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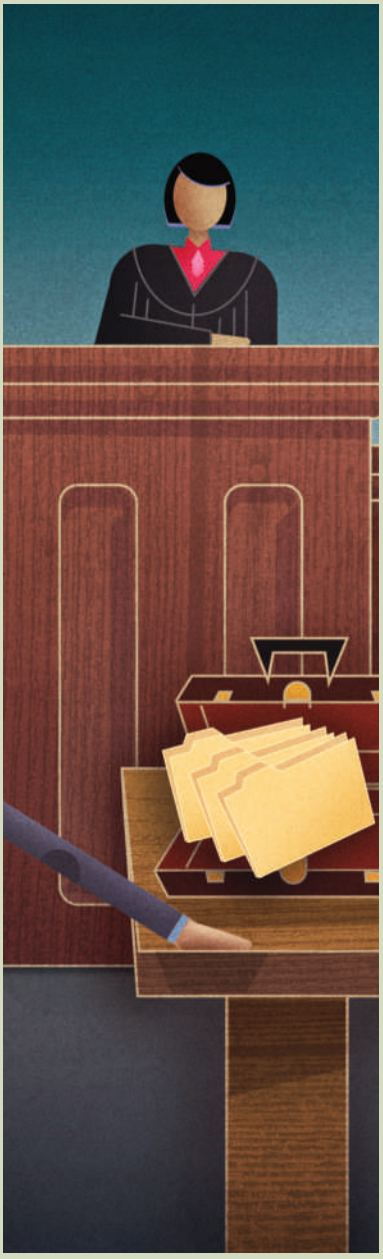

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By Steven B. Katz

The 33 Steps: Postgraduate Legal Writing

In presenting a case in court, the attorney's job is to make the judge's job easier

IN HIS *RHETORIC*, ARISTOTLE TEACHES that persuasion is the interplay of three things: quality of logic (logos), speaker's credibility (ethos) and listener's sympathy (pathos). Lawyers are all about logos, and forget the rest. However, the manner in which the logic of the argument is delivered can enhance—or diminish—credibility and the judge's receptiveness. Too much bombast—trying to establish a broader rule than is needed or using aggressive language about an opponent's weakness—diminishes credibility and motivates the judge to find counsel's weakness. Writing that is hard to wade

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KEN KORRAL

through—unclear, cluttered, disorganized, or just hard on the eyes—diminishes logical force, squanders credibility, and makes the judge more skeptical.

Law school took care of the logos. It takes a lot longer to figure out ethos and pathos. Following is what I have learned about them in 33 years of practice.

Legal Writing Is Legal Thinking. If it can't be written simply and clearly, it hasn't been thought through yet. It's as simple as that.

Be A Lawyer, Not A Cop. Early in my career, I worked for a senior partner who would return research memoranda to associates and tell them, "If I wanted to know what the law is, I would have asked a cop. I went to a lawyer because I wanted to know what to do."

We attorneys are not professional debaters, paid by our clients to win arguments the way companies sponsor NASCAR drivers to win races. Clients hire us to help them achieve a result. Every time pen is taken to paper (fingers to keyboard, voice to tape, whatever), we have a request. We want a judge to do something (or not do something). Everything we write is a reason for a judge to do or don't. Anything we write that isn't a reason to do or don't belongs on the cutting room floor.

Keep Your Eye On the Prize. The objective is always to persuade a judge to do or don't. An attorney persuades by offering reasons to do or don't. Hence, the universal form of legal argument:

Mandatory

Argument: Court must do *X*.

Counter Argument: Court cannot do *X*.

Permissive

Argument: Court should do *X*.

Counter Argument: Court shouldn't do *X*.

Your entire argument should consist of a string of musts, cannots, shoulds, and shouldn'ts that propel the judge to your objective. Mandatory is always better than permissive, and permissive is always better than nothing. Even when mandatory arguments are viable, permissive ones are the spoonful of sugar that helps the medicine go down. It is always better to argue not only that the judge must do (or must not do), but that they should.

Thus, always aim right at *X*. Everything else detracts from your persuasiveness.

