead to the result articulated by the judge. Additionally, clarifying the court's factual basis for the decision will provide future litigants and future courts with the information necessary to resolve future disputes.¹²¹

Headings and an outline format, while not necessary if the opinion is short, help guide the reader through the opinion.¹²² If the opinion is long or involves several distinct issues, discuss each individual unrelated issue before the court separately and provide section headings that correspond to each issue.¹²³ The section headings for these individual unrelated issues should be labeled with roman numerals (I, II, etc.). Then, when analyzing an issue, provide subheadings for any smaller categories within that subject that must be analyzed. The elements or factors that are examined with regard to the *prima facie* case are often good candidates for subsections. The subheadings for these sections are labeled with a capital letter (A, B, etc.). Smaller categories within these subheadings are labeled with numerals (1, 2, etc.) and lower case letters (a, b, etc.) as appropriate.

For example, let's assume that the case for which you are drafting an opinion on a motion for summary judgment involves a question of whether the defendant infringed upon the plaintiff's copyright or

119. See Wanderer, *supra* note 20, at 59.

120. *Id.*

121. See *id.*

122. Belt, *supra* note 45, at 469.

123. See Wanderer, *supra* note 20, at 59.

whether the defendant's use of the copyrighted image was a fair use. The factors to be analyzed when determining whether an author or artist is entitled to the fair use of the copyrighted work include the following:

- (1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹²⁴

The headings for such an opinion may look something like the following:

- I. Copyright Infringement
 - A. Violation of the Owner's Copyright
 - B. Fair Use Defense
 1. Purpose and Character of the Use
 2. Nature of the Copyrighted Work
 3. Amount and Substantiality of the Portion Used
 4. Effect on the Market or Value of the Copyrighted Work

The section headings will serve as landmarks so that the reader does not get lost in the opinion. Additionally, by breaking the opinion into shorter, more manageable chunks of information, the opinion will be less likely to overwhelm the reader and the section headings will aid the reader's understanding of the opinion.¹²⁵

When more than one issue is to be decided, you must decide the order in which to discuss the issues.¹²⁶ The order in which you discuss the issues need not necessarily correspond with the order followed by counsel for the litigants in their briefs.¹²⁷ Generally, you must discuss the most important issue first.¹²⁸ However, if there is a preliminary procedural question that may affect the outcome of the case, you should dispose of that issue first before discussing the substantive matters.¹²⁹ Additionally, if there is a nonprocedural

124. 17 U.S.C. § 107 (2000).

125. See Belt, *supra* note 45, at 469.

126. Smith, *Opinion Writing for New Judges*, *supra* note 35, at 206; Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1206.

127. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1206.

128. *Id.*; see also Smith, *Opinion Writing for New Judges*, *supra* note 35, at 206.

129. Smith, *Opinion Writing for New Judges*, *supra* note 35, at 206; Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1206.

threshold issue, such as a statute of limitations question, you should resolve that issue before discussing the other substantive issues.¹³⁰

Following resolution of threshold issues, you should address major claims or issues before deciding less significant issues.¹³¹ However, if no one claim is more significant than any other claim, you should first resolve the claim that will have the greatest effect on the litigation.¹³² For instance, if a defendant in a criminal appeal requests either a new trial or, alternatively, a reduced jail sentence, the first issue you should address is whether to grant a new trial. If the court grants a new trial, there is no need to consider the defendant's request for a reduced sentence.¹³³ However, all else being equal, resolve the issues based on the hierarchy of authority: resolve constitutional questions first, statutory questions second, common law questions third,¹³⁴ and state law claims fourth. Regardless of the order in which the issues are discussed, the opinion should flow smoothly "from one point to the next, without repetition of facts already stated."¹³⁵

Counsel for the litigants will likely present a plethora of issues in their briefs. The amount of discussion you should devote to a particular issue depends on the issue itself. When dealing with a point of law that is well settled, you can adequately resolve the issue with little discussion.¹³⁶ Often, reference to one or two citations is sufficient.¹³⁷ However, if the issue involves a novel question of law, or an area of law where the court's opinions seem to contradict each other, a longer, more detailed discussion will be required.¹³⁸ Finally, issues with little merit require little discussion.¹³⁹ While these issues do not merit detailed discussion, the opinion should not completely ignore such issues. In order to reassure counsel that the court took notice of the alleged errors, the opinion should mention these issues and note that they are without merit.¹⁴⁰ The discussion of these meritless issues can be grouped together, rather than scattered

130. See *Ethical Judicial Opinion Writing*, *supra* note 16, at 56.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 57.

135. Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1207.

136. See Wanderer, *supra* note 20, at 59.

137. *Id.*

138. *Id.* (citing Smith, *Opinion Writing for Law Clerks*, *supra* note 13, at 1206).

139. *Id.* at 60; see also CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(7), at 159-60.

140. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(7), at 159-60.

throughout the opinion, and dispatched in a sentence or two at the end of the opinion.¹⁴¹ No additional discussion is necessary.

When discussing each individual issue, use the following organization:

[F]irst, identify the discrete issue, perhaps by a section heading; then present the statutory or common law rule that applies and show how that rule has been applied in other analogous cases; finally, apply that rule to the facts in the case at hand by presenting both parties' arguments and reach a conclusion indicating which argument is more persuasive. The final disposition of the case should reflect the sum of the individual conclusions of the separate issues on appeal. If one of the individual conclusions is inconsistent with the final disposition, either that individual conclusion should be changed or the final disposition must be modified. The final disposition must be consistent with all of the individual conclusions.¹⁴²

Remember that, at the trial level, the court's reasoning is simply to justify its decision.¹⁴³ It does not have an "error-correcting" function.¹⁴⁴ At the appellate level, on the other hand, the purpose of the opinion is to determine whether the trial court erred, and if errors were made, whether they were prejudicial.¹⁴⁵ However, before determining whether errors were made, the appellate court must determine whether a final appealable order exists and, thus, whether the court has appellate jurisdiction over the matter.¹⁴⁶ After determining that the court has jurisdiction over the appeal, the court must then note which issues on appeal were preserved at the trial level.¹⁴⁷ Once the court has established jurisdiction and which issues were preserved for appeal, the court must then determine the appropriate standard of review.¹⁴⁸ Often, the standard of review "is established either by statute or by case law. It serves as a guide to measure the weight of the error. It determines whether the error is prejudicial."¹⁴⁹

141. Wanderer, *supra* note 20, at 60.

142. *Id.* (footnotes omitted).

143. *Id.* at 58.

144. *Id.* at 58-59.

145. *Id.* at 59.

146. *Id.* (citing GEORGE, *supra* note 81, at 194).

147. *Id.*

148. *Id.*

149. *Id.* (alteration in original) (quoting GEORGE, *supra* note 81, at 194).

An example of the discussion of the issues section is found below. Please remember that this section may be organized differently depending on the number of issues before the court.

B. The Fair Use Defense to Claims of Copyright Infringement

Generally, under the Copyright Act of 1976, a copyright holder has the exclusive right to reproduce or distribute the copyrighted work and to authorize derivative works. 17 U.S.C. § 106 (2000); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (quoting § 106). Any use of a copyrighted work without the permission of the copyright holder is considered an infringement of these exclusive rights. *Campbell*, 510 U.S. at 576 (quoting § 106). MLB owns the copyright to the Chief Wahoo image. (R. at 26.) Because Preston copied the Chief Wahoo image in her comic book and reproduced the comic book, MLB has established a prima facie case of copyright infringement.

However, the fair use of copyrighted material is not considered an infringement, particularly when done to comment on or criticize the original copyrighted work. 17 U.S.C. § 107 (2000). The purpose of copyright protection is to be the “engine of free expression,” encouraging the progression of science and useful arts for the benefit of society. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). The availability of a fair use defense is consistent with the policies underlying the Copyright Act because, “[e]very book in literature, science and art borrows, and must necessarily borrow, and use much which was well known and used before.” *Campbell*, 510 U.S. at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)). The opportunity to use elements of an existing work to make a new work, particularly for artistic or critical purposes, has always been considered vital to achieving the underlying purpose of the Copyright Act: the creation and progression of new ideas. *Id.* at 578 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1134 (1990)).

Fair use is an affirmative defense which requires the party claiming the defense to carry the burden of its proof. *Id.* at

590 (citing *Harper*, 471 U.S. at 561); *see also* H.R. Rep. No. 102-836, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2554. To determine whether a use is fair, the Court considers the following factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of the copyrighted work.

17 U.S.C. § 107. The presence or absence of any single factor is not dispositive of fair use; rather, all factors are weighed together on a case-by-case basis. *Campbell*, 510 U.S. at 577 (citing *Harper*, 471 U.S. at 560).

The district court concluded that Preston's use of MLB's copyrighted Chief Wahoo image was fair use. (R. at 10.) The district court reasoned that a trier of fact could only conclude that Preston's work was fair use because: (1) her use was parody meant to criticize MLB's use of racial stereotypes for corporate gain; (2) she only copied what was necessary for her purpose; and (3) her comic book would not affect the market demand for MLB's products or those of its licensees. (R. at 10.)

Because we agree with the district court that no triable issues of fact exist on whether Preston's use of MLB's Chief Wahoo image constitutes fair use, we weigh the four § 107 fair use factors on appeal. This Court concludes that Preston's use of MLB's copyrighted Chief Wahoo image constitutes fair use and affirms the district court's grant of summary judgment.

1. The Purpose and Character of the Use

The first factor to consider when determining whether a work is entitled to fair use protection is the purpose and character of the use. 17 U.S.C. § 107(1). In determining whether this factor favors fair use, the Court must weigh the following considerations: (1) whether the work is a use that is considered fair, such as criticism or commentary; (2) whether the use is sufficiently transformative that it does not

merely supplant the original work; and (3) whether the use is commercial or nonprofit in nature. *Campbell*, 510 U.S. at 578-79 (quoting 17 U.S.C. § 107). No single consideration is dispositive of whether the purpose and character factor favors fair use, but each consideration should be weighed collectively. *Id.* at 577 (citing *Harper*, 471 U.S. at 560).

Works that criticize or comment on the copyrighted work are often considered a fair use of the original work under 17 U.S.C. § 107. While § 107 does not expressly identify parody as a fair use, it is a form of criticism that is entitled to fair use protection as it furthers the goals of the Copyright Act by taking a known idea and expanding it through analytic commentary. *Campbell*, 510 U.S. at 580. Parody is a literary or social form of commentary or criticism that imitates the characteristic style of a work for comic effect or ridicule, not just to draw attention or avoid the creative process. *Id.*; *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997). A parodist's claim to fair use is based on the fact that the parodist must use some elements of a prior work to create a new one that comments on the original work. *Campbell*, 510 U.S. at 580. For example, in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), the court found that a spoof of the novel *Gone with the Wind* was a parody because it criticized slavery and commented on the depictions of blacks and whites in the original novel through parodies of the original characters. *Id.* at 1269. The author wrote a novel that copied the core characters, plot, famous scenes, and relationships of the copyrighted novel. *Id.* at 1259. Moreover, the title of the secondary novel, *The Wind Done Gone*, was similar to the copyrighted work, *Gone with the Wind*. *Id.* The court reasoned that *The Wind Done Gone* was a parody of the copyrighted novel that deserved fair use protection because the author used her novel to criticize the copyrighted work's depiction of slavery and the romanticism of the Old South. *Id.*

In determining whether a use was fair, the court does not consider whether the parody was successful, only whether the work could reasonably be interpreted as commenting on the original work. *Campbell*, 510 U.S. at 582. However, the use of a copyrighted work for parody is not dispositive of fair use, and must be weighed with the other factors provided by 17 U.S.C. § 107. *Id.* at 581.

Preston's comic book is a parody of the Chief Wahoo image, which favors the fair use defense. Preston's comic book is a parody because she uses the copyrighted image to criticize MLB's use of the Chief Wahoo image and to comment on corporate exploitation of racial stereotypes. (R. at 47.) On the cover, Chief Wahoo is portrayed wearing a "Freedom Now" T-shirt with his fist raised in salute and Jacobs Field stadium prominently depicted in the background. (R. at 43.) This image coupled with the caption on the cover stating that Wilbur Wahoo "flees his corporate captors to find his own way in the world" (R. at 43), indicates that Chief Wahoo is a prisoner of the Cleveland Indians and of MLB. That he runs away from his corporate captors and frees Uncle Ben and Aunt Jemima (R. at 44), other racial stereotypes being used for corporate advertising, reveals Preston's message—she is using the copyrighted image of Chief Wahoo to criticize MLB's exploitation of racial stereotypes for monetary gain (R. at 47). Thus, her use of the Chief Wahoo image was necessary to alert Preston's audience to the target of her criticism.

In order for her comic book to have an impact, Preston must rely on the public's recognition of the Chief Wahoo image. Just as in *Suntrust Bank*, where the court found that the author's novel was a parody when it copied the characters in *Gone with the Wind* to criticize the copyrighted work's depiction of slavery and romanticism of the Old South, 268 F.3d at 1269, in this case, Preston's comic book was a parody because she copied the Chief Wahoo image specifically to criticize MLB's use of racial stereotypes for corporate gain (R. at 47). Thus, given that the critical nature of her work is reasonably perceivable, Preston's comic book is a parody, which favors fair use.

When evaluating the purpose and character of a parodic use, the court must also determine whether the new work is transformative. *Campbell*, 510 U.S. at 579. A new work is transformative if it does more than merely copy the original, but adds to the original in such a way that it creates a different character and purpose. *Id.* (citing Leval, *Fair Use, supra*, at 1111). Generally, a use that alters the expression or meaning of the copyrighted work will be considered transformative, and a use that merely exploits the creative quality of the original will not. *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006). The level to which the new work is

transformative of the original indicates the novelty associated with the new work, and it is this notion of novelty that is the basis of the fair use defense and the principles of copyright. *Campbell*, 510 U.S. at 580. Finding that the new work is transformative is not absolutely necessary for the fair use defense; however, the more transformative the new work, the less significant the other factors will be in the fair use determination. *Id.* at 579.

