

Applying Principle 1: From Logic to Coherence

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When you approach organization as a legal writer rather than a lawyer, your goal is usually to make your document's point and structure as explicit as possible. To use a New York turn of phrase, you want them in your reader's face. If they are not, there will be two unhappy consequences. The reader becomes impatient and frustrated because he has to work too hard to figure out what the document is all about. And, because he is busy trying to grasp its large-scale point and structure, he has trouble focusing on the details.

To create an organization with this degree of clarity, logic is not enough. The key is another layer of information—"meta-information," or information *about* your information—that makes explicit the relevance, structure, and importance of the underlying information. For a document to appear fully coherent while it is being read, not only at its end, legal writers have to provide more meta-information, and more types of it, than many are inclined to do. And they should provide it earlier than they usually want to, because meta-information helps most when it comes before, not after, the substance it describes.

The key to providing meta-information lies in chapter 2's first principle and its corollaries.

PRINCIPLE 1

**Readers absorb information best
if they understand its significance as soon as they see it.**

Therefore:

- A. Provide a focus.
- B. Make the information's structure explicit.
- C. Begin with familiar information before moving to unfamiliar, new information.

For this chapter, the first and second are most important. The third generally causes the most trouble in two circumstances: writing the introduction to a document (chapter 7) and moving from paragraph to paragraph and sentence to sentence (chapter 8). The rest of this chapter offers six techniques for applying this principle and its first and second corollaries. The first technique emerges from the basic principle itself, the rest from the corollaries.

APPLYING PRINCIPLE 1

***Technique 1.1:
Build containers everywhere.***

To demonstrate how a "container" works, the previous chapter used the example of an introduction to a long section of a judicial opinion. But containers should show up not just at the beginning of a document or section, in places where a heading reminds you to make a new start. They should appear throughout, from start to finish, whenever you are about to dump new data on a reader—whether a truckload or just a handful. In effect, you have to commit yourself to a process of perpetual introduction.

Example 1:

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

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

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

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

Example 2:

Service of process upon the Secretary of State as a designated agent of the foreign state under state long-arm statutes runs contrary to the Congressional intent of the FSIA. If plaintiffs could sue foreign state-owned corporations by service upon the Secretary of State, they could defeat the Act's goal of uniformity and render meaningless the exclusive jurisdictional requirements of Sections 1330 and 1608. And if a foreign state were subject to the varied service provisions of *every* state, there would be confusion over jurisdictional procedures and requirements among foreign sovereigns. This would result in the disparate treatment of foreign entities involved in U.S. lawsuits.

[CONTAINER:] Details both in the House Report and in Section 1608 indicate that Congress did not contemplate service of process on Secretaries of State.

Notably, the House Report on the FSIA expressly states that “[i]f there is no special arrangement [for service of process under Section 1608(b)(1)] and if the agency or instrumentality has no representative in the United States, . . .”

Within Section 1608, when service of process upon the U.S. Secretary of State is a proper method . . .

Example 3:

The action of replevin, with the characteristics I have described, was received into the law of Manitoba in 1870. It was first the subject of a statute in 1875: *An Act Respecting the Administration of Justice*, S.M. 38 Vict. 1875, c.5. **[CONTAINER:]** That statute codified but did not change the action of replevin, at least in substance. It remained one that might be brought by a party dispossessed of chattels for their recovery *in specie*.

“REPLEVIN

1. Whenever any goods, chattels, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects, have been wrongfully distrained under circumstances in which by the law of England replevin might be made, the person so complaining of such distress as unlawful, may obtain a writ of replevin in the manner prescribed by this Act; or in case any of the goods, chattels, property or effects aforesaid have been otherwise wrongfully taken or detained, the owner or other person or corporation capable at the time this Act takes effect of maintaining an action of trespass or trover on personal property may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained by reason of such unlawful caption or detention, in like manner as actions are brought and maintained by persons complaining of unlawful distress.”

Three points about these mini-containers:

- Most set out to provide the ingredients that should be familiar by now: focus; structure (unless, of course, the detail they introduce does not have a structure); and familiar information, in the form of a reference backwards to reassure readers they are still on the same road.
- In the earlier drafts of all these examples, the containers were missing entirely. This is a common problem. At the drafting stage, most of us have too much trouble just getting things down in a roughly logical order to worry about these mini-introductions. As a result, and as chapter 13 discusses, we need to add them when we edit.
- When contextual information does show up in a draft, it often shows up in the wrong place—after the detail, not before it. This misplacement happens most often when the detail is “the law” in its rawest form: quotations, paraphrases, case summaries, and the like. Most legal writers know they should sum up the point of a quotation or paraphrase. But many, novices in particular, seem to feel that a summary would be impertinent before the law has had a chance to speak for itself. This misplaced deference is particularly annoying when it forces us to wade through a dense quotation without help, or gives us a case with no indication of its point. For example:

Before:

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

In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), however, the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. . . .

After:

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

Such a transfer may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor’s obligations. In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. . . .

To see the true power of building containers throughout a document, look at the longer example at this chapter's end.

**APPLYING
PRINCIPLE 1A: Provide a focus.**

***Technique 1.2:
Make the focus specific enough to be helpful.***

At the scale of a paragraph, writers seldom have trouble drafting a good focus in the topic sentence. In larger-scale introductions, however, the focus is often too vague to give readers all the help they need. For a focus to succeed, it must meet a much tougher test than most writers realize: Once readers step off the introduction's firm ground into the morass ahead, will they ever be at a loss—even for a moment—to understand why a detail matters? Both at a document's beginning and in its interior, many introductions fail this test because their writers think of them primarily as overviews or summaries, as most of us are taught to think of them. But they can serve this purpose and still flunk the crucial test.

Here is an example from a judicial opinion.

Before:

This is an appeal from the dismissal of a suit to enforce a compromise settlement of a claim before the Industrial Accident Board, and a judgment rendered pursuant to the settlement. The suit was dismissed because the District Court found that it lacked jurisdiction. For the reasons given below, we reverse.