Shoulder Your Burden But Travel As Light As Possible. It is not advisable to assume the burden of demonstrating more than is needed to make the case. In other words, don't dispute every point your opponent makes; dispute only the ones that need to be disputed. Similarly, focus on persuading the judge to do or don't, not on persuading the judge that your client is (or you are) right.

Antonin Scalia put it better: "Yield indefensible terrain—ostentatiously. Don't try to defend the undefendable.… Openly acknowledge the [points] that are against you.… Bear in mind a weak argument does more than merely dilute your brief. It speaks poorly of your judgment and thus reduces confidence in your other points."[1]

Write for The Chronically Late. I once heard a trial court judge break down how much time he had for each summary judgment motion on his docket: 15 minutes. You want him to stick his neck out for you and risk reversal? You better make your case in the allotted 15 minutes.

Structure a Brief Like an Onion (or an Iceberg). A brief should always be structured so the judge need drill down into the details only so far as needed to be convinced. It is best to make it easy on the judge to set an argument aside when satisfied by starting at the outset with the ultimate relief being sought. Then, sufficient grounds should be provided to grant that relief. If those grounds are separately sufficient, it should be clearly stated. (E.g., "The Court need read no further to affirm.…") Then, for each ground, give the judge sufficient reasons to establish the ground. For each reason, provide further sufficient reasons, and so forth. Moreover, make it easy for the judge to decide when to stop reading and move to the next reason (ground).

You're Not Cooking Pasta. My mother tested if pasta was done by throwing it against the wall to see when it sticks. Some lawyers write briefs the same way because "you never know what will appeal to the judge." However, that is precisely what clients pay us attorneys to figure out. Throwing every conceivable argument at a judge usually ends up with nothing sticking. The correct course is to do the job at hand and make the best argument that can be made, not every argument that can be made.

So, what should an attorney do when the client insists on an argument that counsel judges weak and better left behind? Make it as strong as possible and place it where it does the least damage by distracting the judge from better arguments. In this, the familiar principle of primacy and recency is your best friend: What comes first and last in an argument is most retained by the reader. Thus, put weaker arguments in the middle.

Save Introductions for Cocktail Parties. The heading "Introduction" just screams "stuff you don't really need to know but I can't resist talking about." Instead, place a "Summary" at the top of your brief and use it to summarize the entire argument.

The summary is the most important section of a brief. If you are not ready to write a clear, concise summary of the argument, you are not really ready to write the long version. (Yet do not take this to mean that writing should be delayed until you are ready to summarize the entire brief. Rather, apply it argument by argument, section by section.)

After you have finished the brief, go back to the summary and make sure it is still a summary of the original argument. If your thinking has evolved while writing (which is a good thing), the summary should reflect that.

Don't Be Joe Friday. On the 1950s show *Dragnet*, Sergeant Joe Friday would always have to admonish those silly, rambling citizens to stick to "just the facts." Lawyers do the same thing. From the first law school lesson on how to write a case brief, it was pounded into us to separate the facts, from the legal rules, from application of rules to facts. (Isn't a case brief just an expanded form of IRAC (Issue, Rule, Application, and Conclusion)?) We keep on doing this throughout our legal careers. When we write a brief, we gather all the facts—the general background of the case and the particular events at issue—into one, tightly packed narrative at the front, followed by an exposition of the law and our analysis. Sure, it requires the judge to flip back and forth to line up the critical facts, law, and argument on each point, but they were trained to do that, just like us, right?

Don't do that. Judges may not have the time or patience to mentally reorganize all the stuff you throw at them. Moreover, if they did, what makes you think you are entitled to it? Your job is to make the judge's job easier.

First, banish the fact section completely from your briefs (if you can). Putting that heading (or something like it) just creates the temptation to recite background information not pertinent to the relief you seek. Second, discuss facts in the appropriate level of detail in the argument to which they pertain. Organize facts and law together under the conclusion you want the judge to draw. Don't make flipping between sections necessary. Third, if you have to discuss facts under a separate heading, they should be organized to justify a factual conclusion you want the judge to draw. Also, the heading should not be "Facts" (or something akin)—it should be the factual conclusion or inference you are

advocating. Never hand your judge a section of a brief that contains "all the facts Your Honor needs to keep in mind to understand the rest of my brief. (Please feel free to take notes.)"