Parodies, by their nature, are inherently transformative. *Id.* The essence of a parody is to remind the reader of the original, but also to create a new meaning that comments on the original. *Id.* at 580. For example, in *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), Mattel sued a photographer for using Barbie dolls in photographs where he put the dolls in sexual and violent positions to parody the typical perception of the toy as a symbol of femininity and grace. *Id.* at 796. The court found the photographer's use of the photographs to be fair, reasoning that, although he used Mattel's copyrighted works, the photographer sufficiently transformed the image of the doll. *Id.* at 802. He did not copy Barbie verbatim. Rather, he added new elements to her environment, such as depicting her being attacked by kitchenware, to juxtapose these images with the usual perception of Barbie as a wholesome American girl. *Id.* The court found this use of Barbie to be transformative, noting that the use of "lighting, background, props, and camera angles all serve to create a context for Mattel's copyrighted work that transform Barbie's meaning." *Id.* Thus, the artist created a sufficiently transformative work that expressed a new idea of the kind promoted by copyright law and the fair use defense.

Preston's use of the copyrighted image is highly transformative because her use alters both the image itself and the meaning attached to it. Preston used Chief Wahoo's red skin, broad grin, prominent nose, triangular eyes, pointed eyebrows, dark center-parted hair, and red feather. (R. at 31.) Moreover, Preston named her protagonist Wilbur Wahoo, which is very similar to Chief Wahoo. (R. at 40.) However, while Preston used the static image of Chief Wahoo, the unchanging three-quarter view of his face with a broad grin and one ear showing (R. at 31), she altered the

image in many ways. Preston gave Wilbur Wahoo limbs, a body, and clothing. (R. at 42, 43.) She depicted him from many different angles, not just from the three-quarters angle. (R. at 42.) Preston also portrayed Wilbur Wahoo with varied facial expressions, not just with the broad grin. (R. at 42.)

Furthermore, Preston did not merely repackage the image, but she gave it new meaning. Unlike the copyrighted image of Chief Wahoo, Preston placed Wilbur Wahoo within the context of a story with a background, plot, and friends. (R. at 42–44.) Preston used this context to alter the meaning attached to the copyrighted image. While MLB's Chief Wahoo fosters recognition and admiration for the Cleveland Indians baseball team (R. at 27), Preston's image is a social commentary on the corporate exploitation of racial stereotypes. (R. at 47.) Like the photographer in *Mattel*, whose photos of Barbie were transformative due to the artist's use of lighting, camera angles, and background to change Barbie's meaning, Preston's use of the Chief Wahoo image was transformative because she changed the meaning associated with the image by altering Chief Wahoo's physical appearance and by placing him in a new context. The differing purpose of Preston's image, as well as the elements added to the Chief Wahoo image and the narrative context in which Wilbur Wahoo is situated, are clear indications of Preston's creativity, and as such, the work is sufficiently transformative in nature to favor a finding of fair use.

The final consideration in determining the purpose and character of a use is whether the use is commercial in nature or is for nonprofit educational purposes. *Campbell*, 510 U.S. at 584. The less the use is aimed at commercial gain, the more likely it is to be considered fair use. *Id.* at 579. The commercial character of a parody does not automatically preclude a finding of fair use; however, the courts generally recognize that the higher the transformative and creative value of the parody, the less weight any commercial element will have in the fair use analysis. *Id.* at 585. For example, when the commercial character was secondary to the critical message of the work, the court affirmed a finding of fair use. *Blanch*, 467 F.3d at 254.

The commercial character of Preston's comic book weighs against fair use since she profited from selling the

comic book. Preston sold her comic book in various comic book stores in the local Cleveland area, outside the baseball stadium on game days, and on Web sites. (R. at 46.) While Preston profited from sales of the comic book, she earned a mere five hundred dollars. (R. at 46.) Thus, the commercial character of her use was minimal and secondary to the critical character and purpose of her comic book. Furthermore, the transformative value of her comic book is of far greater weight than its commercial value. Therefore, while the commercial character of the comic book disfavors a finding of fair use, this consideration is given little weight. Since Preston's comic book is a parody that criticizes and comments on the copyrighted image of Chief Wahoo, and the commercial character of the comic book is outweighed by its highly transformative character, the purpose and character of Preston's work favors fair use.

2. The Nature of the Copyrighted Work

The second factor to consider with regard to fair use is the nature of the copyrighted work. This factor recognizes a hierarchy of copyrighted works, with creative works receiving more copyright protection than factual or informational works. *Blanch*, 467 F.3d at 254. The more creative a copyrighted work is, the closer to the core of copyright protection it is, such that a work with a more original element, like a book or song, receives greater protection than factual or informational works, such as a news report. *Id.* at 255. Thus, the less creative the original work, the more firmly a fair use defense can be established. *Campbell*, 510 U.S. at 586.

Although the creative nature of a work typically weighs in favor of the copyright holder, this factor is not helpful in distinguishing fair use in a parody case since parodies, by their very nature, use elements of published, creative works to make their critical point. *Id.* Thus, even if the original work is a creative work, this factor does not bear much weight in a parody case, or where the creative work is used for a transformative purpose. *Id.*; *Blanch*, 467 F.3d at 257.

The Chief Wahoo image is a creative, original expression meant to be protected by the Copyright Act. (R. at 27–28.) However, Preston's comic book is a parody that comments on the use of racial stereotypes for corporate gain by using

the familiar, creative image of Chief Wahoo and manipulating it to tell a new story. (R. at 47.) Therefore, although this factor weighs against a finding of fair use because of the creative nature of the Chief Wahoo image, it is given little weight in the overall fair use analysis and its negative effect on the present case is minimal.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The amount and substantiality factor considers both the quantity and the quality of the portions of the copyrighted work that were used. *Campbell*, 510 U.S. at 587–88. This factor will weigh against fair use where the amount used is great or the portion used is so important to the original that the new work is likely to serve as a substitute for, or cause harm to the market value of, the original. *Id.* The “extent of permissible copying varies with the purpose and character of the use.” *Id.* at 586–87. For instance, a parody is allowed to use a greater amount of the copyrighted work because it must necessarily conjure up the most distinctive and memorable features of the original so that the audience will know who or what the commentary is targeting. *Id.* Furthermore, a parody is not limited to using only those elements needed to conjure the original work, but may use additional elements of the original. *Suntrust Bank*, 268 F.3d at 1273. However, once enough has been taken to conjure up the original in the minds of the readership, any further taking must specifically serve the new work’s parodic aim. *Id.* (quoting *Campbell*, 510 U.S. at 588). Even entire verbatim reproductions of substantial portions of an original work are justifiable where the purpose of the new work differs from the original. *Campbell*, 510 U.S. at 588.

For example, in *Suntrust Bank*, the defendant copied the core characters, character traits, relationships, famous scenes, prominent plot, and verbatim dialogues and descriptions from the novel *Gone with the Wind*. 268 F.3d at 1259. The material was taken for purposes of creating a parody, *The Wind Done Gone*, which criticized the racist undertone of the plaintiff’s copyrighted work. *Id.* at 1273. Despite the fact that a substantial portion of the original copyrighted work was utilized, the court held that *The Wind Done Gone* did not use an excessive amount of the original copyrighted work, but rather the new work’s use was reasonable and fair in relation to its critical purpose. *Id.*

The court noted that a parodist is not required to “take the bare minimum amount of copyright material necessary to conjure up the original work.” *Id.* Rather, since every element taken from the original work served the author’s parodic purpose, the use was deemed fair. *Id.* Further, because the meaning of the new work was very different from that of the original and the new work did not divert consumers from products associated with the original to its own, it was unlikely to serve as a market substitute for the original. *Id.* at 1275–76.

Preston used the entire copyrighted image, incorporating all of Chief Wahoo’s distinguishable features, including his red skin, prominent nose, triangular eyes, broad grin, pointed eyebrows, dark hair, and red feather. (R. at 31.) While Preston copied Chief Wahoo’s facial features, each element was used to conjure up the distinctive image of Chief Wahoo in the reader’s mind so that she could parody that image. (R. at 47.) Furthermore, Preston used each element to further a distinct parodic purpose. She drew attention to the fact that corporations perpetuate racial stereotypes for economic gain when she copied the exaggerated racial characteristics used in the copyrighted image, such as Chief Wahoo’s red skin and dark hair. (R. at 31, 47.) Since a parodist is not required to take only that which is minimally necessary to conjure up the original, and Preston had a parodic purpose for each element copied, as did the author in *Suntrust* whose use was considered reasonable, the amount and substantiality of the portion used by Preston favors a fair use defense.

4. The Effect of the Use on the Potential Market for, or Value of, the Copyrighted Work

The fourth factor to be considered with regard to the fair use defense is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Under this factor, the Court must consider whether there would be a substantial negative impact on the potential market for the original, as well as its derivative works, if use like that in question was unfettered and pervasive. *Campbell*, 510 U.S. at 590 (quoting *Harper*, 471 U.S. at 568). A use harms the market for the original work if it serves as a substitute for the original or its derivative works. *Id.* at 592-93. If an unauthorized use supplants the market

for the original or potentially licensed derivatives, it is not a fair use of the original work. *Id.* For this factor to favor fair use, the new work may harm the market for the original or any derivative works by suppressing the demand for the original so long as it does not actually usurp demand for the original by acting as a market substitute. *Id.* at 592 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

Generally, the more transformative the new work is, the less likely it is that it will actually be able to serve as a market replacement for the original. *Id.* at 591. For example, parodies are not likely to substitute for the original work because parodies serve a different function than the original. *Id.* A parody that successfully criticizes the original work may suppress the demand for the original work, but it cannot usurp the demand. *Id.* at 592. Incidental damage to the market for the original or its derivatives will not defeat fair use so long as the damage is a by-product of a shift in consumer attitude caused by criticism or commentary. *Mattel*, 353 F.3d at 805.

MLB uses the copyrighted image of Chief Wahoo as a team mascot to commercially promote the Cleveland Indians baseball team. (R. at 27–28.) Preston, on the other hand, used the Wilbur Wahoo character in her comic book to criticize corporate use of racial stereotypes. (R. at 47.) The two images, Chief Wahoo and Wilbur Wahoo, serve markedly different functions and appeal to different audiences. Even though Preston's criticism of MLB's use of Chief Wahoo may result in harm to the reputation of the original Chief Wahoo image, it is unlikely that Preston's work will act as a market substitute for the copyrighted image. The difference between the purpose of the original work as a baseball icon and that of Preston's comic book as a criticism of corporate exploitation of racial stereotypes suggests that the effect on the potential market for, or value of, the copyrighted work will be minimal. Thus, this factor favors fair use.

While the nature of the Chief Wahoo image was creative, and thus weighs against fair use, the purpose and character of the comic book favor fair use, as does the fact that Preston did not use an unreasonable amount of the copyrighted image and that the comic book will have no cognizable effect on the market for the Chief Wahoo image or on the derivatives market. Therefore, Preston's use of the

Chief Wahoo image was fair and MLB's copyright of the Chief Wahoo image was not infringed.

f. Conclusion

The conclusion, which is the last paragraph of the opinion, announces the court's disposition of the case and its mandate.¹⁵⁰ The disposition and mandate should not only set forth the decision that has been reached by the court, but also identify the relief to be granted.¹⁵¹ At the trial level, the conclusion section must clearly articulate for whom judgment was rendered. At the appellate level, the judgment appealed may be affirmed, revised and rendered, or reversed and remanded.¹⁵² If the case is reversed and remanded, the opinion must include instructions for the lower court.¹⁵³ These instructions should leave no doubt as to what is required of the trial court on remand.¹⁵⁴ For example, "[i]f the case is to be remanded for a new trial, it is sometimes necessary to spell out the scope of the new trial, whether complete or limited to certain issues."¹⁵⁵ Finally, the opinion will end with a signature line for the judge's signature.

Because Preston's use of the Chief Wahoo image was a fair use, this Court affirms the district court's grant of summary judgment in favor of Preston.

Judge Richter

2. Drafting Suggestions

Armed with your outline and a template for the opinion, you are ready to begin drafting the opinion. Judicial opinions, as with other

150. *Id.* at 60.

151. *Id.*

152. JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 301 (5th ed. 2007).

153. *Id.* at 303.

154. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(7), at 160.

155. BERNARD E. WITKIN, APPELLATE COURT OPINIONS: A SYLLABUS FOR PANEL DISCUSSION AT THE APPELLATE JUDGES' CONFERENCE OF THE SECTION OF JUDICIAL ADMINISTRATION AMERICAN BAR ASSOCIATION (1966), *reprinted in* SEMINARS FOR CIRCUIT COURT JUDGES, 63 F.R.D. 453, 515, 560 (Fed. Judicial Ctr. 1972) (quoting Judge Hamley's remarks at the Appellate Judges' Conference in Montreal on August 7, 1966).

court documents, must be thorough, accurate, logical, grammatically correct, professional, and timely.¹⁵⁶ The following suggestions will help you produce documents that satisfy these criteria.

a. *Miscellaneous suggestions*

Given the caseload that faces the court, it is important that you be efficient and carefully manage your time. However, as inevitably happens when writing, you may suffer writer's block. If writer's block occurs, there is no need to flounder while waiting for the creative juices to flow. Instead, you should take more proactive measures. One measure that you can employ is to discuss the case with the judge so that you know exactly what he or she wants to say before writing.¹⁵⁷ Another measure you can try is to "[s]tart writing where you feel comfortable."¹⁵⁸ You need not begin writing the opinion at the beginning. For many people, the writing process is not linear. Start with what you know. If you do not feel as though you know anything sufficiently well to begin writing, which often happens to novices, just begin drafting. What you write at this point is not nearly as important as the fact that you *are* writing. While your thoughts may be unorganized or ambiguous, later revision and editing can correct these problems. But if you do not begin to write, you will have nothing with which to work and will continue to stare at a blank computer screen or piece of paper. Referring to your outline should also help with writer's block because you have text on the page and a format for the discussion. If you failed to draft an outline at the preparation stage and you are suffering from writer's block, get started by outlining the discussion.