Appellant filed a claim with the Industrial Accident Board (IAB) for a work-related injury that he had sustained on October 10, 2000. Dissatisfied with the outcome of that proceeding, and in a timely manner, he filed suit in the district court of Hightop County, West Carolina, to set aside the award of the IAB. On March 17, 2001, the parties entered into a compromise settlement whereby an agreed judgment was rendered in favor of the appellant, setting aside the IAB award and granting him \$6,000. Further, as a part of the agreed judgment, the appellee agreed to provide necessary future medical treatment and other related services for two years from the date of judgment.

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

Despite the attempt at an introduction in the first paragraph, as we plow through the second we still have no idea about how, and how much, these details will finally matter. Are they just procedural background, or are they relevant to the issues? If so, why? Which ones do we really need to remember?

Here is the full focus we should have seen before the details. The paragraph has been improved in some other ways as well, but pay attention to the information added at the end.

After:

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

Now we know what we should be looking for: Was the settlement a new contract or a part of the original IAB case? In the next paragraphs, we can read the procedural history intelligently, searching for facts that will help to decide that issue.

Even in the smaller-scale introductions throughout the interior of a well-written document, the focus should be specific:

Version 1:

Although the Act provides no clear guidance in these circumstances, several recent decisions have considered the obligations of a so-called “successor employer” under collective bargaining agreements signed by its predecessor.

Version 2:

Although the Act provides no clear guidance in these circumstances, several recent decisions have considered the obligations of a so-called “successor employer” under collective bargaining agreements signed by its predecessor. These cases show that the question cannot be answered by deciding whether the new employer satisfies a universal definition of “successor employer” that always entails the assumption of certain obligations. Instead, a decision about which obligations a new employer has assumed must rest on the facts of each case.

Version 3:

Although the Act provides no clear guidance in these circumstances, several recent decisions have considered the obligations of a so-called “successor employer” under collective bargaining agreements signed by its predecessor. These cases show that the question cannot be answered by deciding whether the new employer satisfies a universal definition of “successor employer” that always entails the assumption of certain obligations. Instead, a decision about which obligations a new employer has assumed must rest on the facts of each case.

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

Most legal writers short-change these interior “introductions,” partly because it is difficult to get them right in a first draft. Good editors learn to look for the places where they need to add or to improve one of these interior contexts. This is not to say that a more specific, detailed focus is always better. In some circumstances, you may want your readers to work through the materials with you, looking over your shoulder as a conclusion begins to emerge from a nuanced and complex analysis. In that case, if you do too much spoon-feeding, they may become recalcitrant. But these situations arise less often than most writers think. Usually, the more specific and explicit you are about where you are heading, the more credible and persuasive you will be.

A final point: The focus should embody a careful substantive decision about what matters, and your wording should reflect that decision accurately. To return to chapter 2’s example about the state troopers’ search, here are three alternative introductions:

Version 1:

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

Version 2:

John Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents’ home, where he lived. He argues that the troopers did not receive his parents’ informed consent for the warrantless search. Although the troopers conducted the search only after Torrance’s father had signed a form permitting them to search his home and seize any material relevant to their investigation, they did not clearly explain the form to the father, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

Version 3:

John Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. Because the troopers did not receive his parents' informed consent for the warrantless search, the evidence they seized is inadmissible.

The first implies that the form's specific language is important, as are the details of the troopers' initial conversation with the father. The second offers a broad focus—the troopers did not receive informed consent—that then narrows to a more specific focus on what they said to the father, but not on the details of the form's language. The third offers the broadest possible focus: Was there informed consent? As a result, it sends us out to look for any indicia of informed consent, not just to examine what happened when the form was read and signed. Which version works best? The choice depends on a substantive decision about what lies at the core of the informed-consent issue.

One final word of warning: The more specific the focus, the longer and denser the context will be. As a result, you must consider whether your readers will be put off because they have to work harder at the beginning. If you think they will be, you could create a two-step focus: Start with a shorter, relatively general focus and then, once readers have been drawn in, add a couple of sentences that offer more specifics. In the second version above, for example, the sentence about what the troopers said to the father could appear a little later, as a prelude to the facts.

**APPLYING
PRINCIPLE 1B: Make the structure explicit.**

No matter how logical your writing, readers will have trouble navigating it if they cannot grasp its structure from the start, and at each step along the way. Your job as a *lawyer* is to provide the logic. Your job as a *writer* is to make the logic evident at a glance. The traditional metaphor here is that of a "roadmap," and note how apt it is: Your document is, to a reader, foreign territory—they

have never been there before. If they are to cross the border confidently and comfortably, they need an overview of what lies ahead.

In the realm of organization, this principle gives rise to four more specific techniques.

Technique 1.3:
Before multi-part structures, create maps
that are as clear as you can make them.

There are two basic types of maps: tables of contents, and maps imbedded in the text, in a paragraph or sentence that lays out the structure of what will follow.

Tables of contents:

If your document allows a table of contents, it is a mistake to regard it as only a list of page references. For those readers who look to a table of contents for a first glimpse of the document's substance, the table should outline a structure that is easy for both the mind and the eye to grasp. If it fails to do this, you have missed an early and easy opportunity to imprint the structure on the reader's mind.

Here is an example of a table of contents that fails as a map, despite getting the page numbers right. It sins against clarity in two ways. First, in the fact section, it misses the opportunity to outline the narrative by using some subheadings. Second, in the argument section, it uses subheadings that are so long and dense—a typical mistake in argument sections—that few readers will persist to the end. The next example, on the following page, works much better as a map.

Example 1

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Example 2

TABLE OF CONTENTS

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In the second example, the subheadings within the Statement of Facts clearly outline the story, and the Argument subheadings are crisp and readable. They are even more readable because this example breaks free of the misguided convention that turns sub-headings into impenetrable thickets of capitalized words. If no rule in a particular court forces you to capitalize all the words in a heading, avoid inflicting that pain on your readers: They will bless you.

Maps in the text:

Whether or not you create a table of contents, in a document of any length you will also need to create maps in the text, not only at the beginning but wherever you begin a passage that has a multi-part structure.