There is a caveat. Sometimes, court rules require a fact section. When they do, you must comply. However, having included the facts pertinent to a particular argument in an earlier section does not allow you to omit them from the argument. Selectively repeat them when needed. Then, consider making the required fact section more of a summary of the facts, leaving more detailed discussion of particular facts to the legal argument in which they belong.

Make the ToC TIC. The table of contents should always "tie it closed." The table of contents is the summary of the brief's summary—a map to the peaks of the "iceberg" described above. The judge should be able to read just the table of contents and have a good handle on the argument laid out in the brief.

No Book Reports. Just because you found it in your research does not mean it needs to be in your brief. If there is a point to working through the history of a rule—go ahead. But if there is none, history is for law review articles.

When should you work through the history of a legal rule? Usually, when the rule has changed in ways germane to your argument. Perhaps critical language has become broader over time—or narrower. Or its application has contracted or expanded. History matters only when your argument turns not only on the present state of the rule but on the trajectory of change.

"Tell 'Em What You're Going To Say, Say It, Then Tell 'Em What You Said." This saying is commonly attributed to Dale Carnegie. It really goes back to Aristotle's *Rhetoric*. It is a classic principle for a reason. Live by it.

KISS.[2] In other words, strive to achieve Strunk & White's greatest maxim: "Omit needless words."[3] The same goes for arguments. If it is too complicated to write simply, it needs to be thought through more. An entire argument may be complex, but each component should be simple. The structure that ties each component should be simple, and the language should be simple. Nothing is so complicated that it cannot be broken down into simple steps.

Once, in an argument before the Ninth Circuit, I was asked, "Counsel, doesn't that argument have too many steps to be right?" "Well, this is ERISA, your honor." I won.

Don't Forget the ABCs. "Always be connecting." As you write, every point should connect to the last one (or the next): Grounds to results, section to section, paragraph to paragraph, and, often, sentence to sentence. Keep your judge connected to the superstructure of the argument. They should never wonder, "Why I am reading this?" They should know.

Pros Eschew Pronouns. Pronouns are great for simplifying writing and avoiding repetition, but they also can be vague. Especially watch out for latter/former, him/her, it/them, this/that. Two rules minimize the risk of confusion: 1) Only one noun gets "pronounced" at a time (also, avoid multiple pronouns in the same passage, even if they are different pronouns); 2) don't connect pronouns across paragraphs, i.e., if Ms. Roe is called "she" later in Paragraph 1, the first reference to her in Paragraph 2 is "Ms. Roe" again.

A related issue is how to handle nontraditional preferred pronouns. The Fifth Circuit recently published an opinion struggling with this very issue. Although it declined to use the nontraditional pronouns urged by a litigant seeking respect for the litigant's gender identity, the Fifth Circuit conceded: "On this issue, our court has gone both ways."[4] Apply sensitivity and avoidance: Avoid the issue with sparing use of pronouns and a preference for the neutral they/them for everyone regardless of preference; but if you can't avoid the issue, do what your judge wants.

Don't Be Passive-Aggressive. The passive voice inevitably wastes words and sounds weak. "It is to be avoided" (he wrote—ironically).

Nouns Are Better Than Adjectives. Research shows that intelligent readers resist being told what to conclude. They prefer their own judgments. So, provide information (facts, rules) that lead them to the right conclusion, and let your judge get there on his/her/their own. For example: Don't say your opponent's position is "meritless"; say "the cases" (or record, or facts, or statute) "do not support it." Don't call a claim "outrageous"; catalog its weaknesses and let your judge be discretionarily outraged. Stick to the point and let your judge draw broader conclusions about candor, reasonableness, quality, and the like.

Don't Get Mad; Get Even (Tempered). The nastier your opponent gets, the more reasonable you should be. Don't respond in kind. An opponent's bombast is a gift—accept it graciously and respond professionally. Judges hate unprofessional conduct. Standing above the fray pays dividends.

Parties Have Names. The federal appellate rules advise, "Counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names…."[5] Do so.

While it is commonly accepted to use parties' last names, it is more respectful—and enhances your credibility—to say "Mr. X" or "Ms. X."