Another tip with regard to drafting an opinion is that footnotes are less appropriate in a judicial opinion than in a law review and should be kept to a minimum.¹⁵⁹ Any information that is necessary to understand the opinion, or is otherwise sufficiently important to mention, should be addressed in the body of the opinion rather than in a footnote.¹⁶⁰ Tangential information, which is commonly discussed in footnotes, often does not deal directly with the case that is before the court and, therefore, is not subjected to the same close and careful scrutiny as the body of the opinion.¹⁶¹ Thus, a footnote

156. Wright, *supra* note 10, at 1191-94.

157. Klein, *supra* note 40, at 35.

158. *Id.*

159. JUDICIAL OPINION WRITING MANUAL, *supra* note 73, at 34.

160. *Id.*

161. *Id.*

may not accurately portray the court's view of the case, and worse still, may throw the rest of the opinion into doubt.¹⁶² Consequently, footnotes may undermine the goals of justifying the court's decision to the litigants and the public. But be aware that your judge may have a different preference.

Additionally, when drafting an opinion, remember to use writing techniques generally employed by good writers. Do not forget what you previously learned about writing just because you've moved into a genre with which you have little experience. Remember to use those paragraphing rules and to write concisely. Write strong sentences. If you are a little rusty on good writing techniques, you can consult any number of resources designed to aid a writer in improving his or her writing. Two good resources for legal writers to consult are *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*¹⁶³ and *Plain English for Lawyers*.¹⁶⁴

Furthermore, when drafting an opinion, you should mimic the judge's writing style. Because writing is connected to personality,¹⁶⁵ each judge has his or her own individual writing style.¹⁶⁶ While some judges prefer complex sentences and an extensive vocabulary, other judges prefer simple declarative sentences and plain English.¹⁶⁷ Because the judge is the one consistent factor in the decision-making process, and not the numerous judicial clerks who come and go from the judge's chambers, a judicial clerk should attempt to emulate the judge's writing style to ensure continuity.¹⁶⁸ To do so, the clerk should read several of the judge's opinions to become familiar with his or her writing style¹⁶⁹ and learn from the judge's edits to documents drafted by the clerk.¹⁷⁰ However, while the judge is the boss, do not be afraid to make suggestions that would improve the clarity of the writing.¹⁷¹

162. *Id.*

163. ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* (2d ed. 2005).

164. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005).

165. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 39.

166. CHAMBERS HANDBOOK, *supra* note 37, § 7.2(C), at 146.

167. *Id.*

168. *Id.*; *Judges' Clerks Play Varied Roles*, *supra* note 5, at 39.

169. CHAMBERS HANDBOOK, *supra* note 37, § 7.2(C), at 146.

170. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 39.

171. Klein, *supra* note 40, at 36.

b. Tone

The tone of a judicial opinion should be professional.¹⁷² The opinion should be respectful of the parties¹⁷³ and demonstrate that the court has carefully considered all the arguments that the parties have made.¹⁷⁴ To that end, you should write the opinion so that a layperson with a high school education can understand it.

A judicial opinion must convey information to the reader in a manner that he or she will understand. Word choice will have the greatest impact on the reader's ability to comprehend the document. The use of unfamiliar or arcane words undermines the goal of conveying information to the reader in a manner that he or she will understand; therefore, you should select the simplest word that adequately communicates the idea.¹⁷⁵ Understanding the law is difficult enough. Do not add to the lay reader's struggle by using challenging words. Furthermore, the court's use of arcane or unfamiliar words will not only make the court appear pompous,¹⁷⁶ but will also alienate lay readers. You might remember reading an arcane case in your first year of law school to identify with your audience. This result undermines the goals of a judicial opinion—justifying the outcome to the losing party and the public in general.

Therefore, when drafting an opinion, you should avoid using “fancy” words when simple words will suffice.¹⁷⁷ Use simple words so that the reader need not constantly run to the dictionary to understand what is being said in the document. When selecting words, consider how many of your readers are likely to know its meaning.¹⁷⁸ If that number is low, consider whether there is another word that expresses the same concept with which your readers will be more familiar.¹⁷⁹ If so, use the word that would be more readily understood by a larger audience.¹⁸⁰ For example, do not use “abecedarian,” which few readers will understand, when “elementary” has essentially the same meaning and far more readers will be familiar with it.¹⁸¹

172. *Ethical Judicial Opinion Writing*, *supra* note 16, at 35.

173. *Id.* at 38.

174. *See id.* at 39.

175. Wanderer, *supra* note 20, at 62.

176. *Id.*

177. Klein, *supra* note 40, at 36; Wanderer, *supra* note 20, at 62.

178. Wanderer, *supra* note 20, at 62 (quoting Marshall F. McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 A.B.A. J. 382, 384 (1949)).

179. *Id.* (quoting McComb, *supra* note 178).

180. *Id.* (quoting McComb, *supra* note 178).

181. *See* Belt, *supra* note 45, at 473.

Also, avoid the use of unnecessary legalese.¹⁸² “Legalese is the language of lawyers, containing words that do not often appear outside the legal profession.”¹⁸³ It is a word or phrase that a lawyer might use in drafting a legal document but would not use in everyday situations, such as when speaking with her grandparents or spouse.¹⁸⁴ Examples of legalese include “said” or “aforesaid,” the use of “same” and “such” as a pronoun, “hereinafter,” and “inter alia.”¹⁸⁵ Sometimes, legal language is critical. Legalese is permissible with terms of art because “they have distinct meanings a synonym cannot replace.”¹⁸⁶ For example, “negligence” is a term of art.¹⁸⁷ To use ordinary language to convey the same information that is conveyed by the term “negligence” would take up at least a paragraph of space. In contrast, many legal writers use the word “said” to mean “the.” For example, said plaintiff then slipped on the ice. “Said” is not a term of art; rather it is useless legalese.

The use of legalese detracts from the effectiveness of an opinion just as the use of unfamiliar or arcane words does.¹⁸⁸ The use of legalese creates a needlessly stilted tone and makes the document one that cannot easily be understood by the public. Therefore, when selecting a word, remember that “[t]he best judicial writers try to express decisions so that a varied audience can understand them.”¹⁸⁹ Consequently, a judge, and thus a judicial clerk, “must translate legalese into language comprehensible for those not trained in the law.”¹⁹⁰

Additionally, avoid using humor in a judicial opinion.¹⁹¹ Humor interferes with the goals of justifying the outcome to the litigants and the public. First, it fails to show the litigants the proper respect by making light of their situation.¹⁹² Second, the use of humor may cause a reader to question whether the court has truly given careful

182. Klein, *supra* note 40, at 36.

183. *Ethical Judicial Opinion Writing, supra* note 16, at 23.

184. Smith, *Opinion Writing for New Judges, supra* note 35, at 209.

185. *Id.* at 209-10.

186. *Ethical Judicial Opinion Writing, supra* note 16, at 23. While some legalese cannot be avoided in legal writing because it has become a term of art, most legalese is avoidable. *Id.*

187. Other examples of legalese that are terms of art include “plaintiff,” “hearsay,” and “felony.” *Id.*

188. Belt, *supra* note 45, at 474.

189. *Id.*

190. *Ethical Judicial Opinion Writing, supra* note 16, at 24.

191. *See id.* at 35-36.

192. *See id.* at 36.

thought to the decision.¹⁹³ Third, not everyone shares the same sense of humor. Finally, humor may have a negative effect on the public's perception of the court system because it appears that the judge does not take judicial duties seriously.

c. Editing and proofreading the opinion

Every document issued by a court must be accurate in every way. The quality of a court document, particularly a judicial opinion, is determined by its "tone, organization, style, method, and reasoning."¹⁹⁴ A document should read easily and flow smoothly from one section to another.¹⁹⁵ Furthermore, a document that contains misspelled words or inaccurate citations shows a lack of care in the document's preparation and brings the accuracy of the substance of the document into question.¹⁹⁶ Because sloppy writing suggests that the writer put insufficient time into drafting the document,¹⁹⁷ a writer must edit and proofread a document to ensure that it is error free and professional in appearance before submitting it to the judge. While editing corrects large scale problems with the document's organization, reasoning, and readability, proofreading focuses on minutia such as typographical, grammatical, and format errors. These tasks are of the utmost importance.

The primary goals of editing are to improve the organization of the document and the manner in which the law or facts have been presented, eliminate verbosity and ambiguities in the text, improve writing style, correct grammar and punctuation errors, and ensure that citations are included where necessary.¹⁹⁸ While editing, you must also confirm that the cases cited in the draft stand for the proposition of law for which the cases are cited.¹⁹⁹ When editing your own work, it is best to set the completed draft aside for at least a day before starting the editing process.²⁰⁰ Time away from the draft will provide you with a fresh view of the document.²⁰¹ A fresh view will allow you to identify larger issues, such as poor organization or faulty reasoning, as well as smaller issues, such as a missing citation or a poorly written sentence.

193. *Id.*

194. *Id.* at 1.

195. *See id.* at 22.

196. CHAMBERS HANDBOOK, *supra* note 37, § 7-3, at 167; Wright, *supra* note 10, at 1191.

197. *Ethical Judicial Opinion Writing*, *supra* note 16, at 2.

198. *See* CHAMBERS HANDBOOK, *supra* note 37, § 7-2(B), at 145.

199. *See id.* § 7-2(A), at 144.

200. *Id.* § 7-2(B), at 145.

201. *Id.*

There are several other techniques that may aid you when editing a draft. One technique that you may use when editing a draft is to read the document out loud.²⁰² Reading the draft out loud may reveal problems with the structure of a particular sentence or paragraph. Yet another technique is editing in stages, with the focus at each stage being on a different issue. For example, during the first stage, you could review the draft looking only for grammar and punctuation problems. Once these problems have been corrected, you could then review the opinion to ensure that the style is consistent with that of the judge. Next, you could review the document with an eye toward missing citations. Finally, after you have edited the document using some combination of the above-mentioned techniques, you should ask another person, for instance a co-clerk, to review the draft and make suggestions for improvement.²⁰³

Once you have made any improvements suggested by the individual who reviewed your draft, and you are satisfied with the substance of the opinion, you are finished with the editing stage. Your final task is proofreading the document to eliminate sloppiness, such as typographical, grammatical, and format errors.²⁰⁴ Additionally, compare the case title to the docket sheet to ensure that the names of the parties are correct and that the case number is accurate.²⁰⁵ Proofreading demands meticulous attention to detail and painstaking care.²⁰⁶ You may have to scour the document again and again to ensure maximum accuracy. Do not be tempted to skip this step in order to save time—proofreading is a necessary step in the writing process. The judge will evaluate your writing, and if your work looks sloppy, the judge will conclude that the substance of the document is sloppy as well.

Just as with editing, you should put the opinion aside for at least a day before starting the proofreading process.²⁰⁷ Time away from the document will allow you to see small problems such as citation errors, repetition of words, superfluous words, missing letters or words, and missing punctuation marks. For example, a fresh view of the draft will allow you to see that you typed the word “statue” when you really intended to type “statute.” In addition to searching for citation errors and superfluous or missing words or punctuation

202. *Id.*

203. *Id.*

204. *Id.* § 7-3, at 167.

205. *Id.* § 7-3(A), at 169.

206. *Id.*

207. Klein, *supra* note 40, at 36.

marks, you must ensure that any quotations are carefully and accurately quoted.

Another helpful technique that you may employ is reading the document backwards. Skimming the draft from the end to the beginning prevents the writer's mind from filling in what the writer expects to see by taking the text out of context. Employing this technique will allow you to notice if a word or punctuation mark is out of place or missing. For example, when reading the document backwards you may notice that a quotation is missing an opening or closing quotation mark.

When proofreading citations, you must ensure that the format of the citations is proper and complies with that used by the court. The citation format is likely to comply with that set forth in either the local court rules or a common citation system used by either *The Bluebook*²⁰⁸ or the *ALWD Citation Manual*.²⁰⁹ For cases cited in the opinion, you must make certain that the parties' names are spelled correctly, and that the volume, court, page number, and year of the decision is accurate.

Once you have finished editing and proofreading the opinion, it should be free of large scale problems with organization and reasoning and small scale problems such as typographical, grammatical, and citation errors. When you are satisfied with the substance of the opinion and sure that the document is professional in appearance, you should submit the draft to the judge. The judge will review the opinion and make some alterations. While the judge may electronically change the document, you may be expected to do so. If so, you should make the changes in a timely fashion and return both the original, marked-up copy of the draft, and the amended draft to the judge for further review.²¹⁰ This cycle may continue many times before the opinion is final.

You should, however, be prepared for the judge to scrap the draft opinion and tell you to start over with a different focus.²¹¹ If this occurs, you should not take this constructive criticism as a personal affront, but should use the situation as a learning experience. Although the opinion drafting process relies on collaboration between the judge and the judicial clerk, it is imperative that you keep in mind that "the entire adjudicative function and decision-making

208. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

209. ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION (Ass'n of Legal Writing Dirs. & Darby Dickerson eds., 3d ed. 2006).

210. CHIPCHASE, *supra* note 116, at 55.

211. *Id.*

process . . . remain exclusively with the judge.”²¹² While the judge must agree with every word that you have written in the opinion, the reverse is not true. You need not agree with the outcome desired by the judge. But even if you do not agree with the judge’s decision and reasoning, you must do as the judge dictates.²¹³ The judge is ultimately responsible for the opinion, not you.

C. Checklist for Critiquing an Opinion

When drafting the opinion, and before submitting it to the judge, consider the following questions to determine whether the opinion does everything that it needs to do and is accurate.