The more complex, unfamiliar, or controversial your analysis, the more important these maps become. To return to our central metaphor, the more your material is like western Colorado, the harder you have to work to make it feel like Kansas. But you should not be embarrassed to use maps even for a simple two- or three-part structure. In these situations, the maps may feel simple-minded to you as you write them, because you already understand the structure. But your readers will have no such qualms, because the territory ahead is a mystery to them. The following box contains three maps, beginning with a short, simple one and ending with a long, complex one.

Example 1:

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

Example 2:

The Division's claim raises three issues. First, was an overpayment made to Mr. Smith? Second, if so, does W.C.S.A 44:10-4(a), and the case law interpreting it, authorize a lien to recover the money from him? Third, if that statute is not available, may the Division nevertheless rely on regulatory authority under W.C. Reg. 44.10.(4), which does authorize a lien?

Is this a good or bad example of mapping? It's actually quite bad, for the structure of the analysis does not turn out, as promised, to be 1-2-3, but instead 1-2a-2b. If readers spot this mis-mapping, they are likely to conclude that the writer's thinking, not only the writing, is unclear. In this case, the hasty reach for a numerical map turns out to be a mistake. Here is a better approach, written as if for a judicial opinion:

The Division's claim requires us first to determine whether it overpaid Mr. Smith. If not, the case is resolved in his favor. If so, however, two issues arise: Does W.C.S.A. 44:10-4(a), and the case law interpreting it, authorize a lien to recover the money? If that statute is not available, may the Division nevertheless rely on regulatory authority under W.C. Reg. 44.10.(4), which does authorize a lien?

Example 3:

The following example came from a difficult advocacy situation. The writer must argue that adverse decisions by a trial judge and jury were based on their misunderstanding of the case. But this motion is being presented to that same trial judge. The writer must therefore avoid making an argument that seems insulting. This will require emphasizing the complexity of the issues, but also making that complexity very clear. This is a classic “Colorado-to Kansas” effort.

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

In this memorandum, we shall demonstrate that judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion.

First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether “The Orchard” would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

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

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

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

Large-scale mapping

Even when writers provide something map-like at a document's start, they often draw it so delicately that the reader is likely to miss the point. The start is no place to be tentative about mapping. In a good map, each piece stands out clearly and strongly, so it sticks in the reader's mind:

Before:

In support of their demand for a jury trial of the alter ego issue, the *Smith* plaintiffs rely heavily on the exception described by Siegel's CPLR Practice Commentaries. Their reliance is arguably misplaced, however, because Siegel does not specifically address whether a plaintiff has a right to a jury trial when the jurisdictional motion is based on an equitable defense (such as the lack of an alter ego relationship between companies) that CPLR § 4101 requires to be tried to a court on the merits. Even though no New York court has addressed explicitly the right to a jury trial on an equitable defense raised in a jurisdictional motion to dismiss, a careful reading of New York case law, Siegel's Practice Commentary 3211:48, and applicable statutes indicates that the equitable alter ego issues raised in our jurisdictional motion to dismiss should be decided by the court, not a jury.

The revision makes two changes. First, it creates a list, the most unmistakable, easiest-to-remember form of map. Second, it fleshes out each element of the list so that it becomes a substantive point, not just a gesture towards a topic. (In doing so, it draws on information the memo provided before this paragraph.)

After:

In support of their demand for a jury trial of the alter ego issue, the *Smith* plaintiffs rely heavily on the exception described by Siegel’s CPLR Practice Commentaries. Their reliance is misplaced, however, for four reasons. First, although the *Cerrato* majority supports the plaintiffs’ interpretation of Siegel’s commentary, the commentary itself does not specifically address whether a plaintiff has a right to a jury trial when the jurisdictional motion is based on an equitable defense (such as the lack of an alter ego relationship between companies) that CPLR § 101 requires to be tried to a court on the merits. Second, a later court agrees with the *Cerrato* dissent that Siegel’s exception should apply only when the issue raised in the motion—not the case as a whole—would be triable to a jury by right on the merits. Third, many New York courts have recognized that jurisdiction is to be decided by the court even when alter ego issues are involved. Fourth, the plain language of the applicable statutes also supports that conclusion.

or:

In support of their demand for a jury trial of the alter ego issue, the *Smith* plaintiffs rely heavily on the exception described by Siegel’s CPLR Practice Commentaries. Their reliance is misplaced, however, for four reasons.

1. Although the *Cerrato* majority supports the plaintiffs’ interpretation of Siegel’s commentary, the commentary itself does not specifically address whether a plaintiff has a right to a jury trial when the jurisdictional motion is based on an equitable defense (such as the lack of an alter ego relationship between companies) that CPLR § 4101 requires to be tried to a court on the merits.
2. A later court agrees with the *Cerrato* dissent that Siegel’s exception should apply only when the issue raised in the motion—not the case as a whole—would be triable to a jury by right on the merits.
3. Many New York courts have recognized that jurisdiction is to be decided by the court even when alter ego issues are involved.
4. The plain language of the applicable statutes also supports that conclusion.

If drawing an indistinct map is one common failing, the greater danger is shirking the task altogether when it requires hard work. Although legal writers are better trained than most in constructing logical clarity out of chaos, young lawyers in particular are sometimes overwhelmed by the interconnectedness of things. Each issue is pertinent to three others; each point needs to be supported by reference to four others; nothing stands alone. Precisely because a good legal mind is so quick to see connections, it sometimes has trouble imposing a stable, relatively simple order on its writing.

In this process, “impose” is the crucial word. The boxes on the following pages provide two examples in which writers failed to perform this act of will. As the revisions demonstrate, your goal should always be to build as simple a structure as possible to support the complexity of the analysis.

Imposing Order

Example 1 comes from a memorandum of law in support of a motion to dismiss. Although the draft reflects an expert grasp of the case, it makes a classic mistake: entangling readers in the case's intricacies without providing a clear structure to organize all that complexity. The revision creates a firm, explicit structure—and thus leaves readers much more hopeful that the writer can guide them through the case safely and efficiently. The result is not just a clearer document, but a more persuasive one. Instead of trying to win by a flurry of counter-punches, it starts by capturing the other side's arguments in an analytical framework of its own choosing.