Don't Serve Alphabet Soup. Lawyers love acronyms, but it gets old fast. Many acronyms are so common in legal writing you are stuck with them: US, NLRB, ERISA, ADA, FBI, USC, etc. However, don't add to the potential confusion. If your client Zoolander's Beauty Supplies is being sued by Red Carpet Weavers, Inc., do you have to file a brief that talks about "ZBS" and "RCWI"? What's wrong with "Zoolander's" and "Red Carpet"? I guarantee your judge will find the latter pair of phrases easier to follow.

Don't Commit Senseless Acts of String-Citing. Nothing screams "Caution! There's a problem here!" more than a brief that says "It is well-established that _____" followed by a long string of citations. If it was well-established, only one cite is necessary. Furthermore, that cite should either be the leading case establishing the rule, a very recent case repeating the rule (preferably from a court binding on your judge), or a decision from your own judge.

There are only three reasons to string-cite: 1) You need to show that a rule has been widely adopted across multiple courts whose holdings are merely persuasive as to one another, 2) you need to show a rule has been applied in varying factual settings, or 3) you need to chart the development of a rule. Additionally, you had better use parentheticals to clarify why you are string-citing. Do not string-cite just because you have done the research. (Remember: "No book reports.")

Only Footnote What You Don't Need Your Judge to Read. Don't assume that anything in a footnote will get read. So, why bother with footnotes at all? Because they are great place for stuff that need not be read. Think of them as the bottom layer of the aforementioned iceberg. They are great for 1) points you don't need to address but think your judge might want to see regardless and 2) points you might need later but are not essential to your argument.

Never footnote: 1) critical parts of your argument, 2) necessary facts, or 3) anything you want the judge to read. Alternatively, you may footnote: 1) additional authority, 2) supplementary arguments, 3) stylistic asides or ephemera, or 4) points you want

to later show were addressed but on which you don't want your judge to focus.

One particularly good use of footnotes is when you actually need to string-cite. Put your best citation in the text, and continue the rest of the string-cite in a footnote. However, never disclose difficult facts or law in a footnote without thinking it through carefully. Paradoxically, nothing calls greater attention to a weak point than burying it in a footnote.

***The Bluebook* Is Not Scripture.** When I went to law school, *The Bluebook* was a pamphlet you could slip in your pocket. No more. Try to remember that 1) it is not law, a rule of court, or anything else, and 2) it is written by law students. Take from it what makes sense and is clear, efficient, and practical. Ignore the rest. (For bonus points, ridicule what deserves ridicule.)

What about the Yellow Book?[6] Here, one can have a robust debate. On the one hand, the California Supreme Court and Court of Appeal do follow it. on the other hand, the rules of court expressly permit either *The Bluebook* or the Yellow Book.[7] I come down on the side of using (modified) *Bluebook* form, even in state courts. A modified *Bluebook* form has advantages. Yellow Book formatting—especially the parenthetical date in the middle of a case citation—is old-fashioned and can be distracting. It is not a coincidence that the Yellow Book, which hasn't been revised in over twenty years, has also not been adopted in other jurisdictions, while *The Bluebook* has.

IRAC Should Stick in Your CRA(w). We all learned the IRAC formula in law school: Issue, Rule, Application, Conclusion. It is logical. It shows how outcomes (rulings) flow from legal rules. But it is not good rhetoric. To persuade, start with your conclusion and work backwards: Conclusion, Rule, Application. (Whew! I'm done.)

Be Easy On the Eye. We are visual learners. A whole courtroom graphics industry has been built around this. This is no less true for writing. "[T]he first thing the reader sees is the overall pattern of light and dark on the page."[8] Using the tools of typography—font, format, spacing—a "legal writer can create a picture…as paint on the canvas of a page" to enhance his/her/their own credibility and the judge's receptivity.[9]

I take seriously Matthew Butterick's two laws of typography: 1) The more difficult a judgment on the contents of a writing, the more influence typography will have on the judgment. 2) The more limited a reader's time or attention, the more influence typography will have on the reader's judgment.[10] When formatting matters, it really matters.

The Times (New Roman), They Are A-Changin'. Times New Roman is the default font of the legal world. For no good reason. No court rule requires it.[11] It is an inferior choice; don't make it.