- _____ Does the court have jurisdiction over the matters before it?
- _____ Are all the legally significant facts included in the statement of the facts?
- _____ Are all the factual statements in the opinion supported by references to the evidence, including depositions, documents, admissions, responses to interrogatories, affidavits, hearing or trial transcripts, and exhibits?
- _____ Are the issues to be decided clearly stated in one location rather than scattered throughout the opinion?
- _____ Have all issues been addressed?
- _____ Have the facts supporting the losing party been stated?
- _____ Have the arguments of the losing party been stated and adequately addressed?
- _____ Do the cases cited stand for the propositions for which they are asserted?
- _____ Are the conclusions in the opinion supported by clear reasoning and legal authorities?
- _____ Is the court’s ruling stated clearly and succinctly?
- _____ Have all omissions from quotations been indicated with ellipses?
- _____ Are all dates and numbers accurate?
- _____ Are all direct quotations from depositions, documents, admissions, responses to interrogatories, affidavits, hearing or trial transcripts, and exhibits, or legal authority perfectly accurate?

212. *Ethical Judicial Opinion Writing*, *supra* note 16, at 69; *Judges’ Clerks Play Varied Roles*, *supra* note 5, at 35.

213. *Judges’ Clerks Play Varied Roles*, *supra* note 5, at 36.

- _____ Is the opinion free of grammar, punctuation, and citation errors, or typos?
- _____ Have all parties been treated with respect?²¹⁴

III. BENCH MEMORANDA

Another document that you may be asked to draft is a bench memorandum. Unlike a judicial opinion, no one will read a bench memorandum but the judge in a trial level case or the panel of judges assigned in an appellate case. A bench memorandum aids the judge's preparation for a motion hearing or for oral argument for an appeal.²¹⁵ The document is generally just a few pages in length²¹⁶ and is essentially a report that familiarizes the judge with the issues before the court on a motion or on appeal, summarizes the briefs of the parties before oral argument, narrows the judge's focus to areas that may require more inquiry, and often recommends an outcome for the case.²¹⁷ A bench memorandum must not only be impartial and critical, but must be thorough enough to summarize the issues in the case without being so thorough that the judge would have been better served by reading the briefs and the record him or herself.²¹⁸

A. *Preparing to Draft the Bench Memorandum*

Preparing to draft a bench memorandum is quite similar to preparing to draft a judicial opinion. First, you should read the case record,²¹⁹ including any trial transcripts and the briefs of the litigants. While reading the record and the briefs, you must identify what issues will be before the court during oral argument and determine which facts are relevant to the resolution of those issues. You should then examine the authorities relied on by the litigants in their briefs²²⁰ and update that research to ensure that no new authorities have been issued since the briefs were filed (a hearing may occur several years after the filing of the briefs). Additionally, you should identify any issues that may require clarification or more research and devise a list of questions that the judge may need to ask during the hearing.

214. Wanderer, *supra* note 20, at 70.

215. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151; LEMON, *supra* note 82, at 18.

216. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

217. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 35.

218. *Id.*

219. LEMON, *supra* note 82, at 18.

220. *Id.*

Finally, you should draft a detailed outline of the bench memorandum.

When drafting the memorandum itself, it is important to check with the judge regarding the desired format for the bench memorandum. The judge may or may not approve of the template set forth below. You should ask the judge for a sample bench memorandum that has been prepared by a predecessor. A sample bench memorandum will provide you with a template that the judge previously found acceptable.

B. Drafting the Bench Memorandum

1. Format of a Bench Memorandum

While the format of the bench memorandum varies based on the individual court, such memoranda often include reference to the facts, the manner in which the case came to be before the court, the jurisdiction of the appellate court, the issues on appeal and the arguments of the litigants with regard to those issues, the holdings of significant cases, and any areas of uncertainty that remain.²²¹ Finally, while some judges want a conclusion or recommendation, others do not.²²² Thus, when drafting a bench memorandum, organize the information in a familiar scheme using the template set forth below. This template should be modified to comply with the requirements of the individual judge.

If drafting a bench memorandum at the appellate level, you should cite to the parties' briefs and the excerpts of record.²²³ When citing to the briefs and excerpts of record, clerks commonly use several abbreviations. Because the cover on the appellant's opening brief is blue, the abbreviation for this document is "Blue Br."²²⁴ The same reasoning holds true for the appellee's response brief, which is referred to as "Red Br.," and the appellant's reply brief, which is designated "Gray Br."²²⁵ The excerpts of record are abbreviated "ER" and supplemental excerpts of record are abbreviated "SER."²²⁶ The presentence report is abbreviated "PSR" and the administrative

221. Wright, *supra* note 10, at 1187.

222. *Id.*; see also CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151 (explaining that some judges discourage their law clerks from using "any conclusory language until after the case has been argued and thoroughly researched").

223. LEMON, *supra* note 82, at 22.

224. *Id.*

225. *Id.*

226. *Id.*

record, if there is one, is abbreviated “AR.”²²⁷ While these abbreviations are commonly used by appellate clerks, if you receive differing instructions from your judge regarding abbreviations, follow the judge’s instructions.

a. Memorandum heading

Begin the bench memorandum with a heading that includes the following information: the type of document that is being presented to the court; the name of the judge or judges for whom the memorandum is written; the name of the person who prepared the memorandum (your name!); the date the memo was prepared; and the caption of the case followed by the docket number of the case.²²⁸ Your judge may require you to include other information following the memorandum heading, such as the city where the oral argument is to occur, the date on which the oral argument is to take place,²²⁹ and the name of the lower court that decided the matter, with the name of the presiding judge listed in a parenthetical.²³⁰ The judge may also require that you include your recommendation regarding the disposition of the case in the information following the memorandum heading.²³¹

An example of a memorandum heading is below:

BENCH MEMORANDUM	
TO:	Judges Doe, Davis, and Johnson
FROM:	Jane Jones, Law Clerk to Judge Doe
DATE:	January 14, 2008
RE:	United States v. Smith, 07-1503

b. Overview

The overview follows the memorandum heading and serves a similar purpose as the introduction in a judicial opinion.²³² The overview should include information regarding “how the case arose,

227. *Id.*

228. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 150-51.

229. LEMON, *supra* note 82, at 22.

230. *Id.*; CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

231. *See* LEMON, *supra* note 82, at 22.

232. *Id.*

the procedural history and status” of the case, “the trial court’s ruling, and which party appealed” the decision of the lower court.²³³

An example of an overview is below:

Overview

Defendant John Smith was arrested and charged with possession of counterfeit currency, possession of methamphetamine, and use of a gun in the commission of a drug trafficking crime. On the day his trial was to begin, Defendant Smith, believing his attorney was unprepared to proceed to trial and that the court would not grant him a continuance, pled guilty to all three charges against him. After he pled guilty, Defendant Smith notified his attorney, probation officer, and the court that he wanted to withdraw his plea because he was not guilty. The district court rejected Defendant Smith’s motion to withdraw his plea and sentenced Defendant Smith to 420 months in custody. On direct appeal, this Court affirmed Defendant Smith’s conviction by memorandum disposition on July 13, 1992.

Defendant Smith then filed a 28 U.S.C. § 2255 habeas corpus petition, which the district court denied without a hearing. On appeal from that decision, this Court remanded to the district court for an evidentiary hearing on the issue of whether Defendant Smith received ineffective assistance of counsel that rendered his plea involuntary. After holding the evidentiary hearing, the district court again denied Defendant Smith’s petition, finding that Defendant Smith was not denied effective assistance of counsel. Defendant Smith appeals.

c. Issue and short answer

This section succinctly summarizes the issues presented in the appeal and provides a brief answer to those issues.²³⁴ This section is similar to the Question Presented and Brief Answer sections that you likely drafted for an office memorandum in your legal writing class. In a bench memorandum, however, the brief answer must include the

233. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

234. LEMON, *supra* note 82, at 23.

legal authority on which the recommended outcome rests and provide citations to that authority.²³⁵

An example of the issue and short answer section is below:

Issue and Short Answer

Was Defendant Smith's guilty plea involuntary because he was denied his right to effective assistance of counsel?

Yes. To prevail on his claim that his counsel's ineffective representation rendered his guilty plea involuntary, Defendant Smith must establish that (1) his attorney's representation was outside the wide range of professionally competent assistance; and (2) Defendant Smith was prejudiced by reason of his attorney's deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice where the defendant has pled guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). On the day he entered his guilty plea, Defendant Smith understood that: (1) his attorney was unprepared to defend him; (2) the court would not grant a continuance; (3) evidence implicating him in the charged conduct had not been suppressed; and (4) he faced a possible term of life in prison if he went to trial and was found guilty. Believing his counsel's lack of preparation and failure to suppress the only physical evidence against him made conviction likely, Defendant Smith pled guilty to avoid a life term. Under the facts here, his plea cannot be characterized as "voluntary." *See United States v. Moore*, 599 F.2d 310, 313 (9th Cir. 1979) ("A plea entered because counsel is unprepared for trial is involuntary.").

235. *Id.*; *Judges' Clerks Play Varied Roles*, *supra* note 5, at 35.

d. *Factual and procedural background*

This section provides a description of the events that gave rise to the litigation and traces the procedural history of the case through the judicial system.²³⁶ This section should include a concise statement of facts, which summarizes the legally relevant facts and includes any necessary contextual facts.²³⁷ Do not simply take the litigants' version of events as gospel. Verify the litigants' factual statements by reviewing the record.²³⁸ The decision of the court below is a good place to find a concise and precise review of the facts.²³⁹ In a criminal case, the presentence report is also a good place to find a review of the facts.²⁴⁰ Remember to cite to the record for each fact included in the bench memorandum. Citing to the record not only informs the judge of the location of the fact in the record, but also that your factual assertions are correct.

Furthermore, when drafting the statement of the facts, distinguish between facts that are undisputed and those that remain unproven.²⁴¹ A simple way to accomplish this is to inform the reader at the beginning of the statement of the facts that "[t]he following facts are undisputed unless otherwise indicated."²⁴² This statement "informs the reader that any factual statement without a qualifier ('alleges,' 'asserts,' etc.) is an undisputed fact."²⁴³ However, if the litigation is in the early stages, and discovery has yet to be completed, inform the reader that "the following facts are taken from the complaint" or that they "are presented in the light most favorable to the nonmoving party."²⁴⁴

When referring to the parties in an appeal, do not use generic procedural designations, such as "Appellant," "Plaintiff-Appellant," "Petitioner," or "Appellee."²⁴⁵ Nor should you refer to the parties at the trial level by their procedural designation, such as "Plaintiff" or "Defendant." It is clearer to refer to the parties by their name.²⁴⁶ When there are a number of defendants, however, it is often easier to

236. LEMON, *supra* note 82, at 24.

237. *Id.* at 24-25; CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

238. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 35.

239. LEMON, *supra* note 82, at 24.

240. *Id.*

241. CHIPCHASE, *supra* note 116, at 38.

242. *Id.* at 38-39.

243. *Id.* at 39.

244. *Id.* at 38.

245. LEMON, *supra* note 82, at 25.

246. *Id.*

refer to them as a single group by listing them once and then informing the reader that they will be referred to collectively as "Defendants."²⁴⁷ When any governmental agency is a party, you should refer to that party as "the Government."²⁴⁸

An example of the factual and procedural background is below:

Factual and Procedural Background

A. Underlying Offense & State Court Proceedings

Defendant Smith was arrested on October 4, 1990, while standing near a car rented by a friend.¹ (Blue Br. 1.) Police officers had followed Defendant Smith after receiving a tip from a confidential informant regarding suspected narcotics trafficking. (Red Br. 4; Blue Br. 12.) A search of the car uncovered methamphetamine and a gun. (Blue Br. 2.) The State of California ("State") charged Defendant Smith with possession of methamphetamine and a gun. (Blue Br. 2.)

In state court, Defendant Smith moved to suppress the evidence uncovered in the search of the car. (Blue Br. 2.) At the suppression hearing, the State argued that the search was valid on the grounds of consent and as a search incident to an arrest. (Blue Br. 2.) According to Defendant Smith, however, the search was not valid because (1) he did not consent to the search; and (2) he was not arrested until after the police searched the vehicle. (Blue Br. 2, 12.) Defendant

1. Defendant Smith and his friend had been sharing the car for several days prior to the arrest. (Blue Br. 11.)

247. *Id.*

248. *Id.*

Smith called three witnesses to corroborate his version of the events surrounding his arrest. (Blue Br. 12.) During the hearing, the California state court judge indicated that he thought there was a “tie” between the parties on the issue of suppression. (See ER G 94, 98.²) However, before the court could rule on Defendant Smith’s suppression motion, the State dismissed the charges against Defendant Smith. (Blue Br. 2.)

B. District Court Proceedings

Defendant Smith was indicted for the same conduct in federal court on April 16, 1991. (Blue Br. 13–14.) On May 20, 1991, Defendant Smith was arraigned and Bob Roe (“Counsel”) was appointed to represent him. (Blue Br. 14.) The arraignment was continued to May 28, 1991, at which point Defendant Smith pled not guilty and the case was set for trial on July 2, 1991, thirty-five days later. (Blue Br. 14.) At a June 26, 1991 status conference, Defendant Smith sought a continuance so that he could retain private counsel with experience in federal practice. (Red Br. 5.) He also argued that he needed more time to consider Counsel’s advice that he either plead guilty and serve a twenty-eight-year term or go to trial and risk life in prison. (ER L 4.) The court denied Defendant Smith’s request for a continuance, informing Defendant Smith that he was already represented by a competent attorney and that the trial would start on July 2, 1991, as scheduled. (ER L 4.) In response, Defendant Smith stated that he wished to plead guilty. (ER L 4.) The court refused to accept Defendant Smith’s plea, putting the matter over until the next day to “let [Defendant Smith] think about it.” (ER L 4.)

