In this book, I am convinced that many of the lights in the
hundreds of short examples from interesting
cases are among the brightest lights in the
practice; I have cut most of the citations
made other changes for readability. Each
case of at least one of the lawyers profiled in this
book, "Aren't most motions and briefs written
by anecdotal evidence suggests that many
writers much larger role in writing and editing
are only believed. In any event, if I include
they think it can help you be a better writer
in the hope that some of these lawyers lost their cases.
and use the book?

Every piece of evidence from Harry Potter to Henry
The source material includes nearly
and to terrorism, and from disputes over jeans
newspapers. The source material includes nearly
billion briefs, from routine discovery motions to
percent of the writing of a lawyer you admire,
selling the sizzle from the start is every advocate's goal indeed.
leave need practical tips and models for sec-
And Judge Aldisert's food metaphor is apt: nothing in advocacy is
uring you trouble, flip to the relevant sec-
mores satisfying than reducing a dispute and its resolution to their
tion to be inspired by some great writing,
escence, almost as if you were preparing a rich sauce.
and a novel.

I hope that reading the book will make
That "essence" is what many judges and litigators will call the
what should such a "theme" contain?

1 RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 142 (2d ed. NITA
2003).
If you delve into the top advocates’ introductions, preliminary statements, and argument summaries, you’ll find that they include up to four main ingredients. As with any recipe, you might not need all four, and you can always adjust to taste. But when you’re poised to start writing, thinking about these ingredients will focus your mind and help “sell the sizzle.”

Not that you should freeze your theme before you write the rest of your brief. Just as you alter the seasoning after sampling what you’ve cooked, so you can fine-tune your theme as you work through your argument and pore over the case law and record. But then again, it’s tough to be a great chef unless you know how you want the dish to look and taste.

In a moment, I’ll share examples of the four “theme of the case” ingredients. For now, here’s a recipe for your introduction, worksheet-style, with the tools you need to make order out of chaos. If you work with these four ingredients, focusing especially on the first two, the pay-off will be a stellar introduction, a sound theme, and a seamless journey through the rest of the brief.

1. **Brass Tacks.** Start with a paragraph or two that covers what many attorneys never explain at all: who the parties are; when, where, and how the dispute arose; what the claims are; and why your client is right.
2. **The Short List.** List the three or four points you would make to a judge who gave you only 60 seconds to explain why you should win.
3. **Why Should I Care?** Offer the court a reason to feel good about ruling in your favor.
4. **Don’t Be Fooled.** Draw a line in the sand between two competing views of your dispute.

Let’s take those four techniques in turn.
1. Brass Tacks: Explain "who, what, when, where, why, how"

Too often lawyers jump right into the legal nuances of the case without explaining, in clear terms, the legal context in which the case arises.

—Wisconsin Supreme Court Chief Justice Shirley Abrahamson

The deeper you are into your litigation, the easier it is to forget what Chief Justice Abrahamson calls the "context in which the case arises." That's why so many lawyers' preliminary statements make you feel as though you've been hit over the head with a hammer.

Imagine you're a judge picking up a motion and you stumble upon this introduction. I've changed only the parties' names:

Defendant New York Yankees, LLC ("NYY") submits this Memorandum of Law to address the issue of whether paragraph 14.1 of the January 6, 2003 EDG Supply Agreement (the "January 6 Document") precludes testimony by Jay Leno of conversations he had with David Letterman of plaintiff New York Mets ("NYM") concerning the price to be charged by NYM to NYY for EDG. As explained below, because paragraph 14.1 is the classic "general merger clause," and is not a "specific disclaimer," it does not preclude testimony of prior oral conversations between the parties.

To avoid this all-too-common chaotic effect, take a deep breath and answer the key questions you would have if you were reading about your case in the newspaper: Who are the parties? When and where and how did the dispute take place? What are the claims? Why should you win? If you are drafting an opening brief, make those

---

answers the beginning of your introduction. And if you can spin some of your answers to your client’s advantage, all the better.

Judge Aldisert, of “sell the sizzle” fame, suggests that the ideal Brass Tacks theme is like the way you’d describe your case to a friend in a bar. Here’s an example he gives: “This case I had this week. . . . The jury came in against me, but I think I have a good issue on appeal. The trial judge allowed this garage mechanic to testify as an expert witness, and he challenged the design of a new gear box on a $100,000 BMW. I got socked to the tune of a million bucks!”

As Judge Aldisert notes, this short tale makes clear that the court erred in admitting the testimony of an unqualified expert.

Now let’s turn to some real-life examples of great opening Brass Tacks passages.

When Attorney General Eric Holder was in private practice at Covington & Burling, he once litigated a high-profile civil case involving bananas, American missionaries, and extortion in Colombia. He and his team started their introduction to a motion to dismiss with a Brass Tacks paragraph telling the court who the parties are, what happened to the plaintiffs and when and where it happened when they brought their claim, what they want, and why they shouldn’t get it. Holder also squeezes in what the claims are not, highlighting the weakness of the plaintiffs’ case:

Eric Holder, In re Chiquita Banana

Plaintiffs in this action are relatives of five American missionaries who were abducted for ransom and tragically murdered in the mid-1990s by a communist guerrilla group in Colombia, known as

3 ROSSER J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 191 (2d ed. NITA 2003).
the Fuerzas Armadas Revolucionarias de Colombia. Now, more than a decade later, they seek to hold Chiquita Brands International, Inc. liable for those deaths under the Antiterrorism Act, and Florica and Nebraska tort law. There is no allegation, however, that Chiquita was involved in the kidnapping and murder of the decedents, that Chiquita intended that these despicable acts occur, or that Chiquita even knew about them until plaintiffs brought this lawsuit. Instead, plaintiffs allege that Chiquita is liable for decedents’ deaths solely because Chiquita’s former Colombian subsidiary made payments extorted by the FARC when this radical Marxist group controlled the remote banana-growing regions of Colombia in which Chiquita’s subsidiary operated.

Remember that in distilling your case in this way, you want to sound like a newspaper reporter, not mime the objectivity of one. Holder neglects to mention, for example, that Chiquita had already paid a $25 million fine to settle criminal charges that it had supported the FARC, which was considered a terrorist group. No matter: after just 140 words, we understand why our sympathies for the murdered missionaries might not warrant civil damages against Chiquita.

For our next example, let’s pivot from bananas to jeans. Calvin Klein, Inc. once sued Warnaco, the company that manufactured Calvin Klein jeans, for violating a license agreement when it distributed the jeans to Sam’s Club and other discount retailers. According to Calvin Klein, selling its high-class jeans to such populist outlets harmed Calvin Klein’s brand. The New York Times noted at the time that the “high-wattage lawyers” on both sides were “the legal equivalent of mutually assured destruction.” David Boies, one of the nation’s most storied trial lawyers, wore the pants
for Calvin Klein. And in the ring for Warnaco CEO Linda Wachner: Brendan Sullivan, of Iran-Contra fame, and his Williams & Connolly colleagues Greg Craig and Nicole Seligman, who represented President Bill Clinton during his impeachment proceedings.