Don't take my word for it. Take the Seventh Circuit's:

> Typographic decisions should be made for a purpose. The *Times of London* chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.[12]

The Seventh Circuit recommends Century, the font used by the Supreme Court and the Solicitor General, although "[a]ny face with the word 'book' in its name is likely to be good for legal work."[13] That's not Times New Roman.

Fully Justify Your Relief, Not Your Text. Gosh, isn't it just great we all have up-to-date word processing programs that let us create full-justified text, just like a book publisher? No. Commercial word-processing software in wide use by lawyers is not capable of the fine kerning that commercial publishing demands. Our full-justified documents do not look like professionally published texts. They usually look awful.[14]

Worse, research shows that computer-generated justified text slows readers down.[15] This is not optimal when writing for the chronically late, as indicated earlier.

Don't Get Lost In Space. In many courts, the rules require double-spaced text, but not in California state court. Here, the rules expressly permit 1.5 spacing.[16] Use it.

Double spacing is a vestige of typewriters, where spacing could only be created by hitting the carriage return key. Hit it once at the end of the line, and you get single spacing; hit it twice, double. Typesetters virtually never used double spacing. The optimal spacing for text is 120 percent to 145 percent of font size.[17] For 12- to 13-point fonts used in most briefs, that's 15 to 19 points of line spacing, not the 24 to 26 that double-spacing produces. The standard 1.5 spacing permitted in the state rules is the sweet spot.

"But aren't we required to line up our text with the margin numbers on pleading paper, which are double-spaced?" No. The rules require either that text and line number align, "or" that the line numbers are "evenly spaced vertically on the page."[18] Since computer-generated pleading paper (like the older printed kind) is evenly spaced, there is no requirement that your text line up.

Score Symbolic Victories. There is no reason to write "section" or "paragraph"—or even their pseudo-abbreviations "sec." and "para."—when the symbols § and ¶ are available on your computer screen. It may be easier for you but harder for the judge. Figure out where § and ¶ are on the keyboard and use them in both citations and text. The only time you need to write them out is when they begin a sentence.

Don't Lose Your Head(ing). Headings are important. They are the summary of your summary—the "elevator pitch" of your argument. After putting careful thought into crafting them, don't toss them onto the typographical trash heap by making these mistakes:

1) Putting them in all-caps. All-caps looks terrible, slows reading dramatically, and people just plain don't like reading all-caps. Psychologists have known this for decades.[19] So, why use them? Because we are looking for contrast between text and heading—a good reason, but poorly executed. The better way to enhance contrast is to use a contrasting font that stands out.[20] I suggest using LARGE AND SMALL CAPS, which is readable in all the ways all-caps is not.

2) Underlining them. Underlining, for those too young to remember, was the only feasible way to emphasize typewritten text. You just backed up and typed under the letters with an understroke key. There is just no reason to use it on computers, and it "makes characters look more alike, which not only slows reading but also impairs comprehension."[21] Bold works better.

3) Shoving them to the left margin. Contrast is enhanced when headings are centered on the page, leaving white space to the left and right that clearly demarcates the end of one major subdivision of your argument and the beginning of the next.

4) Making them one long, complex sentence. KISS applies as much to heading, as to text. If you have a complex

idea to convey, there is no reason why a heading can't be two sentences.

5) Letting them break across the page. Headings only work if your judge can understand them with a glance. Turning the page in the middle of a heading defeats that purpose.

6) Orphaning them. A heading is a navigational aid doing extra duty as a summary. If it sits at the bottom of a page with no apparent text to mark or summarize, it isn't doing anything.

Judges Have Computers, Too. Courts are increasingly requiring—not just requesting—hyperlinked briefs. Nothing enhances persuasiveness more than making it effortless for a judge to check authority against argument. Services to do the hyperlinking for you (for a fee) are numerous. Both Westlaw and LEXIS have services that make the process almost completely automatic. Several courts have even published their own how-to guides for creating hyperlinked briefs.[22]

Proofreading Matters. It's unfair, but it just does. Spelling, word choice, and typographical errors reflect negatively on you and can irritate your judge, pulling the judge's attention away from your argument and wasting some of your precious 15 minutes (and credibility).

Wash, Rinse, Repeat. It's a cliché, but it's true: It takes a long time to write something short. If you haven't gone through multiple drafts of a brief, then you simply haven't devoted enough effort to keeping it simple.