The next day, Defendant Smith again stated that he would like a different attorney, claiming that Counsel had not spoken to him about the case, had advised Defendant Smith

2. Because the Excerpts of Record are not consecutively paginated, the excerpts will be cited by tab letter followed by page number or page range.

to plead guilty, and had stated that it was now "too late" to file any papers, that Defendant Smith would lose and be sentenced to life in prison. (ER M 3.) In response to Defendant Smith's statements, Counsel maintained that he had spoken with Defendant Smith about the facts of the case and that he had no position on Defendant Smith's request for a different attorney. (ER M 4.) The court denied Defendant Smith's request, telling Defendant Smith that he could not "[j]ust keep changing attorneys because [he] wanted to change attorneys." (ER M 4.) Unless Defendant Smith had "somebody here that [he was] going to retain and who will be ready for trial when this matter is set for trial, [Counsel] will be your lawyer." (ER M 4-5.) Concluding that Defendant Smith was not ready to enter a plea on that day, the court indicated that the matter was set for trial and would begin on the scheduled day. (ER M 5.)

On the first day of trial, Counsel informed the court that Defendant Smith intended to plead guilty to the three charges against him. (ER N 4-6.) After being sworn, Defendant Smith prefaced his plea by stating that he had arranged for substitute counsel to represent him, but that this attorney was unable to represent him without a continuance because he was involved in another matter. (ER N 4.) Defendant Smith continued that he was pleading guilty because he was "unable to get this matter continued to allow [substitute counsel] to appear for [him] in court." (ER N 4-5.)

The court responded to Defendant Smith's statements by advising him that no one would force him to plead guilty, but that he would be forced to go to trial on that day. (ER N 5.) The court then asked whether he wanted to plead guilty or go to trial. (ER N 5.) Defendant Smith responded that he wanted to plead guilty because there was no time to present evidence. (ER N 5.) The court responded that Defendant Smith was free to present evidence during the trial, but that the court would not wait for substitute counsel to decide whether he was retained or not. (ER N 5-6.) The court then asked whether Defendant Smith was pleading guilty because he was guilty or "just because [he] want[ed] to plead guilty." (ER N 6.) Defendant Smith responded that it was because he was guilty. (ER N 6.) As the court informed him of the implications of his plea on his constitutional right

to a jury trial and to appeal, Defendant Smith stated that he understood these rights. (ER N 6–7.) He also responded “yes” when asked whether his plea was voluntary. (ER N 10.)

After pleading guilty, Defendant Smith told his probation officer, lawyer, and the court that he was not guilty and wished to withdraw his plea. (Blue Br. 3; ER O.) At his sentencing hearing, Defendant Smith again informed the court that he wished to withdraw his plea and moved to continue sentencing pursuant to Federal Rule of Criminal Procedure 32(d), so that he could retain counsel to withdraw the plea. (ER P 5.) At that time, he also presented a letter to the court detailing his dissatisfaction with his appointed counsel. (ER P 5–6.) In the letter, Defendant Smith complained that Counsel: (1) never asked him about the facts of the case; (2) never filed any motions, such as a motion to suppress; (3) did not review the case with Defendant Smith until three days before trial, at which point he said it was “too late” to investigate leads Defendant Smith suggested; (4) did not have time to subpoena or interview witnesses who had testified previously in the state suppression hearing; (5) told him it was “too late” to get fingerprints of the items found in the search of the car; (6) failed to investigate evidence inculpatory of another person; (7) neglected to receive the state court transcripts until after Defendant Smith pled guilty; (8) had not had time to refute errors in the presentence report (“PSR”); and (9) refused to file Defendant Smith’s motion to withdraw his plea. (ER O.)

After recessing and reviewing the letter, the court questioned Counsel about Defendant Smith’s complaints. (ER P 7–8.) Counsel disputed Defendant Smith’s account, contending that Defendant Smith had refused to meet with him prior to trial and had informed Counsel that he had another attorney. (ER P 9.) Nevertheless, Counsel submitted that he continued to prepare for the upcoming trial. (ER P 9–10.) Counsel also stated that he did not believe there were any valid motions to file in this case. (ER P 10.) The court rejected Defendant Smith’s motion, finding that Defendant Smith was not entitled to withdraw his plea or to a continuance. (ER P 10.) In explaining its

ruling, the court told Defendant Smith, "You cannot make a change every time you want to make it. As I think I've indicated to you on a prior occasion, we don't do things your way. We do them the way they are supposed to be done, by reason of the rules." (ER P 10.)

Prior to Defendant Smith's mention of a continuance, Counsel had asked the court to consider a reduction for Defendant Smith's acceptance of responsibility based on his guilty plea and for leniency in sentencing due to a lack of violent crime in Defendant Smith's criminal history. (ER P 4-5.) After the discussion regarding Defendant Smith's complaints against Counsel's representation, Counsel made no further comment.³ (See ER P 10-15.) Instead, Defendant Smith presented his sentencing argument to the court without assistance from Counsel.⁴ (See ER P 10-15.) The district court sentenced Defendant Smith to 420 months in custody for possession of counterfeit currency in violation of 18 U.S.C. § 472, distribution of 66 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1), and carrying a firearm in a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). (Blue Br. 5.)

This Court affirmed Defendant Smith's conviction by a memorandum disposition on July 8, 1992. No. 12-345, 2007 WL 12345, at *1 (M.D. Cal. Apr. 1, 2007).⁵ In that appeal, Defendant Smith had argued that the district court erred in denying his motion to withdraw his guilty plea. *Id.* Although the Court held that the district court did not abuse its discretion by denying the motion, *id.* at *2, it also noted that Defendant Smith's claim of ineffective assistance of counsel was more appropriately raised as a 28 U.S.C. § 2255 habeas corpus petition, *id.* at *4 n.1.

3. Before the sentencing hearing, Counsel had filed a sentencing memorandum on Defendant Smith's behalf. In that memorandum, Counsel argued for a reduction in sentence based on Defendant's acceptance of responsibility. (ER J 5.)
4. In the remainder of the hearing, Defendant Smith attempted to detail the changes and corrections he had to the probation report and to argue with the court that certain past offenses should not be considered in determining whether he qualified as a "career criminal." (ER P 10-14.)
5. This citation is fictitious. It was made up for purposes of this writing sample.

C. *Defendant Smith's Habeas Motion*

Taking this Court's suggestion, Defendant Smith filed a § 2255 habeas petition in district court. (Red Br. 12.) The district court dismissed the motion without holding an evidentiary hearing. (ER B.) Defendant Smith appealed. (Red Br. 16.)

This Court remanded to the district court, finding that “[a]n evidentiary hearing [wa]s necessary to determine the validity of Defendant Smith’s claim that he [pled] guilty because of Counsel’s ineffective representation and the district court’s refusal to grant a continuance left Defendant Smith with little or no choice other than to plead guilty.” 2007 WL 12345, at *2. This Court also remanded on the question whether Defendant Smith received ineffective assistance at sentencing.⁶ *Id.* at *4. In remanding, the Court found that “[t]he extent of the conflict between Counsel and Defendant Smith at the sentencing hearing, in regard to Defendant Smith’s allegations of Counsel’s ineffective assistance and to Counsel’s silence when Defendant Smith presented his sentencing argument, are enough to raise a factual question about whether Defendant Smith received effective assistance of counsel at his sentencing.” *Id.* at *4–*5.

On remand, the district court held an evidentiary hearing on Defendant Smith’s § 2255 petition on June 10, 2002. Counsel testified⁷ that he had not reviewed the facts of the case with Defendant Smith because Defendant Smith either refused to discuss the facts with him or refused to meet with him.⁸ (ER J 1–2.) Nevertheless, Counsel maintained that he

6. The discussion of this issue has been omitted for the purposes of this sample writing.

7. The direct testimony of Counsel and Defendant Smith was given through affidavits. Both were then subjected to cross-examination on their affidavits and to further questioning by the court. Three additional witnesses provided direct and cross-examination testimony.

8. This is in contrast to his statement at the June 27, 1991 status conference where Counsel maintained that he had discussed the case with his client. (Compare ER M 4, with ER J 1–2.)

continued to prepare for trial by: (1) consulting with a supervisor; (2) having a second attorney and an investigator assigned to the case; and (3) preparing voir dire questions, jury instructions, opening statement, closing argument, cross-examination, and direct examination of defendant in the event he elected to testify. (ER J 1-2.)

Counsel also challenged Defendant Smith's statements regarding his representation. For instance, Counsel stated that he never advised Defendant Smith to plead guilty or told him that he would receive a twenty-eight-year sentence if he did, but rather, that he notified Defendant Smith of the prosecution's proposed plea agreement and explained the U.S. Sentencing Guidelines to Defendant Smith. (ER J 2-3.) In addition, according to Counsel, Defendant Smith failed to inform him that a suppression motion had been filed in state court. (ER J 4.) Finally, Counsel defended his representation of Defendant Smith at sentencing, noting that he had filed a sentencing memorandum requesting a downward departure for acceptance of responsibility and had argued for leniency at the hearing. (ER J 5.) According to Counsel, there was no conflict between him and Defendant Smith that prevented him from effectively representing Defendant Smith at sentencing. (ER J 5; ER W.)

On cross-examination, however, Counsel admitted that he was not prepared on the day Defendant Smith's trial was to begin (ER W 68), but that he never informed the court and did not seek a continuance (ER W 31).⁹ Counsel also conceded that he had failed to inform the court of Defendant Smith's refusal to meet with him or to discuss the facts of the case with him. (ER W 8.) Indeed, Counsel recognized that the file documenting the events in this case contained no mention of any contacts or attempted visits with Defendant Smith from June 4 through June 20, when

9. It is worth noting, however, that Counsel's failure to notify the court that he was unprepared could be because Defendant Smith pled guilty before Counsel could do so.

Counsel noted that he had spoken to Defendant Smith regarding the prosecution's proposed plea agreement. (ER W 12, 15; ER X.) In addition, there was nothing in Counsel's files to indicate that he actually did any work on the case between June 4 and June 21.¹⁰ (ER W 33.) Moreover, Counsel acknowledged that he could not have properly considered whether to file a suppression motion without first reviewing the pleadings and transcript related to the state court hearing, which he did not do until after Defendant Smith pled guilty. (ER W 29, 34.) Neither did Counsel interview the witnesses who testified in state court. (ER W 29, 34.) Finally, Counsel conceded that he had advised Defendant Smith that his options were to proceed to trial or plead guilty.¹¹ (ER W 8.)

According to Defendant Smith, Counsel did not discuss the case or actively prepare for trial for the first three weeks following his appointment. (ER H 6.) It was not until after Defendant Smith rejected the prosecution's plea agreement that he and Counsel engaged in substantial communication about his case. (ER H 7.) Defendant Smith claims that he told Counsel about the state court suppression hearing and the witnesses who testified at that hearing. (ER H 7.) But, according to Defendant Smith, Counsel told him it was too late to prepare any motions, to interview witnesses, or investigate the case. (ER H 7.) Counsel advised Defendant Smith that if he went to trial and lost, he could face life in prison. (ER H 8.) If, however, he pled guilty, he would likely be sentenced to twenty-eight years. (ER H 8.) Believing his counsel was unprepared to begin trial and aware that the court would not grant a continuance, Defendant Smith pled guilty. (ER H 10–11.)

10. It is unclear whether an investigator was assigned to the case before or after Defendant Smith entered his guilty plea. (See ER W 20–21.) Counsel acknowledged that normally a memorandum to the file would document the appointment of an investigator, but the only such memorandum in Defendant's file is dated after Defendant's guilty plea. (ER W 21.) Even if an investigator had been assigned to the case at its outset, the record suggests that the investigator was not given a specific investigative task until after Defendant Smith pled guilty. (ER W 21.)

11. As the district court pointed out, however, this is the choice faced by all defendants.

On cross-examination, Defendant Smith was questioned about statements he made when he entered his guilty plea, specifically his statement that he was guilty. (ER W 63–65.) Defendant Smith testified that he lied at his sentencing because that was “what you were supposed to do” and “that’s what the courts usually expect.” (ER W 60.) According to Defendant Smith, he had lied on prior occasions by pleading guilty to crimes he did not commit because, by doing so, he could “go home.” (ER W 64.) When pressed by the court, Defendant Smith conceded that he had never been told directly to lie, but that it was his belief that it was part of the “deal” for him to falsely state that he was guilty in exchange for a certain agreed upon sentence. (ER W 65–66.) In this case, Defendant Smith stated that the court indirectly asked him to lie by forcing him to choose between going to trial on that day with unprepared counsel or entering a guilty plea. (ER W 66.)

Defendant Smith also called three additional witnesses. Two testified that they had contacted Counsel regarding their testimony at the state suppression hearing. (ER W 43, 47.) Counsel denied that either witness ever contacted him. (ER W 66–67.) A third witness, an attorney, testified that he had agreed to represent Defendant Smith if the case could be continued (ER W 52), and that he had notified the court’s clerk of his possible retention in the event a continuance was granted (ER W 53). In response to questioning by the court, the attorney acknowledged that continuances are never granted over the phone (ER W 53), and that he had not prepared or submitted a substitution of counsel form (ER W 53–54).

On the day after the evidentiary hearing, the district court heard the argument on Defendant Smith’s motion. After argument, the court again denied the motion. (ER W 76–77.) In its oral disposition, the court noted that five years had passed before Defendant Smith filed his motion and concluded that the motion was “totally, totally frivolous.” (ER W 76.) The court found that Counsel was credible in his testimony, but that Defendant Smith and his three witnesses were not. (ER W 77; ER DD 2.) According to the court, “[t]he fact that [Counsel] was not ready for trial on the day of trial doesn’t mean that he wasn’t preparing for

trial and didn't do the best that he could, and that he didn't do a competent job in doing what he could with the evidence that he had." (ER W 77.)