In the first paragraph of Warnaco’s summary judgment motion, the Sullivan team tells us what sort of case they want the dispute to be. Then they tell us where we are in the litigation, what the main claim is, and why that claim shouldn’t carry the day:

**Brendan Sullivan, Greg Craig, and Nicole Seligman, *Calvin Klein Trademark Trust v. Linda Wachner***

This is a contract case. The terms of the pertinent contracts, and the material facts concerning their performance, are not disputed. Plaintiffs’ principal claim has been that defendants without authorization sold apparel through discount and warehouse club retailers. But the undisputed record shows that the contracts authorized such sales, and that plaintiffs for years fully knew of and profited handsomely from them. And now discovery has disclosed in addition that plaintiffs themselves had for years sold eagerly to the very same group of retailers of which they now complain.

In eighty-nine words, we understand the stakes of what the apparel industry considered “a battle between scorpions,” according to the *New York Times*. Also note that these crisp, clear sentences start with such light openers as “But” and “And” while repeating key phrases such as “for years.” The fresh prose is almost journalistic—just what you want in your opening passage.
And in the ring for Warnaco CEO Linda Sullivan, of Iran-Contra fame, and his Williams in-sues Greg Craig and Nicole Seligman, who ent Bill Clinton during his impeachment

oraph of Warnaco's summary judgment motion, tells us what sort of case they want the dispute all us where we are in the litigation, what the why that claim shouldn't carry the day:

**Greg Craig, and Nicole Seligman, Calvin Trust v. Linda Wachner**

at case. The terms of the pertinent contracts, acts concerning their performance, are not dis-
principal claim has been that defendants without apparel through discount and warehouse club.

undisputed record shows that the contracts lies, and that plaintiffs for years fully knew of isnomly from them. And now discovery has
on that plaintiffs themselves had for years sold by same group of retailers of which they now

words, we understand the stakes of what the con-sidered “a battle between scorpions,” accord-
Times. Also note that these crisp, clear sen-
ich light openers as “But” and “And” while is such as “for years.” The fresh prose is almost what you want in your opening passage.

Speaking of the journalistic style, let's turn to a third example, this time from a plaintiff-side patent infringement motion penned by star trial lawyer Fred Bartlit, one of the nation's masters at bringing dry, complex facts to life.

And few things are drier and more complex than your typical patent-infringement case. I pulled a random trial motion in one such case, and here's how the introduction starts. I've changed only the names and numbers:

The Plaintiffs, Acme Corporation, Baker, Inc., and Cary Grant (hereinafter the "Plaintiffs"), commenced this action for alleged patent infringement of U.S. Patent No. 2,859,137, entitled Visual Enhancement Mechanism (hereinafter referred to as the "'137 patent"). The Plaintiffs have asserted claims 1 through 3 of the '137 patent.

Now compare the following example from Fred Bartlit. Here's the beginning of his introduction for Pinpoint, which is suing Amazon for patent infringement. Pinpoint is unhappy about Amazon's "recommendation engine," the feature that gives you personalized recommendations based on your past purchases:

**Fred Bartlit, Pinpoint v. Amazon**

This is a case about online personal recommendation systems. The inventors of the patents in suit pioneered techniques to deal with information overload. They invented systems and methods to help users sort out the plethora of information available and to help online shoppers at the "electronic mall" find items of interest.
Plaintiff Pinpoint, Inc. owns the three patents in suit. . . .

Defendant Amazon.com operates the world’s most successful electronic mall. Amazon also operates the platform that the co-defendants use for their websites.

I’m sure you noticed Bartlit’s direct, conversational tone—a sign of a great trial lawyer who is able to bring his or her advocacy skills to the page.

One final thought: although the Brass Tacks technique is priceless in an opening brief, it can also help reorient the judge in an opposition or reply brief.

Bernie Nussbaum, President Clinton’s White House Counsel and a top partner at Wachtell Lipton, takes such an approach in a reply brief for IBP, a company that was in a high-profile dispute with Tyson Foods over when a party can get out of an agreement by invoking a “material adverse effect” clause:

Bernie Nussbaum, IBP v. Tyson Foods

This is IBP’s Reply Brief in support of its request that the Court continue to enjoin Tyson from prosecuting the Arkansas action—more precisely, that the Court enter a preliminary injunction in follow-up to the two temporary restraining orders it already has entered.

In just one sentence, Nussbaum and his team remind the judge of who is involved, what the dispute is about, where the proceedings are headed, and what the client wants.

For judges, these introductions provide the sort of theme the court needs—they sell the sizzle.
Even so, no matter what you’re filing, you’ll usually want your introduction to run more than just a paragraph. To your Brass Tacks paragraph, consider adding a short list of reasons you should win.

2. The Short List: Number your path to victory

The top advocates love numbered lists: lists in the facts, lists in the argument, and, most of all, lists in the introduction. Nothing helps a brief hold together better than a list of legal, factual, or common-sense reasons that you should prevail.

But here’s the challenge: you don’t want those reasons to be circular and thus unpersuasive. In other words, don’t list things the judge knew you were going to write based solely on the type of motion or brief you’re filing.

If, say, you’re moving for a preliminary injunction, writing “The balance of equities favors the petitioner” won’t cut it. Why do those equities favor the petitioner?

And if you’re moving for a protective order, writing “Defendant is on a fishing expedition” won’t cut it either. All movants for protective orders say the same thing. What proof do you have that the defendant is seeking discovery on irrelevant points or serving unduly burdensome requests?

So make your reasons more specific than your instinct might suggest. Add the word because at the end of each draft reason, and include some detail specific to your own dispute and not to just any dispute with the same procedural posture.

Before we look at examples, here’s a table to help you organize and order your reasons:
<table>
<thead>
<tr>
<th>When the order of your reasons is...</th>
<th>you should...</th>
</tr>
</thead>
<tbody>
<tr>
<td>obvious because the dispute turns on statutory elements, common law factors, or multipart rules, and you need to address them in order or need to start with the one that’s dispositive,</td>
<td>focus on the key facts that establish each of those elements (or not), weaving in the actual elements or rules rather than making those standards the focus of your list.</td>
</tr>
<tr>
<td>obvious because you need to address threshold questions of standing, timeliness, or jurisdiction before addressing the merits,</td>
<td>argue in the alternative (“The Plaintiff lacks standing. But even if the Plaintiff had standing, the claim still cannot be sustained.”).</td>
</tr>
<tr>
<td>not so obvious because the dispute is complex or fact-driven, or because you’re focusing on a broad standard like “materiality,”</td>
<td>add detail to your reasons and order them the way you’d deliver them orally if the judge asked you why you should win.</td>
</tr>
<tr>
<td>dictated in part by your opponent because you’re filing an opposition or reply brief,</td>
<td>stress why you’re still right, and don’t just announce that the other side is wrong.</td>
</tr>
</tbody>
</table>

Now let’s consider how to handle these four situations.

A. Your list is governed by factors or rules

In common law or statutory disputes, your introduction often needs to track the elements of a cause of action (like the four elements of negligence) or a multifactor test (like the factors for injunctive relief). Ordering your list is the easy part: you track the factors the way they appear in the case law or statute, you address only the factors in dispute, or you address the one factor that makes the other ones moot (as in “no damages, no case”).