The “before” in **Example 2** will subject us to a stream of consciousness—an intelligent, legally expert stream, but a stream nevertheless. The clearest signs of organizational trouble appear at the beginning of the third and fourth paragraphs: “moreover” and “at any rate.” By the time readers reach the latter, it feels like the writer's cry of organizational despair: “I don't really know how all this fits together, but take it on faith that it does, somehow.” In the revision, a clear, explicit structure emerges.

The revision also provides a much better overview of what the case is all about, before getting into the details. If the judge were already immersed in the case, that context would not be necessary; but in this brief, for a judge new to the case, it was a major improvement.

Example 1: *Before*

Summary of Argument

In order to prevail, plaintiffs must allege acts by Worldwide which are violations of the securities laws. It is insufficient for plaintiffs to assert that they would have managed Worldwide's investment in Roberts Corp. differently. Management decisions are not reviewable through a securities action. Plaintiffs' latest complaint fails again to make any specific allegations that Worldwide or its directors had knowledge regarding the safety of the Implants which they failed to disclose to the public in violation of the securities laws. This complaint, like the many which preceded it, fails to make any reference to any statement made by Worldwide or its directors in the relevant time period, January 14, 1989, through January 13, 1992 (the "Class Period"), regarding the Implants. Instead, this collage of newspaper clippings and wire service reports traces eight years of public debate regarding the safety of Implants, culminating in the January 13, 1992, moratorium. Conveniently, the complaint omits the rescission of this moratorium as well as the backlash by the scientific, medical and business community against the FDA's hasty, ill-considered acts.

The absence of any evidence of actions by Worldwide that could constitute a violation of federal securities laws or common law fraud is demonstrated by the fact that plaintiffs can allege no specific examples of any fraudulent statements or omissions made by Worldwide or the individual Worldwide defendants. Plaintiffs are instead reduced to resurrecting a thoroughly discredited theory of recovery: that Worldwide failed to set adequate reserves for Roberts Corp.'s losses as a result of products liability suits brought by recipients of the Implants. Even this theory, which is no more than a purported breach of fiduciary duty, is unsupported by facts. Plaintiffs fail to show how Worldwide could have been aware of the lawsuits against Roberts Corp. which have followed the FDA's moratorium or why Worldwide's apparent disagreement with plaintiffs regarding the size of Roberts Corp.'s litigation loss reserves is actionable under the securities laws.

After:

Summary of Argument

Despite the length of the complaint, the essence of plaintiffs' legal theories is presented in a few paragraphs of their first claim for relief. (§§ 100–104). They assert two distinct theories of liability against the Worldwide defendants, both of which fail as a matter of law.

First, plaintiffs allege that *Worldwide itself* failed to disclose material non-public information about the safety of breast implants. (§§ 100–102). Because the only “statements” ascribed to Worldwide are its annual reports and Form 10-Ks (which make no mention of implants), plaintiffs claim merely that Worldwide failed to disclose or account for a loss contingency (§§ 100, 102(a)). As we argue below, this claim lacks specificity (Point I), fails to plead scienter (Point I), and is the type of mismanagement allegation that the Second Circuit has routinely deemed insufficient (Point II).

Second, plaintiffs allege that Worldwide, by virtue of its “control” over Roberts Corp., disseminated false information in *Roberts Corp.*'s public filings (§§ 103–104). This theory also fails because the complaint does not plead facts sufficient to demonstrate Worldwide's control over Roberts Corp., or to establish that Roberts Corp. is Worldwide's “alter ego.” (Point III).

Counts Two and Three, which allege “control person” and aiding and abetting liability respectively, derive from the first Count and cannot survive its dismissal. (Points IV and V). The final count alleges common law fraud and is insufficient as a matter of New York law. (Point VI).

Example 2: *Before*

Preliminary Statement

The instant appeal by Plaintiff-Appellant Big Bank, N.V. (“Big Bank”) relates to an Order issued by Hon. James Rogers, dated January 30, 1991 (the “Order”), pursuant to which Justice Rogers granted, in part, the motion by Defendant-Respondent Minicorp (“Minicorp”) which sought to invalidate Big’s assertion of the attorney-client privilege with respect to certain documents and as to testimony concerning communications between Big and its attorneys.

As demonstrated below, however, the applicable legal principles do not support the decision of the lower Court, and instead fully support Big’s assertion of the attorney-client privilege. The burden on a party seeking to invalidate the attorney-client privilege is extremely high, and Minicorp has simply not made the requisite showing for the abrogation of Big’s attorney-client privilege. Specifically, Minicorp, not Big, has placed the issue of Big’s reliance on counsel’s advice in issue in this case. As such, and in accordance with the cases discussed in Point B (*e.g.*, *Chase Manhattan Bank, N.A. v. Drysdale Securities Corp.*, 587 F. Supp. 57 (S.D.N.Y. 1984)), there has been no waiver of the attorney-client privilege by Big, and Minicorp’s attempted wholesale invalidation of Big’s attorney-client privilege should be rejected.

Moreover, Big’s indication that it relied on counsel’s advice demonstrates only that Big’s counsel (in addition to Big itself) did have communications with Minicorp employees. As the court below noted (R. 16), Big has previously agreed that Minicorp is perfectly free to inquire as to these non-protected communications, and Minicorp has already had the opportunity to question Big’s attorneys as to their contacts with Minicorp’s employees. Minicorp should not, however, be permitted to invalidate Big’s attorney-client privilege in its zeal to determine what its employees may or may not have told Big’s representatives.

At any rate, Minicorp has itself repeatedly taken the position that only its own actions could create Mr. Smith’s apparent authority. As such, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case. Therefore, there is no justification for Minicorp’s attempted abrogation of Big’s attorney-client privilege.

Accordingly, the decision of the Court below, to the extent that it compelled Big to produce documents as to which it had claimed the attorney-client privilege and further required Big’s representatives to provide testimony concerning communications between Big and its attorneys, should be reversed.