The next day, the court adopted the government's proposed findings of fact and conclusions of law. (ER DD.) According to these findings: (1) Counsel was unaware of the state court suppression hearing or other witnesses because no one had told him about them; (2) Defendant Smith had refused to discuss the case with Counsel because he wished to have different counsel; (3) there were no other conflicts or breakdowns in the relationship that prevented their communication; (4) despite Defendant Smith's lack of cooperation, Counsel prepared the case as best he could and made reasonable strategic decisions about the best way to proceed under the circumstances; (5) Counsel was unaware that the private attorney had been contacted or retained as Defendant Smith's counsel; (6) Counsel provided competent representation; (7) Defendant Smith's guilty plea was knowing and voluntary and not the result of ineffective assistance of counsel; (8) nothing in Counsel's representation or the court proceedings forced or suggested that Defendant Smith should untruthfully plead guilty; and (9) Defendant Smith received competent representation at sentencing. (ER DD 2-4.) The court concluded that Defendant Smith's knowing and voluntary guilty plea precluded him from raising claims of constitutional violations, including claims of ineffective assistance of counsel, that occurred before his guilty plea. (ER DD 5.) Further, even if Defendant Smith had received ineffective assistance of counsel, nothing in Counsel's representation forced Defendant Smith to plead guilty. (ER DD 5.)

Finally, Defendant Smith received competent representation at sentencing and, in any event, he was not prejudiced by Counsel's failure to speak at the hearing because Counsel could not have said or done anything more to reduce Defendant Smith's ultimate sentence. (ER DD 5.)

Defendant Smith appealed the denial of the petition. The district court denied Defendant Smith's application for a certificate of appealability. (Blue Br. 8.) This Court granted a certificate of appealability. (Blue Br. 8.)

e. *Standard of review*

Unlike in a judicial opinion, in a bench memorandum the standard of review is usually included in a separate section and given a heading. However, if the case on which you are working has more than one issue with different standards of review, then the applicable standard of review should be included at the beginning of the discussion of each issue rather than in a separate section.²⁴⁹

An example of the standard of review section is below:

Standard of Review

This Court reviews a district court's decision to deny or grant a motion under 28 U.S.C. § 2255 de novo. *See United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). We review findings underlying the district court's decision on a § 2255 motion for clear error. *See United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002). Whether a defendant received ineffective assistance of counsel is also reviewed de novo. *See id.* This Court reviews a district court's finding of facts for clear error. *Fry*, 322 F.3d at 1200.

f. *Discussion*

The discussion is your analysis of the issues. When there are multiple issues, you should organize the discussion in separate sections, with each issue being discussed under a separate heading.²⁵⁰

When discussing a particular issue, begin by articulating the issue before the court. Then, summarize the arguments raised by the appellant or, at the trial level, by the moving party.²⁵¹ Next, briefly summarize the appellee's argument or, at trial, that of the nonmoving party. Be sure to verify that the authorities relied upon by the litigants in their briefs stand for the legal propositions that the litigants claim they do. Follow the summary of the arguments with a statement of the governing law and apply that law to the facts of the case, discussing any key cases.²⁵² Finally, identify for the judge any matters that should be clarified or explained during oral argument, including a list of questions that inquiry at oral argument might

249. LEMON, *supra* note 82, at 28; *see also* discussion *supra* Part II.B.1.e.i.

250. LEMON, *supra* note 82, at 29.

251. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

252. LEMON, *supra* note 82, at 30.

resolve.²⁵³ If you are using the judge's voice when drafting the bench memorandum, you can convey questions or observations to the judge by using footnotes.²⁵⁴ Then, if desired by the judge, end the discussion with a brief recommendation regarding how the case should be resolved.²⁵⁵

An example of the discussion section of a bench memorandum is below:

Discussion

Was Defendant Smith's guilty plea involuntary because he was denied his right to effective assistance of counsel? Ineffective assistance of counsel deprives a defendant of her or his Sixth Amendment right to counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *see also Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (holding that accused criminal defendants are entitled to counsel at every critical stage of the proceedings against them). Because he pled guilty, Defendant Smith cannot raise any claim of a constitutional violation that occurred prior to entry of that plea. *See Tollett v. Henderson*, 411 U.S. 258, 268 (1973). Rather, Defendant Smith can only raise such a constitutional claim to support his assertion that his plea was not knowing and voluntary. As the *Henderson* Court explained,

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea

253. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 35; CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151.

254. CHIPCHASE, *supra* note 116, at 27; *see also* discussion *infra* Part III.B.2.

255. LEMON, *supra* note 82, at 30.

Id. at 267. "To be voluntary, a plea must be one in which the defendant is permitted to choose between pleading guilty and undergoing a trial that comports with the fundamental principles the Constitution imposes." *United States v. Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000).

Defendant Smith argues that Counsel's ineffective assistance violated his Sixth Amendment right to counsel and led to a guilty plea that was neither knowing nor voluntary. (Blue Br. 30.) According to Defendant Smith, Counsel's performance was deficient due to Counsel's failure: (1) to inform the court of the complete breakdown in communication between Counsel and Defendant Smith;¹² (2) to prepare to defend Defendant Smith at trial; (3) to seek a continuance;¹³ (4) to make a motion to suppress; and (5) to correctly inform Defendant Smith of applicable law and sentencing alternatives. (Blue Br. 40-54.) According to Defendant Smith, Counsel's ineffective assistance convinced Defendant Smith that he could not win at trial and, thus, caused him to plead guilty involuntarily. (Blue Br. 40-54.)

To establish that his plea was involuntary because it was the result of ineffective assistance of counsel, Defendant Smith must first meet the test articulated in *Strickland*. See *Hill v. Lockhart*, 474 U.S. 52, 56, 58 (1985) ("[V]oluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Under *Strickland*, a defendant claiming ineffective assistance of counsel must establish that: (1) counsel's actions were outside the wide range of professionally competent assistance; and (2) the defendant was prejudiced by reason of counsel's deficient performance. *Strickland*, 466 U.S. at 669. A deficient performance is one in which counsel made errors so serious that she or he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. To demonstrate

12. A breakdown of the attorney-client relationship can result in a denial of the Sixth Amendment right to counsel. See *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998).

13. These first three claims will be analyzed together as part of Counsel's alleged failure to prepare for trial.

prejudice where the defendant has pled guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

A. Counsel's Representation of Defendant Smith

1. Failure to Prepare for Trial and to Seek a Continuance

Defendant Smith complains that Counsel: (1) did not meet with him to discuss the case until shortly before trial; (2) failed to seek a continuance even though he acknowledged that he was unprepared for trial; and (3) failed to file a motion to suppress the evidence seized in the vehicle search. According to Defendant Smith, his plea was not voluntary because Counsel was not prepared for trial.

According to both Defendant Smith and Counsel, the two did not meet to discuss Defendant's case until shortly before trial was to begin. Counsel attributes this failure to Defendant Smith's refusal to meet with him on the occasions he attempted to meet. Defendant Smith claims that Counsel did not attempt to meet with him until after he rejected the prosecution's plea arrangement. Regardless of the reason, it seems unlikely that Defendant Smith pled guilty entirely because of the lack of communication between him and Counsel. Rather, this claim will be analyzed in conjunction with Defendant Smith's claim that Counsel failed to adequately prepare for trial.

"A plea entered because counsel is unprepared for trial is involuntary."¹⁴ *Moore*, 599 F.2d at 313. "Pretrial investigation and preparation are the keys to effective representation of counsel. Courts have repeatedly stressed the importance of adequate consultation between attorney and client, the interviewing of important witnesses, and adequate investigation of potential defenses." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (citations

14. The government mischaracterizes *Moore's* holding by claiming that the *Moore* court found a plea voluntary despite the defendant's attorney being unprepared where the attorney made significant efforts to prepare. However, what the court in *Moore* actually found was that the evidence supported a finding that counsel was prepared for trial.

omitted). This Court has found counsel ineffective where the defendant is able to show that “counsel’s actions were deficient and that the deficiency prejudiced the defendant.” *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (vacating judgment of district court where it was not possible to “determine if counsel’s decision was a strategic one, and, if so, whether the decision was a sufficiently informed one”).

Counsel was appointed to represent Defendant Smith on May 20, 1991. According to both Defendant Smith and Counsel, the two did not meet to discuss Defendant Smith’s case until shortly before trial was scheduled to begin. Counsel attributes this failure to Defendant Smith’s refusal to meet with him. Regardless of the reason, however, Counsel still had an independent duty to investigate the facts of Defendant Smith’s case. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (“[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client.”). Indeed, as this Court noted in remanding this action, Defendant Smith’s purported refusal to meet with Counsel prior to trial was not dispositive. Rather, “[Counsel] still had the responsibility to prepare for trial, and to seek a continuance if time was too short.” 2007 WL 12345 at *2. While it is clear that Counsel took some action to prepare Defendant Smith’s case for trial, it does not appear that he took all reasonable steps to prepare.

Counsel testified that he prepared for trial by: (1) consulting with a supervisor; (2) having a second attorney and an investigator assigned to the case; and (3) preparing voir dire questions, jury instructions, opening statement, closing argument, cross-examination, and direct examination of defendant in the event he elected to testify. According to the district court, Counsel’s testimony was credible and established that, even though he was unprepared on the day Defendant Smith’s trial was to begin, that did not mean he was not preparing for trial or that he failed to do a competent job with the evidence he had.

Nevertheless, Counsel’s own testimony suggests that he did not undertake his independent duty to investigate.

Counsel testified that he was unprepared on the first day of trial, but that he did not seek a continuance.¹⁵ *See id.* at *4 (noting that even if Defendant Smith refused to meet with him, Counsel “still had the responsibility to prepare for trial, and to seek a continuance if time was too short”). Moreover, Counsel also conceded that his files contained no indication that he did any work on Defendant Smith’s case or even attempted to contact Defendant Smith from June 4 through June 20.¹⁶ Of particular concern is Counsel’s concession that he did not review the state suppression hearing transcript until after Defendant Smith pled guilty and that he did not interview the witnesses who testified at that hearing.¹⁷

15. The district court found that Counsel’s failure to seek a continuance prior to trial was a “strategic decision” because he was aware that such a request would be futile, as the court had indicated it would not grant such a continuance. (ER W 74.) To the court, this suggested that Counsel planned to seek a continuance on the day of trial by announcing that he was unprepared to proceed. (ER W 74.) However, the court’s own statements made such a “strategic decision” highly risky. In numerous statements, the court had made it clear that trial would proceed on that day, telling Defendant Smith that “we’re going to trial, as has been set. Just understand that it’s now been set for July 2nd, and we’ll be going to trial on July 2nd.” (ER L 4.)
16. The district court found it important that Defendant Smith conceded that his search for another lawyer “ate up” three weeks of his time to prepare for trial. (ER W 72.) To the district court, this indicated that Defendant Smith chose not to speak with his appointed lawyer because of his intent to retain alternative counsel. (ER W 72.) However, Counsel’s records contain no indication that he attempted to meet with Defendant Smith during that time. Moreover, that Defendant Smith was occupied searching for another attorney did not relieve Counsel of his duty, as attorney of record, to continue preparing for trial.
17. While this issue is considered separately below, this failure is relevant to the present discussion because it suggests a lack of preparation that denied Defendant Smith effective representation. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (“[W]hile respondent’s defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.”).

Counsel acknowledged that he could not have adequately considered such a motion without reviewing the state court suppression transcript. Counsel did not offer a strategic reason for failing to fully investigate the possibility of a suppression motion. Rather, he contended that he was unable to do so because Defendant Smith never informed him of available witnesses or of the suppression hearing in state court. The district court accepted this as an adequate explanation.

That no one else told him about the state suppression hearing should not relieve Counsel of his independent duty to “*undertake reasonable steps* to investigate all avenues of defense.” See *Tucker*, 716 F.2d at 583 n.16; *Sanders*, 21 F.3d at 1456 (“[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client.”); see also *Birt v. Montgomery*, 709 F.2d 690, 701 (7th Cir. 1983) (“Essential to effective representation . . . is the independent duty to investigate and prepare.”); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) (“At the heart of effective representation is the independent duty to investigate and prepare.”). At the very least, Counsel should have reviewed the state court record before Defendant Smith entered his guilty plea. By reviewing that docket, Counsel would have discovered that a suppression hearing had been held. A review of the transcript would have revealed that the state court thought the evidence on suppression suggested a “tie.” It would also have revealed possible witnesses to testify at a suppression hearing in federal court. Counsel had access to these records; indeed, he testified that he reviewed the transcript after Defendant Smith entered a guilty plea. However, this was too late to benefit Defendant Smith.

Counsel’s lack of preparation, in particular his failure to investigate, constituted deficient performance. See *Hendricks*, 974 F.2d at 1109. As discussed more fully below, his counsel’s deficient performance clearly prejudiced Defendant Smith.

2. Failure to Move to Suppress Evidence Seized in the Vehicle Search

Defendant Smith next complains that Counsel's failure to move to suppress the evidence seized in the vehicle search constituted ineffective assistance of counsel.

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman, 477 U.S. at 375.

During the state court suppression hearing, the judge opined that there was a "tie" between the parties on the issue of suppression. Although the judge never ruled on the motion, this close call suggests that Defendant Smith had a meritorious Fourth Amendment claim and that he may have prevailed if Counsel had filed a similar motion in federal court. The suppression of the evidence seized—the currency, gun, and methamphetamine—would likely have been dispositive as it would have left no other physical evidence connecting Defendant Smith to the crimes with which he was charged. More important here, if the evidence had been suppressed, it is very unlikely that Defendant Smith would have pled guilty. Counsel's failure to move for suppression of this evidence constituted ineffective assistance of counsel and clearly prejudiced Defendant Smith. See *Kimmelman*, 477 U.S. at 372.

3. Failure to Correctly Advise Defendant Smith Regarding Sentencing

Finally, Defendant Smith argues that Counsel rendered ineffective assistance when he advised him that he would be sentenced to twenty-eight years (i.e., 336 months) if he pled guilty, but would face the possibility of life in prison if he were convicted at trial. Defendant Smith was ultimately sentenced to 420 months, or thirty-five years, in custody.