But in developing that list, avoid doing what most attorneys do: copying the elements and simply declaring that each one has been established—or not.

In this example, former Solicitor General Seth Waxman weaves in the well-known factors for injunctive relief as he seeks a permanent
For reasons is... you should...

- The dispute turns on common law factors, and you need an order or need to show it’s dispositive, focus on the key facts that establish each of those elements (or not), weaving in the actual elements or rules rather than making those standards the focus of your list.

- You need to address standing, timely before addressing argue in the alternative (“The Plaintiff lacks standing. But even if the Plaintiff had standing, the claim still cannot be sustained.”).

- The dispute is driven, or because a broad standard add detail to your reasons and order them the way you’d deliver them orally if the judge asked you why you should win.

- Your opponent believes opposition or reason stress why you’re still right and don’t just announce that the other side is wrong.

Consider how to handle these four situations.


Governed by factors or rules

In statutory disputes, your introduction often needs to address the elements of a cause of action (like the four elements) or a multifactor test (like the factors for standing). Ordering your list is the easy part; you track the factors and declare they appear in the case law or statute, you address them in dispute, or you address the one factor that makes moot (as in “no damages, no case”).

Following that list, avoid doing what most attorneys do: elements and simply declaring that each one has or not.

Former Solicitor General Seth Waxman weaves in factors for injunctive relief as he seeks a permanent injunction for MercExchange. The dispute arose out of MercExchange and eBay’s high-profile dispute over eBay’s “Buy It Now” feature:

**Seth Waxman, MercExchange v. eBay**

The *equities* strongly favor [injunctive relief for MercExchange]. This is a case of deliberate, and by eBay’s own assertion, *avoidable infringement*. eBay was not only well aware of MercExchange’s patent (“the ’265 patent”), but eBay tried to purchase that patent before it started infringing. . . .

MercExchange, on the other hand, will continue to suffer *irreparable harm* in the absence of an injunction. MercExchange, and MercExchange’s licensees or potential licensees are, or aspire to be, competitors of eBay. Permitting eBay to continue using MercExchange’s technology would irremediably harm MercExchange’s *ability to market, sell or license its technology* to these existing or future competitors to eBay. . . .

The *public interest* also favors injunctive relief. In addition to serving the strong public interest in maintaining the integrity of the *patent system* by enforcing patent rights, enjoining eBay also serves the public interest in promoting competition.

As you can see, the four factors lurk in the background, not the foreground. The facts should carry the day.

**B. You need to address threshold questions before addressing the merits**

Sometimes the order of your reasons is obvious not because you’re tracking, say, a four-factor test, but because you have to resolve
threshold issues such as standing or mootness before you can address the merits. In those cases, argue in the alternative by following former Solicitor General Ted Olson’s “even if” example below as he asks the court to throw out a suit challenging Senator John McCain’s citizenship. The plaintiff was a leader of the American Independent Party:

Ted Olson, Robinson v. Bowen

Plaintiff lacks standing to raise his claims for relief, and his complaint demands resolution of a nonjusticiable political question. But even if plaintiff could satisfy the justiciability requirements of Article III, dismissal of his complaint still would be required because the injunctive relief plaintiff seeks is barred variously by Article II of the U.S. Constitution, the First Amendment, and the Twelfth Amendment, and because, in the absence of a valid claim for injunctive relief, plaintiff would lack standing to pursue declaratory relief against the defendants.

C. Your dispute is complex or fact-driven

The way to order or structure your list will not always be so obvious, particularly when the dispute turns on contested facts or on a broad standard like “materiality” or “reasonableness” or “competitive harm.”

But you can use that structural freedom to your advantage. Starting with a blank slate gives you a chance to think of the three or four points you’d make to the judge if you had only 60 seconds to do so. Those points, listed in the order you’d make them orally if you had to look the judge in the eye, will give you the structure you need.
such as standing or mootness before you can

keep in mind the gold standard for these lists: in each num-
bered reason, share something that’s not obvious from the caption
or the procedural posture.

Take the following example. Supreme Court stalwart Maureen
Mahoney defended the University of Michigan Law School
against a challenge to its affirmative-action admissions plan.
Toward the beginning of her winning brief, she might have listed
an unpersuasive circular reason such as “The plan does not violate
the Equal Protection Clause.” But why else would she be defend-
ing a plan against an Equal Protection challenge? Instead, in her
Statement of the Case, she lists three specific factual, legal, and
policy reasons to leave the plan intact:

Maureen Mahoney, Grutter v. Bollinger

First, academic selectivity and student body diversity, including
racial diversity, are both integral to the educational mission of the
Law School. Second, the Law School successfully realizes both
goals through an admissions program that is “virtually indistin-
guishable” from the Harvard plan that five Justices approved in
Bakke. It evaluates the potential contributions and academic
promise of every individual and does not employ quotas or set-
asides. Third, no honestly colorblind alternative policy could pro-
duce educationally meaningful racial diversity at present without
enrolling students who are academically unprepared for the rigor-
ous legal education that the Law School offers.

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

Of all the top advocates in this book, Mahoney is one of the best at using lists throughout her briefs. Here's another example, this time from a dispute about whether a public law school can require student groups to admit any student who wants to join. A Christian student group at Hastings College of Law allowed anyone to attend its meetings, but it required members to sign a statement of faith. After the law school refused to fund the group, the group sued. Here are Mahoney and former Solicitor General Greg Garre on why the law school had the better constitutional argument (the Supreme Court later agreed):

**Maureen Mahoney and Greg Garre, Christian Legal Society v. Martinez**

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

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

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

*Fourth*, petitioner is not seeking—and by no means has been denied—equal access to Hastings' programs and activities. It seeks a *favorable* status: the funds and benefits that go along with school recognition plus an "exemption" from the rules that apply to every other group seeking such benefits.
This Short List technique is perhaps even more useful in trial filings, where the facts can often overwhelm.

After the Mahoney side won the law school version of the Michigan case at the Supreme Court, the state's voters passed a referendum seeking to undo the result. Jennifer Gratz, one of the original parties to the undergraduate version of the litigation, moved to intervene in litigation over whether the referendum was constitutional. In opposing what he calls Gratz's "eleventh-hour motion to intervene," Larry Tribe, best known for his Supreme Court work, starts his trial motion with a numbered list of specific reasons to keep Gratz out of the case:

Larry Tribe, Gratz v. Bollinger

First, Ms. Gratz's motion to intervene is untimely. Second, Ms. Gratz lacks a substantial legal interest sufficient to support her intervention. At most she has a mere desire to see Proposal 2 upheld for political and ideological reasons. Third, Ms. Gratz's purported "interest," like Mr. Russel's, is adequately represented by Attorney General Cox. Finally, adding Ms. Gratz to the case at this late stage would serve no purpose other than to needlessly delay the litigation.

In seventy-five words, you can see the goal—to keep Ms. Gratz out of the lawsuit—through four procedural and substantive lenses.