After:

Preliminary Statement

Plaintiff-Appellant Big Bank, N.V. appeals from an Order issued by Hon. Richard Rogers that granted, in part, a motion by Defendant-Respondent Minicorp Securities Corporation to remove the attorney-client privilege from certain documents and from testimony concerning communications between Big and its attorneys.

In the underlying action, Big seeks to recover approximately \$6,000,000 in loans to Minicorp. To induce Big to make the loans, an employee of Minicorp executed a letter representing that Minicorp would maintain certain collateral. Minicorp does not dispute that the representation was fraudulent. It does claim, however, that the employee did not have apparent authority to make the representation. In its motion, it asked for a wholesale abrogation of the attorney-client privilege between Big and its attorneys on two bases: that Big's attorneys had communicated with Minicorp's employees during the course of arranging the loan, and that Big had subsequently relied on counsel's advice in making the loan.

The burden on a party seeking to invalidate the attorney-client privilege is extremely high [*What is the burden?*]. For three reasons, Minicorp has failed to meet this burden.

First, Minicorp has itself repeatedly taken the position that only its own actions could create the employee's apparent authority. As a result, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case.

Second, Minicorp itself—not Big—placed the question of Big's reliance on counsel's advice in issue in this case. Big cannot, therefore, be held to have waived the privilege.

Third, Big has agreed that Minicorp is free to inquire about communications between Big's attorneys and Minicorp's employees, and Minicorp has already questioned the attorneys about these contacts. Minicorp does not need to attack the attorney-client privilege between Big and its attorneys to investigate the attorneys' communications with Minicorp.

Accordingly, the decision of the Court below should be reversed to the extent that it (1) compelled Big to produce documents as to which it claims attorney-client privilege and (2) required Big's representatives to provide testimony about communications between Big and its attorneys.

Keeping it simple means two things:

1. Keeping the number of points in the map to a minimum. Once you go beyond four, you stretch most readers' patience. What can you do, then, when you have no choice but to deal with a long list of topics? The answer, usually, is to combine some of them into broader categories by imposing a second-level, more abstract organization on the underlying, more specific one. Here is an example from a brief that dealt with a bewildering list of specific issues. For his own sanity as well as his readers', the writer grouped the issues into a more manageable set of five categories:

The issues raised on this appeal fall into five categories:

1. issues relating to whether the Debtors and the Brown family have standing to appeal;
2. issues arising out of the disqualification of Judge John B. Smith as a result of his financial interest in J.P. Morgan & Company;
3. issues relating to substantive consolidation, which are raised only by the Debtors;
4. issues relating to the classification system of the Committees' Plan, which are raised only by the Brown family; and
5. issues raised by the doctrine of mootness.

As he turned to each set of issues, he then created a map of the specific issues in the set.

2. Designing the map not only so it is accurate in some abstract sense, but also so it prepares the reader for what follows. At times, when you have a clear three- or four-part structure, you may not want to draw a map that simply lists the three or four topics. As the reader moves forward, do you want all of the topics planted with equal force in his mind? Or are some more important, at least to his ability to grasp what follows? Here, for example, is a three-topic map that de-emphasizes the third topic, for reasons that should be self-evident:

This memorandum reports two legislative developments the outcome of which is still in doubt: a potential change in the treatment of the European Community under subpart F of the U.S. tax code, and a potential tax increase on short-term capital gains. In both cases, clients who would like their views heard in Congress should act as soon as possible. The memorandum also reports on the proposed increase in the public debt limit, which will affect tax legislation later this year.

Here is another, more complicated example, this time from a judicial opinion. The judge had to deal with four issues, each cleanly defined. In this situation, most writers would have constructed a simple, four-part map:

On appeal, Moritz contends his conviction of unlawful possession of cannabis should be reversed because (1) the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt of possession of cannabis with intent to deliver, (2) the unannounced entry by the officers executing the search warrant was not constitutionally reasonable, (3) hearsay testimony was improperly admitted at trial, and (4) expert testimony was improperly admitted at trial.

But the judge thought like a writer—or, more precisely, like a reader—about how to make the map more useful. After the map, he realized, the reader will plunge into paragraphs of detail to which only the first two issues are relevant. To create a context that helps the reader, therefore, his map should separate those issues from the ones that come into play only later. It should also reverse the first two issues, so they appear in the same sequence as the facts that will be relevant to them.

On appeal, Moritz contends his conviction of unlawful possession of cannabis should be reversed because (1) the unannounced entry by the officers executing the search warrant was not constitutionally reasonable, and (2) the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt of possession of cannabis with intent to deliver. He also contends that hearsay testimony and expert testimony were improperly admitted at trial.

The cannabis was discovered during a search by two agents of the Cumberland Metropolitan Enforcement Group (MEG) and two Cumberland County sheriff's deputies executing a search warrant. A third agent arrived after the search began. The record shows the residence was described as a "basement house." The above-ground portion consisted only of a bedroom, a foyer closet, and a hallway. The basement level contained a kitchen, a living room, and a bathroom.

MEG Agent Dan Brotz testified that after knocking on the door of the residence, he saw Moritz's roommate, Brian Tipton, come to the door and then retreat about six feet. Brotz testified that he waited approximately 45 seconds to a minute before striking the door open with a sledgehammer. Brotz was not asked whether the police identified themselves as police officers prior to the forced entry. Brotz was dressed in civilian clothes. However, he was wearing a black "raid" jacket with

“police” clearly printed on the front and back. Brotz also had his revolver drawn. The other MEG agent present also wore civilian clothes and a “raid” jacket just like Brotz’s. The two sheriff’s deputies were wearing sheriff’s uniforms.

Upon entering, Brotz found Tipton standing in the doorway of the upstairs bedroom, approximately six feet from the front door. . . .