And One to Grow On: Rules Are Made to Be Broken. No, not court rules. You have to follow court rules, but the rules that always start "This is the way it is done…." Most of the time those are not required by court rules and are not supported by good reason. Feel free to break those and do what makes better sense.

This admonition includes the rules in this article. For example, the rule that says don't make your judge "flip back and forth" between sections to put facts and law together to reach a conclusion. However, this article occasionally asked you to flip to other rules. It did so for a reason. The alternative would have been to repeat a lot of material in other parts of the article to illustrate how different rules worked together. It would have resulted in a longer and more repetitive article. So, on balance, it made better sense to ask the reader to flip—a conclusion that almost never follows in court briefs. This article is shorter than most court briefs, printed in a three-column format, and contains point headings every two or three paragraphs. Flipping is much less disruptive to the reader in this format.

In short, apply as much thought and care to the pathos and ethos of your writing as you do to the logos.

Are you persuaded? (Cf. "Don't be Passive-Aggressive" above.) ■

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[1] Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges 20 (2008).

[2] For anyone unfamiliar with this acronym, contra the style consideration mentioned later, it means "Keep it simple, stupid."

[3] William Strunk & E.B. White, The Elements of Style 39 (3rd ed. 2005).

[4] U.S. v. Varner, 948 F. 3d 250, 255 (5th Cir. 2020).

[5] Fed. R. App. P. 28(d).

[6] Edward W. Jesson, Cal. Style Manual (4th Ed. 2000) [hereinafter Jesson].

[7] Cal. R. Ct. 1.200. Curiously, the text of Rule 1.200 italicizes "*California Style Manual,*" which does not conform to the Manual. *See* Jesson, *supra* note 6, at §3:1.

[8] Ruth Anne Robbins, *Painting With Print: Incorporting concepts of Typographic and Layout Design Into the Text of Legal Writing Documents,* 2 J. Ass'n of Legal Writing Directors 108, 110 (2004) [hereinafter Robbins].

[9] *Id.* at 110-111.

[10] Matthew Butterick, Typography for Lawyers 28 (2nd ed. 2010) [hereinafter Butterick].

[11] No, the California Rules of Court do not require Times New Roman. The appellate rules permit the use of "[a]ny conventional font," so long as "[t]he font style [is] roman." Cal. R. Ct. 8.204(b)(2), (b)(3). A roman font style is one that is principally upright, not slanted as in italic. *See, e.g.,* Robert Bringhust, The Elements Of Graphic Style 55-56 (2nd Ed. 1997). The rules permit only limited use of italics "for emphasis" and "[c]ase names." Cal. R. Ct. 8.204 (b)(3).

[12] Seventh Circuit, Requirements And Suggestions For Typography In Briefs And Other Papers 3, *available at* http://www.ca7.uscourts.gov/forms/type.pdf [hereinafter Seventh Circuit] .

[13] *Id.* at 5.

[14] Butterick, *supra* note 10, at 134.

[15] S.R. Trollip and G. Sales, *Readability Of Computer-Generated Fill-Justified Text*, 28:2 Human Factors 159 (1986).

[16] Cal. R. Ct. 2.108(1).

[17] Butterick, *supra* note 10, at 137.

[18] Cal. R. Ct. 2.108(4).

[19] Robbins, *supra* note 8, at 115 & nn. 23-24.

[20] *Id.* at 127-28.

[21] Seventh Circuit, *supra* note 12, at 5.

[22] *See, e.g.,* Blake A. Hawthorne, Guide to Creating Electronic Appellate Briefs (2019), *available at* https://www.txcourts.gov/media/1443805/guide-to-creating-electronic-appellate-briefs-2019-adobe-acrobat-pro-dc.pdf; District of Nebraska, Attorney Guide to Hyperlinking in the Federal Courts (2013), *available at* https://www.ned.uscourts.gov/internetDocs/cmecf/AttorneyGuide-Hyperlinking.pdf. The District of Nebraska has even created an add-in for Word that automates the creation of hyperlinks to case file documents, *available at* https://www.ned.uscourts.gov/internetDocs/cmecf/LinkBuilderforMSWord.pdf.