Let's consider how to use a numbered list in an even more fact-intensive example. Now wearing a criminal law hat, crack trial lawyer Brendan Sullivan is seeking a shorter sentence for Walter Forbes, the former Cendant chairman convicted of the largest
accounting fraud of the 1990s. Watch how Sullivan follows a legal justification by listing two strong factual ones:

Brendan Sullivan, United States v. Forbes

First, while Mr. Forbes does not dispute that the jury verdict permits each of the sentencing enhancements applied by the [Presentence Report], the cumulative, overlapping impact of these adjustments warrants a reduction in the resulting sentencing range, as Judge Thompson found in the case of E. Kirk Shelton.

Second, Mr. Forbes’ admirable character and history of charitable giving warrant consideration in determining the length of his sentence. Third, Mr. Forbes’ advanced age should be taken into consideration, particularly in light of the statutory mandate that a punishment should be “sufficient, but no greater than necessary to effectuate the goals of criminal punishment.”

In all these examples, the attorneys reach the goal I proposed at the start of this section: to get across in writing what they would say to the judge in person if they had only 60 seconds to co so.

D. You need to regain the offensive in response to your opponent’s arguments

It’s all the more challenging—and important—to stick to a list of winning reasons when you’re filing an opposition or reply brief. Most lawyers spend too much time resurrecting the other side’s arguments before shooting them down, thus letting their adversaries dictate the structure.

Yet some lawyers manage to fight that instinct and stay on the offensive.
of the 1990s. Watch how Sullivan follows a legal form, including two strong factual ones:

- **United States v. Forbes**

Forbes does not dispute that the jury verdict increased the sentencing enhancements applied by the court, the cumulative, overlapping impact of these enhancements a reduction in the resulting sentencing length found in the case of E. Kirk Shelton. Forbes' admirable character and history of charitable donation should be taken into consideration in determining the length of his sentence.

- **Kathleen Sullivan, SEC v. Siebel Systems**

[T]he Commission's papers do not adequately address any of the fundamental—and fatal—flaws in the Complaint:

**First**, the information that defendant Kenneth Goldman allegedly disclosed was either previously disclosed to the public by the Company in the days leading up to Mr. Goldman's statement or is not material on its face. . . .

**Second**, the Commission conveniently ignores the U.S. Supreme Court's admonition that a selective disclosure rule—like Regulation FD—must have "explicit" Congressional authorization. . . .

**Third**, Regulation FD suffers from significant and fatal constitutional issues.

Moving from the boardroom to pro football, I'll share a similar three-part list from a reply brief for NFL Enterprises signed by Herbert Wachtell of Wachtell Lipton. The dispute was over which channels would broadcast a high-stakes Patriots-Giants game during the run-up to the 2008 Super Bowl. By "high stakes," I don't just mean that people cared deeply about the final score (38–35, giving the Pats a rare-for-the-NFL undefeated season). I also mean that the
Senate Judiciary Committee threatened to reconsider the NFL’s antitrust exemption if the game wasn’t broadcast on major networks.

After the NFL caved, Echostar, the owner of the Dish satellite network, wanted to downgrade the league in its tiered line-up of channels. Wachtell’s bullet points strengthen his effort to enjoin Echostar from doing so while highlighting the issue of whether congressional intervention is force majeure:

**Herbert Wachtell, NFL Enterprises v. Echostar Satellite**

*As shown in NFL Enterprises' opening papers, three grounds independently compel the conclusion that NFL Enterprises is likely to prevail, any one of which is sufficient:*

- Even assuming *arguendo* that the simulcast of the Patriots-Giants game would constitute a breach, the decision here to **simulcast a single game** of a 48-game, six-year Agreement would not under the terms of the contract or as a matter of law rise to the level warranting termination of the parties’ Agreement—in whole or in part.
- Echostar cannot be permitted to **seize upon a claimed breach to cherry-pick and purport to repudiate solely selected pieces** of the parties’ Agreement—while claiming a right to continue to enjoy the benefit of those portions of the Agreement that it would prefer to remain in force and pay only a fraction of the fees required by the Agreement.
- And in any event, there was no breach of contract of any kind on the part of NFL Enterprises even in the first instance—**for the decision to accede to strong Congressional and public pressure to make the Patriots-Giants game available on broadcast TV falls squarely within the provisions of the Agreement’s force majeure clause.***
committee threatened to reconsider the NFL's antitrust case. The game wasn't broadcast on major networks. Echostar, the owner of the Dish satellite to downgrade the league in its tiered lineup of NFL's bullet points strengthen his effort to enjoin proceedings so while highlighting the issue of whether intervention is force majeure.

NFL Enterprises v. Echostar Satellite

In NFL Enterprises' opening papers, three grounds compel the conclusion that NFL Enterprises is correct, any one of which is sufficient:

arguing that the simulcast of the Patriots-Giants game would constitute a breach, the decision here to single game of a 48-game, six-year Agreement under the terms of the contract or as a matter of fact the level warranting termination of the parties' contract in whole or in part.

The NFL Enterprises' decision cannot be permitted to seize upon a claimed breach and purport to repudiate solely selected pieces of an Agreement—while claiming a right to continue to benefit of those portions of the Agreement that it is to remain in force and pay only a fraction of the agreed by the Agreement.

Event, there was no breach of contract of any kind of NFL Enterprises even in the first instance—for example, to accede to strong Congressional and public pressure the Patriots-Giants game available on broadcast squarely within the provisions of the Agreement's fair clause.

One style suggestion: avoid the legalism “even assuming arguendo” that you see in the first bullet—and in so many other filings. “Even if” is shorter and more elegant.

So let me conclude this tour of lists with my own “short list” of reasons to favor such lists:

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

In many motions and briefs, a Short List of reasons explaining why you’re right, preceded—at least in an opening brief—by a Brass Tacks passage, is a perfect recipe for a persuasive introduction or preliminary statement.

Here's an example from David Boies that follows that two-part formula: first Brass Tacks, and then The Short List. The case involved Hollywood, distribution rights for a movie called Push, and the question of when an e-mail exchange is an enforceable contract. Boies represented The (Harvey) Weinstein Company (TWC.) I've added commentary in brackets and boldfaced Boies's three-item “short list”:

David Boies, Weinstein v. Smokewood Entertainment

On January 27, 2009 [when], The Harvey Weinstein Company reached an agreement with Smokewood's agents—John Sloss and Bart Walker of Cinetic Media, Inc.—for TWC to acquire the
worldwide licensing and distribution rights to the critically acclaimed motion picture Push: Based on the Novel by Sapphire [who and what]. As is customary in the entertainment industry [why], the deal was negotiated orally and then confirmed in writing via email, with the parties agreeing to memorialize the agreement in a more detailed writing at a later point [when and how]. TWC confirmed its agreement with Sloss and Walker in two emails. Each email clearly stated that the parties had reached final agreement and had “concluded this deal.” Walker responded to both emails. In his written and signed responses, Walker did not deny that TWC and Smokewood had a deal for the distribution and licensing rights to Push. Indeed, Walker promised to provide TWC with a more detailed written agreement within a few hours [what and when].