Mapping throughout

As with containers, maps should appear not just at the start of a document or section, but throughout. And they are most often missing in the interior, because most writers forget to add them once they are in the flow of their prose. In the example below, the map was left out of the first draft:

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

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

1. The Section 304 Proceedings

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

At the “micro” level of a document, maps tend to be missing even more often. Here is an example of the damage that can result (focus on the sentences in italics):

Before:

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

First, the lender in this position must take actual “possession” of the vessel or facility. *This requirement is open to interpretation, as the term “possession” is not defined.* Under one reading, “possession” calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for . . .

The italicized sentences leave unanswered a basic organizational question: “How many requirements, and how many interpretations, are we facing here? Just how torturous is this all going to be?” Here is the revision:

After:

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

First, the lender must take actual “possession” of the vessel or facility. Because the amendment does not define the term “possession,” this requirement is open to two possible interpretations.

Under the first and more likely reading, “possession” calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for . . .

Here is another example, in which drawing the map takes more effort. It was missing entirely in the first draft. To create it, the writer had to do more than unpack a word like “several.” He had to step back, look at his whole analysis, and draw its strands together into a concise summary.

Section 16(B) Liability: The ABC Group is also exposed to Section 16(B) liability risk. Because the Group will buy 100,000 shares of Megabucks from XYZ, amounting to 15 percent of Megabucks’s shares, it may be held liable as a person holding more than 10 percent of the corporation.

The Section 16(B) question revolves around whether there has been a purchase and a matching sale (or vice versa). While it is clear that the ABC Group will purchase Megabucks shares, it is unclear whether a matching sale will occur at the time those shares are exchanged for Imperial shares after the merger.

[MAP] As the discussion below will explain, the stock exchange will not be a sale if . . . or if . . . If neither of those conditions is met, however, then the exchange will be a sale. Nevertheless, ABC can still avoid 16(B) liability if . . .

Technique 1.4:
Use the document’s layout to make the structure visible.

As several of the examples in this chapter demonstrate, if your structure is visible at a glance, your readers will find your writing less intimidating and easier to navigate. Creating this visibility usually requires subheadings, numbers, or both. On a smaller scale, it may also require you to break your prose into paragraphs that match the sections of your map. Because this technique merges with those in chapter 5, we will delay further examples until then.

But we should be especially clear about one point underlying this emphasis on self-evident structure. While simple, visible structure makes your prose easier to read, it does much more. It announces to the reader in the strongest possible tones that you are in confident control of your analysis and, by extension,

that your reader can have confidence in you. You know exactly where you are going and why, and you declare this to the reader as obviously as possible. Visible structure therefore supplies more than clarity; it supplies power.

Technique 1.5:
After you draw the map, follow up with roadsigns.

As useful as maps are, they are not enough to make us comfortable in a strange city. We also want roadsigns along the way that match the map. Readers need the same comfort. Each time the road takes a turn, they want a roadsign that links back to the initial map. Most of the time, these signs can be short and simple. If the map was basically a list, the signs need be no more than “first,” “second,” or perhaps just the numerals themselves. Sometimes, when readers need breathing space in a long document, they may appreciate the more elaborate “We now turn to . . .” Subheadings can do the same work, with the advantage of standing out more clearly at a glance. For example, here is a final revision of an example you just saw. This time, we give you a longer chunk of it:

After:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an “owner or operator” for environmental liability purposes. Before liability will be imposed, two requirements must be met: the lender must (1) take actual possession of the property and (2) exercise actual control over it.

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

Under the first and more likely reading, “possession” calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. . . . [Two paragraphs omitted.]

2. *Actual control.* The second prong of the amendment’s two-part test for liability is whether the lender exercises “actual . . .

Technique 1.6:
***Make maps and roadsigns congruent
with each other and the terrain they describe.***

If you set out consciously to draw a map, the chances are you will make it accurate. But maps tend to go astray in three situations: when you do not realize you are drawing one; when you are so far away from the map that you forget what it said; and when your map comes up against another structure that overrides it.

Inadvertent maps. In complex documents, readers will search desperately for clues about the unfamiliar terrain ahead. Any summary that looks like a map—particularly a list—will be taken as an outline of what lies ahead, whether or not you meant it to be. If you inadvertently create a misleading map, they will be annoyed. Even worse, they may suspect you are not in control of your material, and therefore question your credibility. For example:

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

[Now we give you only the sub-headings from the rest of the passage.]

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

Most readers will instinctively assume that the first sentence provides a three-part map—“informed manner,” “good faith,” and “honest belief . . . best interest.” Two things then go wrong. The map does not match the actual sequence of topics. And in two of the three subheadings, the language is so dif-

ferent from the map's that we have to translate to see where we are. All this confusion came about not because the writer was incompetent, but for reasons that afflict most drafts. In the throes of composition, a writer often fails to notice that he has created a map, and then fails to notice that he has changed his organization as it unfolds.

Distant roadsigns. Even when writers consciously make a map and try to stick to it, their memory can fail them. The result, as we saw in the previous example, is that the language in the roadsigns differs from the map's language. Another example: When one of us first revised the passage about the meaning of "owner or operator," he wrote the second subheading to read "managerial control" instead of "actual control," the words he used in the map. He had no excuse but failing memory.

Occasionally, we see a writer going out of his way to create variety in the wording of his roadsigns, usually because he was taught by a creative-writing type that repetition is boring. This is terrible advice. To see why, think about the context our "map" and "roadsign" metaphors suggest: driving down a highway. If you are driving down the interstate from Boston to Philadelphia, usually a miserable experience from the start, you are comforted to see signs that say "Philadelphia—100 miles," "Philadelphia—50 miles," and so forth. The signs might be more entertaining if they said "Philadelphia—100 miles," "City of Brotherly Love—50 miles," "Home of the Liberty Bell—20 miles." But, if the road is new to you and you are worried about the route, clarity, not entertainment, is what you crave.

Conflicting structures. This problem arises most often on the large scale: A writer provides a clear map for a long document, but then gives one of the document's sections a structure that conflicts with the map. Because the problem usually results from a "default" organization, a topic discussed in the next chapter, we will save the examples for then.