According to the PSR, the sentencing guideline for Defendant Smith's offenses was 360 months to life in prison. (PSR 23.) This guideline was calculated without a two-step downward adjustment for acceptance of responsibility. With such an adjustment, the low end of the range would have been reduced to 292 months (twenty-four years and four months). (Red Br. 45 n.8.) The PSR makes clear that Counsel was not wrong in stating that the high end of the sentencing range was life imprisonment. Thus, Defendant Smith's complaint must be that Counsel incorrectly calculated the low end of the range.

When Counsel advised Defendant Smith of the possible sentence he would receive if he pled guilty, he was contemplating that Defendant Smith would receive a downward adjustment for acceptance of responsibility. In his sentencing memorandum and at the sentencing hearing, Counsel sought a downward reduction for acceptance of responsibility on the basis of Defendant Smith's guilty plea. Such an adjustment, paired with the five year consecutive sentence for the firearm offense, would have resulted in a sentence of twenty-nine years and four months, a difference of one year and four months from Counsel's calculation of twenty-eight years. Standing alone, such a miscalculation is not sufficient to constitute ineffective assistance of counsel. *See Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (noting that "a mere inaccurate prediction, standing alone, would not constitute ineffective assistance"). Defendant Smith's ultimate sentence of thirty-five years was the result of his recanting his admission of guilt, which thereby removed the possibility of an acceptance of the responsibility adjustment.

B. Was Defendant Smith Prejudiced by the Cumulative Effect of Counsel's Representation?

Even if Counsel's individual failures are insufficient alone to justify a finding of ineffective assistance of counsel, Defendant Smith's claim does not necessarily fail. Rather, for purposes of ineffective assistance of counsel, "prejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978)). Thus, here, the question is whether Defendant Smith would not have pled guilty if Counsel had been properly prepared for trial or sought a continuance and

if he had filed a motion to suppress the evidence seized from the vehicle search.¹⁸ See *Hill*, 474 U.S. at 59. Taken together, Counsel's errors may have caused Defendant Smith to believe he had no other choice but to plead guilty. On the day he entered his guilty plea, Defendant Smith believed that: (1) his attorney was unprepared to defend him; (2) the court would not grant a continuance; (3) evidence implicating him in the charged conduct had not been suppressed; and (4) he faced a possible term of life in prison if he went to trial and was found guilty. Moreover, these were not just Defendant Smith's beliefs. Counsel later acknowledged that he was not prepared to begin trial that day; the court had repeatedly stated that a continuance would not be granted; no suppression motion had been filed; and the PSR stated the maximum guideline as life in prison. Taken together, these facts—in particular that his attorney was unprepared and the evidence against him had not been suppressed—made it all the more likely that Defendant Smith would be found guilty and face a life term of imprisonment. This, paired with the court's dogged insistence on trial beginning on that day, pressured Defendant Smith into entering a guilty plea against his will.

18. Because I do not believe Counsel wildly miscalculated Defendant's minimum sentence, I do not include that as an error that may have caused Defendant prejudice. Such a miscalculation, however, may contribute to a cumulative impact that resulted in prejudice to Defendant. See *Iaea*, 800 F.2d at 865 (“[T]he gross mischaracterization of the likely outcome presented in this case, combined with the erroneous advice on the possible effects of going to trial, falls below the level of competence required of defense attorneys.”).

g. Conclusion or recommendation

Finally, if so desired by the judge, you should include your views on the merits of the case. These views must be supported by analysis and explanation. Finally, you should include any recommendations that you may have regarding disposition of the case.²⁵⁶ At the trial

256. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(2)(a), at 151. These recommendations may include the clerk's recommendation on whether the court should decide the matter with a full, per curiam or memorandum opinion. Additionally, if the clerk recommends either a per curiam or memorandum opinion,

level, you will recommend that the judge either grant or deny the motion before the court. At the appellate level, you will recommend that the court either affirm the decision of the lower court or reverse and remand the case back to the trial court for further action.

However, when drafting the recommendation, if you disagree with the result that binding authority seems to compel, you should express this disagreement in the memorandum.²⁵⁷ If you are drafting the memorandum using the judge's voice, your disagreement and the basis for that disagreement can be brought to the judge's attention in a footnote.²⁵⁸ The judge may agree that justice requires a different outcome and may be able to distinguish the case before the court from the seemingly binding precedent.²⁵⁹ At the appellate level, the judge may even recommend that the issue be reviewed by the full court en banc so that the previous precedent could be overturned.²⁶⁰

An example of the conclusion and recommendation are below:

Conclusion

Defendant Smith has established that, on the day his trial was to begin, his attorney was unprepared to defend him, because the attorney had not conducted a reasonable investigation and had no strategic reason for failing to do so. Counsel's lack of preparation was only exacerbated by the district court's rigid and repeated refusal to grant a continuance. Thus, Defendant Smith faced a Hobson's choice: proceed to trial with unprepared counsel and risk a life sentence or plead guilty and receive a lesser sentence. Believing his counsel's lack of preparation made conviction likely, Defendant Smith pled guilty to avoid a life term. That he chose the latter course cannot be called "voluntary" under the facts here. *See Moore*, 599 F.2d at 313 ("A plea entered because counsel is unprepared for trial is involuntary."). Accordingly, I recommend that the panel reverse the district court's denial of Defendant Smith's habeas petition and remand to the district court for a new trial.

the bench memorandum should include a draft of the recommended document. *Judges' Clerks Play Varied Roles*, *supra* note 5, at 34.

257. LEMON, *supra* note 82, at 33.

258. CHIPCHASE, *supra* note 116, at 27; *see also* discussion *infra* Part III.B.2.

259. LEMON, *supra* note 82, at 33.

260. *Id.*

2. Tone

As with a judicial opinion, a bench memorandum has a formal, professional tone. However, unlike an opinion, which is always written in the judge's voice, bench memoranda can be written in either the clerk's voice or the judge's voice.²⁶¹ The voice used when drafting a bench memorandum is up to the judge's discretion.²⁶²

The difference between the clerk's voice and that of the judge is essentially a difference in style.²⁶³ When writing in your voice, you are simply advising the court as to the proper outcome of a case.²⁶⁴ Thus, you will set forth the facts, the litigants' arguments, and the governing law in a neutral fashion. You will analyze the issues and offer a recommendation without writing "the court finds" or "the court holds."²⁶⁵ You are not deciding the matter; you are simply advising the court on the facts and law and offering a recommendation. While you are offering a recommendation to the judge as to what the outcome of the case should be, your style should be more analytical than persuasive.²⁶⁶ The style you use should be similar to that which you used when drafting an office memorandum for a law firm in your first-year legal writing class. The judge will review all the materials and make the decision. The bench memorandum simply provides "an analytical framework in which the judge[] [has] access to the relevant issues, arguments, and controlling law."²⁶⁷

When you draft the bench memorandum in your voice, it is important to be diligent in the research and writing process. Remember that the bench memorandum will serve as the primary resource when drafting the opinion and disposition of the case following oral argument.²⁶⁸ In fact, the bench memorandum itself can be converted into the opinion by rewriting the memorandum using the judge's voice. Assuming the judge agrees with your position on the case's outcome, your recommendation will become the disposition for the case.²⁶⁹

261. CHIPCHASE, *supra* note 116, at 26.

262. *Id.* at 27.

263. *Id.* at 26.

264. *Id.*

265. *Id.*

266. LEMON, *supra* note 82, at 18.

267. *Id.*

268. *Id.* at 20.

269. *See id.*

In contrast, when using the judge's voice, you should write the memorandum as if you are speaking for the court. Instead of advising the judge, you will draft the memorandum as if you were deciding the matter as the judge.²⁷⁰ When using the judge's voice, you will set forth the facts, the litigants' arguments, and the governing law in a neutral fashion, but instead of advising the court and offering a recommendation, you will analyze the issues and reach a decision.²⁷¹ "When using the court's voice it is correct to say, 'The court holds,' and ['the court finds']."²⁷² Further, you should draft the memorandum so that when it is complete, the judge could simply sign it and issue the disposition.²⁷³ Judges who prefer clerks to draft bench memoranda in the court's voice prefer this because it "avoid[s] unnecessary work when transforming the memo into the order."²⁷⁴

3. Editing and Proofreading

Finally, remember to edit and proofread the document before submitting it to the judge. Just as with an opinion, or any other document that you submit to the judge, the bench memorandum should be free of errors and professional in appearance.²⁷⁵ When editing a bench memorandum, pay particular attention to the voice you use when drafting. Do not shift back and forth between your voice and that of the judge.

C. *The Bench Book*

Once the bench memorandum is complete, you should incorporate it into a "bench packet" or "bench book" for the judge.²⁷⁶ This packet of information should contain not just the bench memorandum, but also the docket sheet for the case; the opinion and disposition of the lower court (or the decision being appealed); the litigants' briefs; excerpts from the record; any relevant statutes, rules, and regulations; either the most important cases or summaries of those cases; and any other important documents from the case file.²⁷⁷

Just as the bench memorandum helps the judge prepare *for* oral argument, the bench book assists the judge *during* oral argument.

270. CHIPCHASE, *supra* note 116, at 26.

271. *See id.*

272. *Id.* at 26-27.

273. *Id.* at 26.

274. *Id.* at 27.

275. *See* discussion *supra* Part II.B.2.c. for information on editing and proofreading techniques.

276. CHIPCHASE, *supra* note 116, at 52.

277. *Id.* at 52-53; LEMON, *supra* note 82, at 40.

The bench book compiles pertinent information and documents that the judge may need to access quickly while on the bench hearing argument. Additionally, you can use the bench book when drafting the opinion following oral argument.²⁷⁸

III. JURY INSTRUCTIONS

While judicial clerks at the appellate level will often be required to draft a bench memorandum, judicial clerks at the trial level will often be called upon to draft jury instructions.²⁷⁹ Jury instructions are the charge that the court gives to the jury at the conclusion of a trial and before the jury begins deliberations. While the court does not charge the jury until the end of the trial, procedural rules often require the judge to disclose the final jury instructions to counsel prior to closing arguments.²⁸⁰ Thus, jury instructions must be prepared quickly and efficiently.²⁸¹

A. *Preparing to Draft Jury Instructions*

The judge will tell you “whether the case will be submitted for a general verdict or on special interrogatories.”²⁸² With a general verdict, the jury simply decides the liability or nonliability of the defendant.²⁸³ With a special verdict, however, the jury makes findings only on factual issues submitted to them by the judge; the judge then determines the legal effect of the verdict.²⁸⁴ It is important to note that “[t]he use of special interrogatories may substantially affect the content” of the jury instructions.²⁸⁵

Drafting clear jury instructions requires expertise in the subject area.²⁸⁶ Because jury instructions are a major cause of reversals or new trials on appeal, it is of the utmost importance that the instructions be substantively accurate.²⁸⁷ To ensure accuracy when you draft jury instructions, you must prepare by consulting the record and the pretrial order, learning about the issues, and researching

278. See LEMON, *supra* note 82, at 40.

279. See CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(1), at 148.

280. *Id.* § 7-2(F)(1), at 149.

281. See *id.* § 7-2(F)(1), at 148.

282. *Id.*

283. BLACK'S LAW DICTIONARY 1555 (7th ed. 1999).

284. *Id.*

285. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(1), at 148.

286. *Id.* § 7-2(F)(1), at 149.

287. *Id.*

relevant authorities.²⁸⁸ Additionally, you must review the requested jury instructions submitted by the litigants.

A wealth of resources is available to make drafting jury instructions easier. The judge will often have standard or form jury instructions that you may consult.²⁸⁹ In addition to the judge's personal cache of instructions, many trial courts have developed pattern or model jury charges that may serve as a helpful guide.²⁹⁰ In federal court, several sources are commonly relied upon when drafting jury instructions,²⁹¹ including the Federal Judicial Center's pattern civil and criminal jury instructions for each federal circuit,²⁹² *Federal Jury Practice and Instructions*,²⁹³ and the *Modern Federal Jury Instructions*.²⁹⁴ There are also form books that include jury instructions for specialized areas of law, such as antitrust law.²⁹⁵

B. Format for Jury Instructions

The format for jury instructions is deceptively simple. When drafting the instructions, you must type each paragraph of an instruction "on a separate piece of plain, white, letter-sized paper with the description at the top and numbered" (e.g., Jury Instruction No. 1), and include the citation to authority at the end of the paragraph.²⁹⁶ You should write the instructions using plain language that a layperson with a high school education could understand.²⁹⁷ "Each instruction should be written in short, simple sentences, enumerating the elements of a violation, theory, or defense so that the jurors can approach a decision step-by-step."²⁹⁸ Additionally, you should insert names and facts where appropriate and quote or paraphrase the pertinent statute or legal rule.²⁹⁹

288. *Id.* § 7-2(F)(1), at 148–49.

289. *Id.* § 7-2(F)(1), at 148.

290. *Id.* § 7-2(F)(1), at 150.

291. *Id.*

292. *See, e.g.*, FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS (1987), reprinted in SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL (Matthew Bender & Co. 2007).

293. *See, e.g.*, O'MALLEY ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS (6th ed. 2006).

294. *See, e.g.*, SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CIVIL (2007).

295. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(1), at 150.

296. *Id.* § 7-2(F)(1), at 148.

297. *Id.* § 7-2(F)(1), at 149.

298. *Id.*

299. *Id.*

Once the proposed jury instructions are complete, but before the jury is charged, counsel must be given an opportunity to object to the proposed instructions.³⁰⁰ These objections are made on the record.³⁰¹ If changes to the instructions are necessary following counsels' objections, the instructions are retyped and the final version of the instructions is filed in the record.³⁰² Each version of the jury instructions, including the jury instructions requested by the litigants and the proposed jury instructions, are included in the record for purposes of appellate review.³⁰³

C. *Editing and Proofreading*

Finally, as with any other document drafted for the court, when drafting jury instructions you must edit and proofread them before submitting them to the judge.³⁰⁴ Not only should jury instructions be professional in appearance, but they must be free of grammatical and typographical errors.³⁰⁵ Jury instructions are, after all, entered into the record for purposes of appellate review and a "small" error, such as a misplaced comma, could lead to reversal.³⁰⁶ Furthermore, jury instructions must be easily understood by a jury of laypersons and free of ambiguity.³⁰⁷

D. *Sample Jury Instructions*

A set of jury instructions in a criminal case is set forth below. Remember that each instruction is on a separate page.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *See id.* § 7-3, at 167.