After midnight on January 28, 2009 [when], Sloss and Walker decided to breach the agreement with TWC and sell Push to TWC’s competitor, Lions Gate Entertainment Corp. Thus, at 4:42 a.m. on the morning of July 28, 2009, Walker sent an email to TWC claiming that “there has been no agreement reached with The Weinstein Company respecting PUSH.” This was contrary to the previous email exchanges and the first time Walker told TWC that he did not believe TWC and Smokewood had a deal on Push [what]. A few days later, Smokewood purportedly entered into an agreement with Lionsgate for the exclusive distribution rights to Push.

Smokewood’s motion to dismiss does not dispute that Sloss, Walker and Cinetic were acting as its agents or that Sloss and Walker had the authority to enter into an agreement with TWC for the rights to Push. Smokewood’s only argument is that Sloss’s and Walker’s agreement with TWC is unenforceable because it was not memorialized in a signed writing as required by section 204 of the Copyright Act [what]. This argument fails for three independent reasons [short list].
First, TWC’s agreement does in fact satisfy the signed writing requirement of the Copyright Act. . . .

Second, even assuming arguendo that the emails do not satisfy section 204 of the Copyright Act, it is black letter law that section 204 does not apply to nonexclusive licenses. . . .

Finally, wholly independent of any licensing agreement, TWC has stated a claim for breach of its preliminary agreement with Smokewood, which under New York law required Smokewood to negotiate with TWC in good faith and memorialize the agreement in writing.

With no fuss or angst, Boies has crafted the perfect introduction through just these two techniques.

But when you want your introduction to be as richly flavored as possible, consider sprinkling in two more ingredients: Why Should I Care? and Don’t Be Fooled.

3. Why Should I Care?: Give the court a reason to want to find for you

The “slippery slope” is one of the great litigator clichés. But although you should avoid the phrase “slippery slope” itself, you do want to explain, as former D.C. Circuit Chief Judge Patricia Wald puts it, “why it is important [for the court] to come out your way, in part by explaining the consequences if we don’t.”

We’ll call that technique Why Should I Care? This technique often forces you to lift your head out of the case law and the record so you can draw instead, in the words of Tenth Circuit

Judge Stephen Anderson, “on a parade of horribles or ultimate absurdity, unworkability, or untenability to show the fallacy of an opposing argument when carried to its logical extreme.”

So how do you make your opponent’s position sound “unworkable,” if not downright absurd?

You trigger at least one of these three judicial fears:

- The fear of misconstruing a doctrine or statute.
- The fear of creating new duties, rules, or defenses.
- The fear of reaching an unfair result or causing harm.

On the record, all judges are happy to endorse motives one and two: not wanting to apply the wrong law or to create new law. In that respect, they are endorsing the “a judge is like an umpire calling balls and strikes” model put forth by Chief Justice John Roberts during his nomination hearing.

But only off the record will many judges admit to motive three: trying to reach a fair result or simply “to do the right thing.” In practice, though, says Seventh Circuit Judge Richard Posner, judges are not umpires. According to Posner’s book How Judges Think, both trial judges and appellate judges are essentially “pragmatists” who care about the effects their decisions may have: “Judges are curious about social reality. . . . [T]hey want the lawyers to help them dig below the semantic surface.”

Experienced advocates appear to sense this intuitively. In my work with large law firms and agencies, I have noticed that to the younger attorneys’ more strictly legalistic introductions, the senior partners and managers often add a “common sense” reason for victory. “Judges are concerned about both the institutional and the real-world consequences of the rules they adopt,” note

appellate superstars Andy Frey and Roy Englert. “[E]ven if favorable precedent is available and you intend to rely heavily on it, write the argument in a way that gives the judges confidence that they should follow that precedent.”

Let’s look at examples of how you can play to each of the three fears, thus enriching your introduction with the Why Should I Care? technique.

A. The fear of misconstruing a doctrine or statute

You can always invoke the judge’s primal fear: the fear of getting the law wrong.

Playing the stare decisis card never hurts, even at the Supreme Court where it matters least of all. In a major case involving racial bias in jury selection, for example, Carter Phillips, one of the most in-demand appellate advocates, filed an amicus brief for former judges and prosecutors, including Attorney General Eric Holder and Oklahoma City bombing prosecutor Beth Wilkinson. Here he cuts to the chase about what will happen if the Supreme Court affirms a lower court decision finding no bias:

**Carter Phillips, Miller-El v. Dretke**

Amici believe that anything less than a reversal of the Fifth Circuit’s decision would send a highly visible, detrimental signal that this Court has retreated from its clear rulings in Batson and Miller-El.

---

You might also want to remind the court why a case exists in the first place, as Stephen Shapiro did here:

**Stephen Shapiro, Stoneridge Investment Partners v. Scientific Atlanta**

Plaintiff contends that this suit should proceed because the Vendors engaged in deceptive conduct as part of a “scheme to defraud.” That expansive theory of liability would gut *Central Bank*, turning product manufacturers who do business with a customer into “primary violators” potentially liable for unlimited market losses suffered by the customer’s investors. The result here would be that Motorola and Scientific-Atlanta shareholders would have to compensate Charter shareholders for a fraud committed by Charter’s own management.

President Barack Obama once used a similar approach in a brief about the Voting Rights Act, a statute at the heart of his academic focus at the University of Chicago Law School. Along with two other lawyers in a prominent Chicago civil-rights firm, Obama suggests that the Supreme Court needs to correct a misreading of both the statute and the cases construing it:

**Barack Obama, *Tyus v. Bosley***

The lower court’s holding fundamentally misreads this Court’s voting rights jurisprudence, as well as that of other circuits. Moreover, this holding turns the Voting Rights Act on its head by immunizing *intentional* racial discrimination as long as the “bottom line” of a single-member district redistricting plan is proportionality.
so want to remind the court why a case exists in
as Stephen Shapiro did here:

B. The fear of creating new duties, rules, or defenses

Especially in trial filings, you can also appeal to judges' reluctance
to create new law, new claims, or new defenses. For one thing,
trial judges don't want to get reversed. More selflessly, they don't
want to give plaintiffs more ways to sue—or give defendants more
ways to prolong litigation.

Jamie Gorelick, whose career spans from the Clinton White
House to BP's public relations, appeals to such motives in her
reply brief seeking to dismiss claims against Duke University in
litigation over the Duke Lacrosse indictments and ensuing scan-
dals. In a case in which sympathies lie with the wrongfully accused
players and not with the university, she warns against creating
new duties for educational institutions that they cannot possibly
sustain:

Jamie Gorelick, Carrington v. Duke University

The premise of all these claims is that the University and its admin-
istrators had a legal obligation to protect Plaintiffs from the conse-
quences of a police investigation—by quelling media coverage of
the case, preventing campus protests, and even interceding to stop
the investigation. That premise is invalid, and the Complaint
should be dismissed.

Gorelick's larger point resonates: as much as you might
think that finding for the Duke students would vindicate their
rights, imposing new duties on university administrators would
encourage them to spend time at the police station rather than
interacting with their students. In the end, then, finding for the
student-plaintiffs would hurt future students—the very people
you think you'd be helping.
As we move from North Carolina to Michigan, Larry Tribe suggests that allowing a nonparty to intervene in litigation over a referendum arising out of the Michigan affirmative-action cases would create a brand-new per se rule with harmful effects of its own:


The petition . . . invites this Court to create an unnecessary and counterproductive per se rule—that states can never adequately defend ballot-enacted legislation—which is repulsive to both the dignity of state governments and the sound discretion of the district courts.