Building Containers Everywhere: An Example

The original version of the brief you are about to read contains some excellent lawyering: It marshals all the right authorities into the substance of a logical argument. But it reads much more like an archaic “Statement of Law and Facts” than a modern, fully formed brief, primarily because it lacks the contextual, introductory information—the “meta-information”—before each chunk of raw material. The revision adds that information in the form of “containers” or mini-introductions at several places throughout the brief (and in sub-headings).

The revision also tackles two other problems.

First, the brief’s basic, three-part structure does not match its underlying logic. The brief relies on two types of authority—the Speedy Trial Act and case law. Logically, therefore, the brief should be divided into two main parts. In the original, however, it is divided into three—two dealing with the Act, one with the case law. The revision has two main sections, one for each type of authority, with the second again divided into cases from other circuits and from this one.

Different substantive decisions about the analysis could lead to different structures. For example, the relevant authority from the controlling circuit is merely dicta. Does it deserve a subsection of its own, thus suggesting that it has equal weight with precedent from other circuits? Or, for another example, the discussion of the Act’s language employs legislative history to help interpret one prong of the Act’s three-part test. That legislative history stands strongly for the proposition that dismissal without prejudice can undermine the Act’s effectiveness. Does the history therefore deserve a subsection of its own? These decisions require one to think first like a lawyer, not a writer—but, again and again, focusing as a writer on a document’s structure will force you to think more clearly as a lawyer about its substance.

Second, the brief lacks an introduction to create a context and a theme for the case: What should the reader be looking for, and why is justice on the defendant’s side? The revision provides this focus, as well as an introductory map.

Before:

UNITED STATES DISTRICT COURT
DISTRICT OF WEST DAKOTA

UNITED STATES OF AMERICA
V.
JOHN ROBINSON

CAUSE NO. SA-89-CR-83

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

Defendant John Robinson respectfully submits that, under the provisions of the Speedy Trial Act, the information against him should be dismissed with prejudice. (1)

I

(2) The Speedy Trial Act provides, in pertinent part, that

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

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

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

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

(1) The lack of an introduction is obvious, as is the lack of useful subheadings attached to the Roman numerals. As the brief progresses, however, look for less obvious places where small-scale introductions or contexts are missing.

(2) Quotations of any significant length should be preceded by an introduction that focuses on their gist and their relevance.

In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

II

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

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

2. The facts and circumstances surrounding the delay. There is no explanation given for the delay in the filing of this case. (3) Defendant appeared before the Magistrate on the complaint on December 27, 1988. Counsel was appointed and the undersigned first met Mr. Robinson in the Public Defender Office on January 6, 1989. On January 9, 1989, the date scheduled for the preliminary examination, the undersigned contacted the Special Assistant U.S. Attorney at Brooks Air Force Base, advised that the preliminary examination had been waived, and suggested that the case be resolved by Pretrial Diversion. Two days later, the undersigned was informed that the case would not be recommended for Pretrial Diversion. Nothing more was heard from the government until the motion to dismiss count one of the complaint. In that motion, the government conceded that more than thirty days had elapsed since the summons was served and implied that the date of the initial appearance was somehow relevant to the determination of the motion. Even so, the dismissal was not entered until more than thirty days had elapsed following the initial appearance. The only reference in the Speedy Trial Act to an appearance by a defendant before a judicial officer's being a factor in calculating

(3) At the beginning of subsections, just as at the beginning of major sections, experienced editors assume that they have some introductory work to do. In Section II, the first subsection is too short to need a fuller introduction. The second is not, yet its first sentence is actually something of an anti-introduction: It tells readers that they should go forward looking for the absence of an explanation—in effect, for nothing. Even if the sentence is substantively accurate, it is not much of an incentive to keep reading.

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

3. Impact of re prosecution on the administration of the Act and the administration of justice. In determining whether a dismissal for violation of the Speedy Trial Act should be with or without prejudice, the legislative history is instructive. In the legislative process, there was much concern over possible abuse in the dismissal without prejudice option: (4)

The Committee believes that permitting the re prosecution of a defendant whose case has been dismissed for failing to meet the speedy trial limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:

Another area of doubt is that engendered by a consideration of the technique of the bill’s (S. 754) dismissal “without prejudice.” I would think if I were you, of the impact on the grand jury systems of re-indictments and the time requirements of re-indictment.

(4) The second sentence does provide a focus for what follows: Look for ways in which the dismissal-without-prejudice option could be abused. But it is a half-hearted effort. For an editor, the automatic question should be, “Is this focus specific enough? Should it offer more help, perhaps by alerting readers to the types of abuse at stake?” Even if the start of a subsection didn’t prompt this question, the sight of the long quotation that follows should.

Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists.

* * *

With respect to the propriety of requiring a permanent bar to future prosecutions, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee in their Commentary on Standards Relating to Speedy Trial.

The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli, endorsed the ABA position. . . .

1974 U.S. Code Cong. & Admin. News 7401, 7430.

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

III (5)

In *United States v. Angelini*, 553 F. Supp. 367 (D. Mass. 1982), a prosecution was not brought to trial within the seventy-day limit of § 3161 (c)(1), plus exclusions. The defendant’s motion to dismiss was granted 25 days after the expiration of the time for trial.

(5) The Roman numeral should be enough to trigger an editor’s introductory reflex. So should the section’s plunge into the details of a case, without any introductory framework to bind the case and the following ones into a coherent analysis.

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

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

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

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

(6) Where in this paragraph has the writer buried its point: the proposition for which the case stands? In the middle. Almost always, the discussion of a case should begin with the statement of its point and the point's relevance to the analysis.

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

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

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

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

(7) The record in this district is replete with such failures, starting with the *Salgado-Hernandez* case. A cursory examination of cases in the office of the Federal Public Defender reveals the following: Most recently this court dismissed without prejudice *United States v. Small*, SA-89-CR-16 (driving while intoxicated). Cases filed by complaint and still pending, with no information or indictment filed by the government, include *United States v. Cano*, SA-88-421M-1 (driving while intoxicated, complaint filed October 21, 1988); *United States v. Rodriguez*, SA-87-605M-1 (driving while intoxicated, complaint filed December 17, 1987); *United States v. Hernandez*, SA-88-337M-1

(7) Although this list of cases is long and ugly, it serves a purpose: to provide evidence for the claim that, in this district, the government has regularly failed to meet the time limits. But the two introductory sentences leave readers guessing about some key contextual information: how many cases over what period? and what kind of cases? Note that the first cases in the list are all DWI-related, not theft cases like this one.