305. *See id.*

306. *See* Bridwell v. State, No. 05-07-00258-CR, 2008 WL 467271, at *8 (Tex. App. Feb. 23, 2008).

307. CHAMBERS HANDBOOK, *supra* note 37, § 7-2(F)(1), at 149.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF :

AMERICA,

Plaintiff, : Case No. 2:06-CR-000

v. : Judge Holschuh

JOHN SMITH, :

Defendant. :

INSTRUCTIONS TO THE JURY

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INTRODUCTION

Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case. I will start by explaining your duties and the general rules that apply in every criminal case. I will also explain some rules that you must use in evaluating particular testimony and evidence. Then I will explain the required elements of the crime that the defendant is accused of committing in this case. And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

1

JURORS' DUTIES

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.

Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

2

**PRESUMPTION OF INNOCENCE, BURDEN OF
PROOF, REASONABLE DOUBT**

As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence. Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives.

If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not so convinced, say so by returning a not guilty verdict.

“EVIDENCE” DEFINED

You must make your decision based only on the evidence that you saw and heard here in this courtroom and on the exhibits that have been admitted into evidence. Do not let anything that you may have seen, heard, or read outside of this courtroom influence your decision in any way.

The evidence in this case consists only of what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; and any stipulations that the lawyers, on behalf of their clients, agreed to.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And any comments I may have made or questions I may have asked are not evidence.

Make your decision based only on the evidence, as I have defined it here, and nothing else.

4

CONSIDERATION OF EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves.

5

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Now, some of you may have heard the terms “direct evidence” and “circumstantial evidence.”

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could reasonably conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law does not make a distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

The law does require that before convicting a defendant, the jury must be satisfied from all the evidence in the case that the government has proved the defendant guilty beyond a reasonable doubt.

6

CREDIBILITY OF WITNESSES

Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

Let me suggest some things for you to consider in evaluating each witness's testimony:

1. Ask yourself if the witness was able to clearly see or hear the events concerning which the witness testified. Sometimes even an honest witness may not have been able to see or hear what was happening, and may have made a mistake.
2. Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?
3. Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.
4. Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?
5. Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

6. Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.

7. And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

7

TRANSCRIPTIONS OF RECORDINGS

You have heard some recordings that were received in evidence, and you were given some written transcripts of the recordings.

Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

8

**TESTIMONY OF A PAID INFORMANT UNDER A
GRANT OF IMMUNITY**

You have heard the testimony of John Doe. You have also heard that he received money from the government in exchange for providing information, and that the government has promised him that, in exchange for his cooperation, he will not be prosecuted for possession of a \$20 rock of crack cocaine found on his person.

The use of paid informants is common and permissible. It is also permissible for the government to promise not to prosecute someone for a crime in exchange for his cooperation. But you should consider John Doe's testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government paid him or what the government promised him.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

TESTIMONY OF LAW ENFORCEMENT OFFICERS

You have heard the testimony of Special Agents Jane Jones and Tom Taylor of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

The fact that a witness may be employed by the federal government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. It is your decision, after reviewing all the evidence, whether to accept the testimony of these law enforcement witnesses and to give to their testimony whatever weight you find it deserves.

Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

You should consider those same things in evaluating the testimony of the law enforcement officers.

COURT'S QUESTIONS

As you probably noticed, I occasionally ask questions. I do have the right to ask questions if I think the evidence will be a little clearer once those questions are answered. If any of you have concluded from any of my questions that I was trying to give you my impression of which witnesses were being truthful, or which party should win this case, that's simply not so. The credibility or believability of each witness is solely the function of the jury and not of the court.

11

DEFENDANT'S ELECTION NOT TO TESTIFY

A defendant has an absolute right not to testify or present evidence. The fact that he did not testify or present any evidence cannot be considered by you in any way. Do not even discuss it in your deliberations.

Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

12

NUMBER OF WITNESSES

One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

13

LAWYERS' OBJECTIONS

There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

Do not interpret my rulings on any objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court, including the testimony of the witnesses, any stipulations of the parties, and on the exhibits that have been admitted into evidence.

14

DEFINING THE CRIME

That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. I will next explain the required elements of the crime that the defendant is accused of committing.

But before I do that, I want to emphasize that the defendant is only on trial for the particular crime charged in the indictment. Your job is limited to deciding whether the government has proved each and every element of the particular crime charged beyond a reasonable doubt.

I turn then to the indictment.

15

DISTRIBUTION OF COCAINE BASE (CRACK COCAINE)

Title 21 of the United States Code, Section 841(a)(1), makes it illegal "for any person knowingly or intentionally . . . to . . . distribute . . . a controlled substance." The indictment in this case accuses the defendant of knowingly and intentionally distributing more than 50 grams of cocaine base, commonly known as crack

cocaine, a Schedule II controlled substance, in violation of this statute.

For you to find defendant guilty of this crime, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt:

1. That the defendant distributed cocaine base, commonly referred to as crack cocaine, a Schedule II controlled substance;
2. That the defendant did so knowingly and intentionally; and
3. That, at the time of the distribution, the defendant knew that the substance distributed was cocaine base.

In addition, the government must prove that the alleged offense occurred, in whole or in part, in the Southern District of Ohio on or about June 22, 2006, the date alleged in the indictment.

If you are convinced that the government has proved each of these three elements beyond a reasonable doubt, and that the offense occurred, in whole or in part, in the Southern District of Ohio on or about June 22, 2006, say so by returning a guilty verdict on this charge. If you have reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

I will now give you more detailed instructions concerning each of these elements.

16

DEFINITIONS

“Distribute”

The term “distribute,” as used in these instructions, means to deliver or to transfer possession or control of something from one person to another. The term “distribute” includes the sale of something by one person to another.

“Controlled Substance”

You are instructed as a matter of law that cocaine base, otherwise known as crack cocaine, is a Schedule II controlled substance.

“Knowingly and Intentionally”

To act “knowingly” means to act voluntarily and with awareness of the nature of one’s conduct, and not because of ignorance, mistake, or accident. An act is done

“intentionally” if it is done deliberately with the specific intention to do the act that the law prohibits.

I want to explain something about proving a defendant’s state of mind. Ordinarily, there is no way that a defendant’s state of mind can be proved directly, because no one can read another person’s mind and tell what that person is thinking. But a defendant’s state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant’s mind. You may also consider the natural and probable results of any acts that the defendant knowingly did, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

“On or About”

I also want to say a word about the date mentioned in the indictment. The indictment charges that the crime happened “on or about” June 22, 2006. The government does not have to prove that the crime happened on that exact date. But the government must prove that the crime happened reasonably close to that date.

“Southern District of Ohio”

The Court takes judicial notice that Columbus, Ohio, is within the Southern District of Ohio. Because you as members of the jury are the triers of fact in this case, you are not required to accept the Court’s instruction that Columbus, Ohio, is within the Southern District of Ohio, and you may make your own determination of this fact.

17

SUMMARY

Keeping in mind the above instructions regarding the applicable law, if you unanimously find that the government has proved beyond a reasonable doubt that the defendant did knowingly and intentionally distribute cocaine base, commonly known as crack cocaine, a Schedule II controlled substance, and that the alleged offense took place, in whole or in part, in the Southern District of Ohio, on or about June 22, 2006, then you must return a verdict of guilty.

However, if you unanimously find that the government has failed to prove beyond a reasonable doubt any one of the essential elements of the offense, as I have explained those elements to you, then you must return a verdict of not guilty. That concludes the part of my instructions explaining the elements of the crime. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

18

JURY FOREPERSON, QUESTIONS FROM JURY

The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

Once you start deliberating, do not talk to the Court Security Officer, to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, have the foreperson sign them, and then give them to the Court Security Officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes.

19

RESEARCH AND INVESTIGATION

Remember that you must make your decision based only on the evidence that you saw and heard here in court. All of the exhibits that have been admitted into evidence will go to the jury room with you, together with a copy of these instructions and the verdict form.

Do not try to gather any information about the case on your own while you are deliberating. For example, do not bring any books, like a dictionary, or anything else with you to help you with your deliberations and do not conduct any independent research, reading, or investigation about the case.

Make your decision based only on the evidence that you saw and heard here in court.

20

UNANIMOUS VERDICT

Your verdict, whether it is guilty or not guilty, must be unanimous.

To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt. To find the defendant not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt that the defendant is guilty of the offense alleged in the indictment. Either way, guilty or not guilty, your verdict must be unanimous.

21

DUTY TO DELIBERATE

Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with.

In the end, your vote must be exactly that—your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt or has failed to do so.

Juries sometimes ask to have portions of the trial transcript made available to them during deliberations. A trial transcript has not been prepared and therefore is not available to you. Instead, you, as jurors, must rely on your collective recollection of the testimony of the witnesses.

22

PUNISHMENT

If you decide that the government has proved the defendant guilty of the charge alleged in the indictment, then it will be my job to decide what the appropriate punishment should be.

Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt or has failed to do so.

23

VERDICT FORM

I have prepared a verdict form that you should use to record your verdict. If you decide that the government has proved the defendant guilty beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the defendant guilty beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.

Each of you should then sign the verdict form and put the date on it.

24

COURT HAS NO OPINION

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt or has failed to do so.

25

PROCEDURE WHEN VERDICT REACHED

When you have reached a verdict and have filled out and signed the verdict form, the foreperson of the jury shall notify the Court Security Officer that the jury has reached a verdict.

26

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**UNITED STATES OF :
AMERICA,**

Plaintiff, : Case No. 2:06-CR-000

v. : Judge Holschuh

JOHN SMITH, :

Defendant. :

VERDICT

We, the jury, find the defendant John Smith:

**___ Not Guilty ___ Guilty of Distribution of Cocaine
Base, a Schedule II Controlled Substance, as alleged in
the Indictment.**

<u>United States v. John Smith</u>	
Page 2 of 2	
_____	_____
Foreperson	
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
Date: _____	

V. ORDERS

“The purpose of [an] order is to tell the person to whom the order is directed precisely what to do”³⁰⁸ While no specific or “magic” language is required to make an order effective, plain language should be used to avoid ambiguity. Unambiguous language helps the person to whom the order is directed understand what action is required of him or her and also allows others to determine whether that person has completed the action dictated by the court and whether he or she did it correctly.³⁰⁹

“Most courts have a standardized format for orders”³¹⁰ Your co-clerk and the judge’s secretary will be familiar with this format and, if asked, more than happy to share it with you.³¹¹ The format generally begins with the caption of the case, which includes the name of the court, the case number, names of the parties, and the title of the order.³¹² Following the caption is a paragraph that includes the date of any hearing that may have taken place, the names of counsel who appeared at the hearing, and the nature of the matter to be

308. *Id.* § 7-2(F)(6), at 156.

309. *Id.*

310. *Id.*

311. *See id.*

312. *Id.*

decided by the court.³¹³ This information should be followed by the action that the court is taking and the factual or legal basis for the court's determination, as well as a statement telling the litigants what they must do as a result of the court's action.³¹⁴ The order should end with a signature line for the judge's signature.³¹⁵

Occasionally, the judge will order counsel for the prevailing litigant to submit a proposed order for the court's signature.³¹⁶ If this occurs, you should review the proposed order closely to be sure that it conforms to the judge's determination in court (or conference) and determine whether the losing party agrees that the order conforms to the judge's decision.³¹⁷ This party's approval is usually indicated by a signature.³¹⁸ However, if the proposed order documents a stipulation of the parties, you should confirm that the order is accompanied by a copy of the stipulation that has been signed by all parties.³¹⁹ Additionally, you should confirm that the substance of the proposed order complies with the judge's directions with regard to the stipulation.³²⁰

Finally, as with any document drafted for the court, you must edit and proofread orders to eliminate errors and ambiguity.³²¹ Given that the purpose of an order is to tell the person to whom the order is directed what the court requires him or her to do, it is of the utmost importance that the court's directive be clear and unambiguous.³²²

VI. CONCLUSION

You are undoubtedly excited to begin your judicial clerkship—there is no better legal training for a new lawyer. As a clerk, you will gain insight into the decision-making process and learn how the court operates from within the judge's chambers.³²³ Your clerkship will be a valuable learning experience. The bottom line, though, is that you are there not only to learn, but to aid the judge. The purpose of this article is to help you hit the ground running. You will know the types

313. *Id.*

314. *Id.*

315. *See id.* § 7-2(F)(6), at 157.

316. *Id.* § 7-2(F)(6), at 156.

317. *Id.* § 7-2(F)(6), at 157.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* § 7-3, at 167.

322. *Id.* § 7-2(F)(6), at 156.

323. *See id.* § 1-1, at 2.

of documents you may need to draft, how to draft those documents, how to edit those documents, and how to serve as an ear for the court.

While this article might be somewhat overwhelming at first, for now know that there are some key points to remember. First, ensure that you understand the assignment and what is expected of you at the time the judge gives you the assignment. Second, before ever beginning to write, you should review the record to gain an understanding of the issues and to identify the relevant facts.³²⁴ Third, after completing your research of the issue, you should outline the body of the document because it will aid your organization of the document and will ultimately save you time.³²⁵ Fourth, when drafting the document, you should use the good writing techniques identified in this article and in other sources.³²⁶ Fifth, you should always edit and proofread any document before submitting it to the judge.³²⁷ All documents submitted to the judge must be free of grammar, spelling, citation, and typographical errors.³²⁸ Sixth, know that it is fine to ask for help if it is needed. Finally, remember to have fun! A clerkship is, perhaps, the greatest learning experience there is for a lawyer.

324. See *supra* text accompanying note 32.

325. See *supra* text accompanying note 37.

326. See discussion *supra* Parts II.B.2.a-b.

327. See discussion *supra* Part II.B.2.c.

328. *Id.*