For our final example, let’s move from Michigan to England, where J. K. Rowling lives, or perhaps to Godric’s Hollow, where Harry Potter once lived. A former American librarian had the temerity to publish a Harry Potter reference guide. Rowling didn’t care for that one bit—and sued. Intellectual-property guru Larry Lessig, whom *National Law Journal* has deemed “one of the lawyers who defined the decade,” came to the librarian’s rescue, claiming, among other things, that Rowling is asserting a right that doesn’t exist—and shouldn’t:

Larry Lessig, *Warner Bros. Entertainment v. RDR Books*

J. K. Rowling, author of the Harry Potter books, asserts that this reference guide infringes both her copyright in the seven Potter novels and her right to publish, at some unidentified point in the...
From North Carolina to Michigan, Larry Tribe suggests a nonparty to intervene in litigation over a refusal of the Michigan affirmative-action cases would be law per se with harmful effects of its own:

*Michigan Civil Rights Initiative Committee v. Michiganend Affirmative Action, Integration and Proportional Representation and to Fight for Equality by Any Means*

...invites this Court to create an unnecessary and per se rule—that states can never adequately enacted legislation—which is repulsive to both the governments and the sound discretion of the example, let's move from Michigan to England, saving lives, or perhaps to Godric's Hollow, where 
there lived. A former American librarian had the 
thing to hand in a Harry Potter reference guide. Rowling didn't 
hit—and sued. Intellectual-property guru Larry 
*National Law Journal* has deemed “one of the law- 
the decade,” came to the librarian's rescue, claim-
ing things, that Rowling is asserting a right that 
shouldn't:

*Warner Bros. Entertainment v. RDR Books*

The author of the Harry Potter books, asserts that this 
fringes both her copyright in the seven Potter 
right to publish, at some unidentified point in the 
future, a reference guide of her own. In support of her position 
she appears to claim a monopoly on the right to publish literary 
reference guides, and other non-academic research, relating to her 
own fiction.

This is a right no court has ever recognized. It has little to recom-
mend it. If accepted, it would dramatically extend the reach of 
copyright protection, and eliminate an entire genre of literary 
supplements: third party reference guides to fiction, which for cen-
turies have helped readers better access, understand and enjoy 
literary works. By extension, it would threaten not just reference 
guides, but *encyclopedias*, glossaries, indexes, and other tools that 
provide useful information about copyrighted works.

C. The fear of reaching an unfair result or causing harm

Now let's turn to the pragmatic concerns that some judges say 
they ignore. As retired Wisconsin Court of Appeals Chief Judge 
William Eich once said, judges need advocates “to show them 
why the result you seek is the soundest of available alternatives, 
and the one that will bring about a just result for the parties, the 
public, and the development of the law.” In other words, judges 
want to do the right thing, whether that means treating litigants 
fairly or creating good incentives—not that all judges will agree 
on what that “right thing” is.

As an advocate, you shouldn't pat yourself on the back for play-
ing the fairness card when you represent a coal miner burned in a 
mine blast. Congratulate yourself instead if you can make a judge 
think “Unfair!” even though your client is an unsympathetic 
conglomerate—or worse.

Take the Conrad Black case. The fabulously wealthy publisher of such newspapers as The Daily Telegraph and the Chicago Sun-Times, Black ran into trouble with the SEC and was later convicted of fraud and sentenced to federal prison, though the Supreme Court has put his conviction in limbo.

In the SEC proceedings, Black was ably represented by Greg Craig, who also worked on the Calvin Klein jeans case discussed earlier. Craig turns a dispute over a document in the SEC's custody into a question of fundamental fairness—for Black:

**Greg Craig, United States v. Conrad Black**

The Government should not be allowed to cherry-pick one document, withhold it from Mr. Black without any description, and then subject him to intrusive discovery requests from the SEC. Otherwise, he will be forced to make crucial decisions—such as whether to invoke his Fifth Amendment privilege—with his eyes closed and his hands tied. This would be both unfair and unconstitutional.

Sometimes it's enough of a challenge to suggest that defeat on the motion would be unfair for your client. But other times, you can go further, suggesting that defeat for your client would be bad for others as well.

In the following example, Bernie Nussbaum represents Judith Kaye and other New York state judges in a suit against the New York State Assembly. The cause—low judicial pay—does not exactly tug at the heartstrings. But Nussbaum manages to turn the issue into something that could harm the entire New York citizenry:
The fabulously wealthy publisher had Black case. The fabulously wealthy publisher
who ran into trouble with the SEC and was later
put his conviction in limbo.

Proceedings, Black was ably represented by Greg
prosecutors on the Calvin Klein jeans case discussed
as a dispute over a document in the SEC’s
question of fundamental fairness—for Black:

**United States v. Conrad Black**

A client should not be allowed to cherry-pick one
of his Fifth Amendment privilege—with his eyes
and hands tied. This would be both unfair and

enough of a challenge to suggest that defeat on
will be unfair for your client. But other times, you
suggesting that defeat for your client would be bad
example, Bernie Nussbaum represents Judith
New York state judges in a suit against the
assembly. The cause—low judicial pay—does not
be a chance that could harm the entire New York

**Bernie Nussbaum, Judith Kaye v. Sheldon Silver**

New York’s judges have lost more than a quarter of their salaries
to inflation in the last decade, leaving them among the worst-paid
judges in the Nation—49th out of the 50 states, to be exact.

Judicial morale is rapidly diminishing, making it difficult to implement
initiatives to address growing caseloads and other problems faced by
the judicial system.

Here’s yet another way to play to judges’ pragmatic concerns:
suggest that defeat for your client would create perverse incentives
for the world at large. In this excerpt from their argument summary,
Paul Clement and Greg Garre are defending the FCC’s
restrictions on the “F-Word.” The two former solicitors general
suggest that preventing the agency from regulating the F-Word
would force parents to have embarrassing conversations with their
children about what that word means:

**Paul Clement and Greg Garre, FCC v. Fox**

As the Commission explained, the F-Word is effective when
used to intensify or insult precisely because it has an offensive
sexual connotation. Moreover, fine points of the distinctions
between denotations and connotations may be lost on children
seeking an explanation of the word’s meaning from their parents.

Not that Clement and Garre have the last word here.
Representing the broadcasters on the other side, Kathleen Sullivan
counters in an argument summary that the FCC would create its
own perverse incentives if it were allowed to keep fining stations
that let the F-Word slip onto the airways:

The Theme 29
Kathleen Sullivan, *FCC v. Fox*

On pain of fines of $325,000 per incident, radio and television stations across the Nation are now forced by the FCC’s fleeting expletives policy to engage in expensive monitoring and policing of live broadcasts lest a stray Anglo-Saxon word slip out, no matter how isolated and no matter how lacking in sexual or excretory meaning in context.

Just in case you’re unmoved by the woes of America’s broadcasters, Kathleen Sullivan links their plight to something more universal: the threat that all Americans would enjoy fewer “valuable and vibrant” television programs.