(driving while intoxicated, complaint filed August 18, 1988); *United States v. Buchanan*, SA-88-515M-1 (driving while intoxicated, complaint filed December 23, 1988); *United States v. Ayala*, SA-88-109M-1 (driving while intoxicated, complaint filed March 18, 1988); *United States v. Austin*, SA-88-34M-1 (misdemeanor theft, complaint filed February 4, 1988); *United States v. Ritter*, SA-88-500M-1 (driving while intoxicated, complaint filed December 7, 1988); *United States v. Salas*, SA89-2M-1 (felony theft, complaint filed January 5, 1989); *United States v. Runkle*, SA-88-222M-1 (driving while intoxicated, complained filed June 7, 1988); *United States v. Barreda*, SA-88-340M-1 (driving while intoxicated and felony destruction of government property, complaint filed August 18, 1988); *United States v. Tucker*, (driving while intoxicated, complaint filed October 25, 1988); *United States v. Ramirez*, SA-88-230M-1 (driving while intoxicated, complaint filed June 7, 1988); *United States v. Martinez*, SA-88-438M-1 (driving while intoxicated, complaint filed October 25, 1988); *United States v. Knight*, SA-88-482M-1 (driving while intoxicated, complaint filed December 1, 1988); *United States v. Asebedo*, SA-88-422M-1 (driving while intoxicated, complaint filed October 21, 1988); *United States v. Acuna*, SA-88-436M-1 (driving while intoxicated, complaint filed October 25, 1988); *United States v. Delgado*, SA-88-385M-1 (driving while intoxicated, complaint filed September 29, 1988); *United States v. Esparza*, SA-88-315M-1 (driving while intoxicated, complaint filed August 1, 1988); *United States v. Esguivel*, SA-88-221M-1 (driving while intoxicated, complaint filed June 7, 1988); *United States v. Flores*, SA-87-398M-1 (driving while intoxicated, complaint filed August 18, 1987); *United States v. Heinric*, SA-88-65M-1 (uttering insufficient check, complaint filed March 3, 1988); *United States v. Rodriguez*, SA-87-268M-1 (driving while intoxicated, complaint filed June 8, 1987); *United States v. Moore*, SA-87-400M-1 (driving while intoxicated, complaint filed August 20, 1987); *United States v. Martinez*, SA-87-439M-1 (case dismissed a year after filing when defendant made restitution); *United States v. Meyer*, SA-87-552M-1 (driving while intoxicated, complaint filed November 10, 1987); *United States v. Maldonado*, SA-88-130M-1 (misdemeanor theft, complaint filed April 5, 1988); *United States v. Perry*, SA-88-220M-1 (uttering worthless checks, complaint filed June 7, 1988); *United States v. Lacy*, SA-88-220M-1 (driving while intoxicated, complaint filed June 7, 1988). A more thorough search of the files in the Public

Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many, many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement, revealing a continuing pattern of failure to bring formal charges within the time permitted by the Act. The government in this district does indeed "frequently fail to meet the time limits." . . .

After:

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

After charging John Robinson with the theft of merchandise worth \$26, a misdemeanor, the government failed to indict him within the Speedy Trial Act's 30-day time limit. The Court should therefore dismiss this case with prejudice, a result dictated by the Act's language and legislative history, and by relevant case law.

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

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

I. Under the Speedy Trial Act, the information should be dismissed with prejudice

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

- a. the seriousness of the offense,
- b. the facts and circumstances leading to the dismissal, and
- c. the impact of a reprosecution on the administration of justice.¹

In Mr. Robinson's case, all three factors weigh in favor of dismissal with prejudice.

1. "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice." 18 U.S.C. 3161(b).

[Note: This footnote simply demonstrates that you are not misrepresenting what the Act says. Could you instead put the quotation in the main text? Yes, but the quotation imbeds the three factors in a dense paragraph, rather than laying them out clearly on the page as they are in the text. The choice is a judgment call, and a close one.]

1. The offense was minor. Mr. Robinson is charged with a misdemeanor, the theft of \$26 worth of merchandise from the Base Exchange at Brooks Air Force Base.

2. The delay resulted from the government's procrastination. The delay resulted solely from the government's repeated failure to act, not from plea negotiations or any other events in the case.

The initial proceedings.

The motion to dismiss.

The filing of the information.

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

With respect to the propriety of requiring a permanent bar to future prosecutions, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee in their Commentary on Standards Relating to Speedy Trial:

The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

1974 U.S. Code Cong. & Admin. News 7401, 7430.

II. Case law supports dismissal with prejudice when a delay results from the government's negligence or when it regularly fails to meet time limits

Although courts have generally rejected a presumption that a dismissal for violating the Speedy Trial Act should be with prejudice, several courts in other circuits have held that dismissal with prejudice is required when the government

fails to act through negligence, as occurred in this case. In addition, two Fifth Circuit opinions have stated in dicta that dismissal with prejudice is appropriate when the government “regularly or frequently fails to meet the time limits.” Federal prosecutors in this district have an established pattern of failing to meet the limits.

A. Other Circuits approve dismissal with prejudice when a delay results from government negligence.

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

[DISCUSSION OF *CAPERELLA AND RUSSO*]

B. This Circuit’s dicta support dismissal with prejudice where the government frequently fails to comply with the Act.

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

[EXPANDED DISCUSSION OF *SALGADO-HERNANDEZ AND MELQUIZO*]

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

The record in this case is replete with such failures, starting with the *Salgado-Hernandez* case. A cursory, incomplete examination of cases in the Federal Public Defender’s office reveals [] instances over [] months in which the government has failed to prosecute within the time limits of the Speedy Trial Act. A fuller search would no doubt reveal many more. These cases are of different types, but include theft cases.

Most recently . . .