Kathleen Sullivan, *FCC v. Fox*

For many broadcasters, the chilling effect is profound and discourages live programming altogether, with attendant loss to valuable and vibrant programming that has long been part of American culture.

In this respect, Sullivan’s approach is like Bernie Nussbaum’s. To problems of less-than-obvious urgency (Big Brother broadcasters and gloomy state judges), they add problems that are more universal—and frightening: fewer television options and diminished access to the courts.

The sky would also fall, suggested former Solicitor General Ted Olson in an amicus brief, if the Supreme Court upheld the Ninth Circuit’s copyright decision in Grokster, the file-sharing case—unless, that is, you want to live in a world with “absurd results,” “eviscerated” property rights, “frustrated” creators, “stifled” innovation, and
“harmed” artists, not to mention a “thwarted” Copyright Act. Not even the most jaded Justice could ask Why Should I Care? after the litany that follows:

Ted Olson, MGM v. Grokster

The Ninth Circuit’s decision eviscerates intellectual property rights. It frustrates those who have invested substantial resources in creating an original work, only to see the fruits of their labors snatched away. It rewards those, like Respondents, who unjustly profit by designing tools to enable the theft of private property. And it stifles innovation by depriving citizens of the incentive to create works of art or music or literature that can be enjoyed by people ages hence.

If left uncorrected, the decision below—in the short term—will deny creators and artists the financial benefits that are rightfully theirs. But in the long term, the costs will fall on society as a whole in the form of songs and movies that are not created, precisely because the law (as the Ninth Circuit sees it) will not protect and reward their investments of time and money. The decision below thwarts the “basic purpose” and “ultimate aim” of the Copyright Act: to “secure a fair return for an author’s creative labor” and “by this incentive, to stimulate artistic creativity for the general public good.”

Few cases have such broad implications, of course, but you can try striking the “defeat for me would be bad for them” chord while remaining in the confines of your lawsuit. In Paul Smith’s response to the government in a discovery dispute, for example, he suggests that requiring production would discourage other parties from
exercising their right to participate in litigation that minority farmers brought against the United States:

**Paul Smith, Keepseagle v. Veneman**

Defendant (USDA) has issued a subpoena to class member and potential witness William Whiting seeking materials, including highly sensitive financial records and tax returns, that have no bearing on Mr. Whiting’s potential testimony and are plainly improper at this stage of the litigation... [If Defendant, an agent of the United States government, can compel citizens to disclose their most sensitive financial information as the price to pay to enter the courtroom and testify as witnesses in this case, defendants will chill participation in this important lawsuit.]

What unifies all these *Why Should I Care?* examples is that the lawyers have gone beyond the case law and the record, giving the judge a pragmatic reason to want to rule for them—or at least to feel bad about ruling for their opponent. With a bit of creativity and thought, you can rise to that challenge yourself.

4. **Don’t Be Fooled: Draw a line in the sand**

Many legal disputes boil down to a clash between two competing views. By contrasting those two views in your introduction, you can preempt your opponent's attempts to make the case into something it's not.

The Don’t Be Fooled technique challenges you to draw a line in the sand in that very way.

Take this example from a Ruth Bader Ginsburg amicus brief in *Regents of the University of California v. Bakke*, the famous
ought to participate in litigation that minority against the United States:

**seagle v. Veneman**

...[the SDJ has issued a subpoena to class member and William Whiting seeking materials, including financial records and tax returns, that have no Whiting’s potential testimony and are plainly protonage of the litigation. . . .] If Defendant, an agent of states government, can compel citizens to discloseive financial information as the price to pay to and test as witnesses in this case, defen- participation in this important lawsuit.

Af these Why Should I Care? examples is that the beyond the case law and the record, giving the reason to want to rule for them—or at least to ring for their opponent. With a bit of creativity can rise to that challenge yourself.

**spotted: Draw a line in the sand**

Freed down to a clash between two competing those two views in your introduction, your opponent’s attempts to make the case into

**spotted** technique challenges you to draw a line in every way.

Example from a Ruth Bader Ginsburg amicus brief University of California v. Bakke, the famous affirmative-action case from the 1970s. The parallel contrast between “compels” and “permits” says it all:

**Ruth Bader Ginsburg, Regents of the University of California v. Bakke**

The issue in this case is not whether the Constitution compels the University to adopt a special admission program for minorities, but only whether the Constitution permits the University to pursue that course.

The next example is from a much more recent amicus brief from Walter Dellinger. The dispute is about whether the government can withhold funding for law schools that refuse to allow military recruitment, an issue that occupied Justice Kagan when she was dean of Harvard Law School and that provided some of the few interesting moments during her confirmation hearing:

**Walter Dellinger, Rumsfeld v. FAIR**

Accordingly, this case is not—and never has been—about whether law schools may “discriminate” against the military or whether they must provide “equal access” to military recruiters. Instead, the question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school’s failure to make a special exception might incidentally hinder or preclude military recruiting. The answer is “no.”

In Dellinger’s version of the case, the military recruiters, not the law schools, are the ones looking to deviate from “the rules.”
Drawing a line in the sand was also important in the following example from Chief Justice Roberts. The case turns on an emotional issue: sex-offender registration. The ACLU and others argued that such registration schemes amounted to an unconstitutional *ex post facto* punishment.

In the Alaska registration regime, after the sex offenders were released from prison, their names and photos were posted online. Death threats and other attacks often ensued. In these two sentences, Roberts transforms a case about whether the sex offenders were punished after serving the time into a case about whether the Alaska Legislature *intended* for them to be punished when it passed the statute in the first place:

**John Roberts, Smith v. Doe**

[Alaska’s Megan’s Law] is a regulatory law intended to help protect the public from future harm by collecting truthful information and making it available to those who choose to access it. It is not a penal law intended to punish people for past acts.

This technique works just as well in trial settings.

In the variation that follows, patent-litigation guru Morgan Chu ensures that Tivo’s version of the dispute can be replayed long after the fact:

**Morgan Chu, Tivo v. EchoStar**

EchoStar is correct that this case is being closely watched—but not for the reason it suggests. The case is not about restricting the right to design around a patent. Rather, it tests whether court orders
meant to enforce a patentee’s right to exclude impose any real restraint on a large, aggressive, deep-pocketed infringer.

And here, in a summary judgment reply brief, former Manhattan U.S. Attorney Mary Jo White invokes a popular defense theme, claiming that Donald Trump sued her book-author client for revenge, not money, after the author allegedly downplayed The Donald’s net worth:

**Mary Jo White, Trump v. O’Brien**

This lawsuit never has been about recovering damages that Trump allegedly sustained as a result of the Book, but instead is about Trump attempting to exact revenge against O’Brien for writing what Trump perceived as a negative book about him and to deter other journalists from doing the same.

Here’s an interesting twist for you. In filings in a proposed merger between XM Radio and Sirius mentioned earlier, Dick Wiley suggests that his opponents are stuck in the past:

**Richard Wiley, In re XM-Sirius Merger**

This is 2007, not 1997. Satellite radio competes vigorously with and is substitutable for numerous other audio entertainment services and devices—particularly terrestrial radio, but also a variety of new devices and services.

Similarly, in a Ninth Circuit brief for Microsoft, Nancy Abell, often called the nation’s top defense-side employment lawyer,
draws a line between isolated lies and what she claims is the plaintiff’s more sinister agenda:

Nancy Abell, Jackson v. Microsoft

To sum up: Jackson’s misconduct went to the heart of his case. It involved far more than simply lying to Microsoft, or lying to the court about a single and wholly peripheral matter. Jackson has proven that, in order to advance his claims, he is willing to use stolen documents, he is willing to pay for stolen data, he is willing to inveigle other Microsoft employees into wrongdoing. He has proven that he is willing to raid his adversary’s attorney-client communications about his case to advance his claims. And he has proven—on multiple occasions—that, if he thinks it will advance his cause, he is willing to take the stand in a federal court and commit perjury.

And here, Supreme Court advocate Roy Englert expands on a quotation from the 9/11 Commission to draw a line in the sand between theory and proof when it comes to Saudi Arabia’s role in funding terrorist groups:

Roy Englert, Federal Insurance Company v. Kingdom of Saudi Arabia

The 9/11 Commission found that Saudi Arabia did not provide financial or material assistance to the September 11 terrorists or their al Qaeda organization: “Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior
been isolated lies and what she claims is the
better agenda:

*John v. Microsoft*

Jackson's misconduct went to the heart of his case.
More than simply lying to Microsoft, or lying to the
jury and wholly peripheral matter. Jackson has
wished to advance his claims, he is **willing to use**
material he is **willing to pay** for stolen data, he is **willing**
Microsoft employees into wrongdoing. He has
**willing to raid** his adversary's attorney-client
material at his case to advance his claims. And he has
**willing to take the stand** in a federal court and

**Some Court advocate Roy Englert expands on a**
9/11 Commission to draw a line in the sand
proof when it comes to Saudi Arabia's role in
al-Qaeda:

*General Insurance Company v. Kingdom of Saudi Arabia*

The Commission found that Saudi Arabia did not provide
material assistance to the September 11 terrorists or
organization: “Saudi Arabia has long been consid-
ered the source of al Qaeda funding, but we have found no
relationship between the Saudi government as an institution or senior

Saudis officials individually funded the organization.” In keeping
with their practice throughout this litigation, petitioners quote only
the first portion of this sentence, as if that were the finding of the 9/11
Commission, while omitting the Commission's actual finding that there
was no evidence implicating respondents in the funding of al Qaeda.

In all these examples, the attorneys don't want the court to be
“fooled” about what the case is all about. But in our final example,
John Payton, the director of the NAACP's Legal Defense Fund,
doesn't want the court to be “fooled” about what relief the parties
are seeking. Don't be fooled by the arid bankruptcy talk either.
Intervening in what some called “a modern day Dred Scott,” the
NAACP accused a Tennessee city council of engaging in environ-
mental racism by poisoning landfills that contaminated the Holt
family's water supply and afflicted several family members with
cancer:

**John Payton and the NAACP, In re Alper Holdings USA**

By this Objection, the Holt Plaintiffs are **not asking that confir-
mation of the Proposed Plan be delayed** or the effective date of the
Proposed Plan, and consequently distributions to general unsa-
cured creditors and conversion of the common stock of existing
equity) be stayed until the district court's decision on their appeal
is rendered. Instead, the Holt Plaintiffs **simply request that the**
defects in the Disclosure Statement and Proposed Plan be rectified by
establishing a sufficient reserve for holders of Disputed Claims
(including the Holt Plaintiffs).
Pulling the Techniques Together: A Preliminary Statement Dissected

Let's end with a full preliminary statement that incorporates all four techniques. It's from Ted Wells, Scooter Libby's lawyer and the National Law Journal Lawyer of the Year in 2006. The example comes from a perfectly structured motion that we will return to later.

The legal issue is common, even mundane. Representing Citigroup, Wells wants to transfer a lawsuit over an auction from New York to England, where many of the events took place. As with the Push movie example, I have added commentary in brackets and have highlighted in bold where Wells uses the techniques discussed earlier:

Ted Wells, Terra Firma v. Citigroup

This case belongs in the courts of England. Plaintiffs are Terra Firma Investments (GP) 2 Limited and Terra Firma Investments (GP) 3 Limited, two Channel Island investment funds managed by an English company, with offices in London. Terra Firma asserts that it was misled into bidding in an auction conducted in London, under English takeover rules, to purchase the English-listed company EMI Group plc by London-based bankers of Citi, which acted both as EMI's financial advisor and as lender to Terra Firma in providing financing for its successful bid. Consistent with the English locus of these transactions, Terra Firma pledged—in a series of agreements with or for the benefit of Citi—that the courts of England would be the appropriate and exclusive forum for the resolution of any disputes relating to information that Terra Firma relied upon in bidding for EMI as well as any claim connected to
Techniques Together: A Preliminary Statement

A full preliminary statement that incorporates all "Th's from Ted Wells, Scooter Libby's lawyer and Journal Lawyer of the Year in 2006. The examine-perfectly structured motion that we will return

There is common, even mundane. Representing grants to transfer a lawsuit over an auction from and, where many of the events took place. As the example, I have added commentary in back-grounded in bold where Wells uses the techniques

Firma v. Citigroup

Songs in the courts of England. Plaintiffs are Terra

Firma (GP) 2 Limited and Terra Firma Investments

two Channel Island investment funds managed by an

, with offices in London. Terra Firma asserts that its bidding in an auction conducted in London,

takeover rules, to purchase the English-listed com-

ple by London-based bankers of Citi, which acted

financial advisor and as lender to Terra Firma in

King for its successful bid. Consistent with the

these transactions, Terra Firma pledged—in a

rents with or for the benefit of Citi—that the courts of

appropriate and exclusive forum for the reso-

sputes relating to information that Terra Firma

selling for EMI as well as any claim connected to

the financing of its bid. And yet, in contravention of both the terms of the mandatory forum selection clauses and the principles underlying the doctrine of forum non conveniens, Terra Firma filed suit in New York instead of the mandatory and more convenient English forum [Brass Tacks: who, what, when, where, why, how]. This case should be dismissed on either of two independent grounds [The Short List].

First, a series of agreements specifying that the claims asserted by Terra Firma be resolved in the courts of England requires dismissal of this Complaint. Upon entering the bidding process for EMI, Terra Firma executed an agreement relating to the conditions under which information would be supplied to Terra Firma by EMI and its advisors, including Citi. . . .

Second, New York is an inconvenient forum. This case, as pleaded, indisputably arises out of acts that overwhelmingly took place in London. . . .

Although Terra Firma, a stranger to this forum, chose to bring its case in this Court rather than in England, its choice is entitled to little or no weight when the motivation appears to be forum shopping [Don't Be Fooled: plaintiffs are not always entitled to their choice of forum]. There is no reason to tax the resources of this Court [Why Should I Care?] in adjudicating a complex dispute about an English transaction that can and should be resolved by an English court.

With your own mix of these four thematic ingredients in place, you are now ready to craft the fact section, the argument, and everything else that comes your way.