[APPLAUSE]

**CATHERINE STETSON:** Thanks. Thanks so much for coming to talk with us today. Can you all hear me OK? Good. A couple caveats and provisos and one correction at the beginning, the correction is that only my mother calls me Catherine. So I go by Cate. The caveat and proviso is that this little doodad apparently runs that little thingbob. So I'm going to try to use this PowerPoint presentation when Chris and I speak.

But we've-- we're luddites when it comes to this. So if things go south, we're just going to end up talking to you. And I hope that's OK. You've heard a little bit about kind of Chris's and my, to the extent we have credentials to talk about this. But we both clerked for a federal district judge and then for a Court of Appeals judge. And we both came to Hogan & Hartson at a very lucky time for us, because it was when John Roberts was the head of the appellate practice section at Hogan & Hartson.

So along with everything that we learned in law school and in clerking for a trial judge and for an appeals judge, we had the opportunity to learn how to write briefs from someone who was very, very good at it. So what we're going to attempt to do today in the time that we have is to give you some insights, hopefully not too random with a little bit of order to them, into how we go about writing briefs.

One of the other caveats to this is that it's really hard we discovered as we were sitting down to talk about this program to try to figure out how to teach writing a good brief, much less how to teach it in an hour. So we're going to do the best we can. We're going to leave a little bit of room for questions at the end. And I understand there's time for a reception at the end, too.

And I'd really encourage all of you to talk with us if you've got questions that you don't feel like posing to the whole group about brief writing. So with that, I'm going to grab this thingbob. Oh, magic.

**CHRIS HANDMAN:** Fantastic.

**CATHERINE STETSON:** All right. So I'm going to begin, you all are all either second years or third years. Do we have any first years here? We have first years in the audience. OK. Let's just a quick review about the difference between a brief and a memorandum. Because a lot of you all, particularly-- even second years who haven't yet maybe worked at a law firm, the most that you've done, except for the one foray into brief writing, has been mostly legal memo writing.

Legal memos and legal briefs are two very, very different animals. Legal memos are supposed to be objective. They are supposed to be thorough and assessing. And they-- the goal is to recommend a strategy to a client or to a partner or to a fellow associate that you're working with. A brief is different in several critical respects. It is not objective. Your goal is not to be a neutral party. Your goal is to be an advocate.

Along with that, you are still though in the position of recommending an outcome to someone. You are in the position of recommending a likely outcome to the court. So you can never lose sight of the fact that, along with your obligation to the client to be an advocate for that client, you have an obligation to the court. And that's one of the things that we're going to keep touching on during the course of this time is the obligation to the Court that you have to be basically a fair dealer, a candid lawyer, and an officer of the court when you relate things like facts and law and argument to the court.

So your end goal is to do kind of the same thing in a brief but with a little bit of a more evocative twist, which is to recommend an outcome that the court can adopt and to lead the court in that direction with your briefing.

**CHRIS HANDMAN:** Well, good afternoon. I'm going to talk to you now in segue-- and that was a beautiful segue, Cate, by the way on that-- to the types of briefs that you might encounter as you either engage in moot court or I believe there's a Supreme Court practice here as well. And you might see any number of these sorts. And there's really three sorts of briefs when we talk about appellate advocacy that you might find yourself writing.

The one that you almost all encounter in a moot court competition is what we call a merits briefs. That means at the federal appeals courts, you have the direct appeal from the district court. And you are simply arguing whether this should be affirmed or it should be reversed, vacated, or somehow sustained. And of course, that falls into the appellant's opening brief or petitioner's brief, if you have a petition for review, the appellee's brief, and then the reply brief if you're the appellant.

The goal of a merits brief is simply to persuade the court that on the merits, you're right. And that whatever outcome you're seeking, reversal or affirmance, is the one that the court should follow. It's a pretty straightforward goal. How you get there, of course, is kind of what we're here to talk about today. But it's important, as you set-- as you begin to do any briefing, to know what your objectives are.

And we begin with the merits, which everyone I think is probably more familiar with, because that is a big distinction from the next category that you see on this slide, the briefs that seek or oppose discretionary review. By that, we mean, of course, petitions for writs of certiorari, petitions for rehearing or rehearing en banc that are directed to the federal appeals courts. Those, of course, are discretionary.

The courts can take them or leave them at their will for any reason or no reason at all. And so what you're trying to do there is do more than simply demonstrate that you're right. Because being right isn't enough. Otherwise, the Supreme Court's docket, instead of having 70 cases, would have thousands of cases. They have to choose which ones they're going to pick. And the emphasis, therefore, becomes a lot different.

Your principal goal no longer is to show that you're right. Your principal goal is to appeal to the criteria that the Court uses. And this is-- that's a whole separate section. But in the Supreme Court, you're trying to emphasize that there's a split of authority among the Courts of Appeals. This is a question of broad national significance. This is something that cries out for the Supreme Court's jurisdiction. And that's the principal focus.

You can weave into that this notion of, oh, by the way, we're right. But that's what you're really trying to do. And so, as with any writing exercise, it's very important to be conscious of what your objectives are. One of the problems you see with many cert petitions is that they just reflexively repeat the same points they raised in their merits briefs, which is a very ineffective way to get cert granted.

The final brief that we talk about is the amicus brief. And that can enter into both the discretionary petition stage or the merits stage. And there the key, as an amicus, is to not-- your first goal is, one, don't undermine the party, of course, that you're trying to support. Two, try to add value. It's a meaningless exercise to simply echo the points that the party you're supporting has already raised.

What you'd ideally like to do is to bring a unique perspective to the Court, offer some unique, whether it's a factual expertise or some novel legal reconceptualization, those are the sorts of amicus briefs that really add value. And if you are retained to do an amicus brief, whether through a clinic or whether in practice, you should always sit down and not only ask, how do we win, but what unique angle can we bring? And those are really the most effective briefs.

So again, the key at any stage is always to ask yourself, what are your objectives, and to set out a little bit of a roadmap on how you want to get there.

**CATHERINE STETSON:** OK. Parts of a brief. And I don't need to either teach or reteach this aspect of legal research and writing to you, because you remember this part. Or you'll get to it in a couple months. There are basic elements of any brief, very, very predictable, whether you're in a state court of appeals or a federal court of appeals, the question presented or the issue presented, the statement of the case, which is a recitation of how the case arrived at that point.

Was it coming up from an agency? Was it after a bench trial? Was it decided on a motion to dismiss or on summary judgment? Those little procedural touch points along the way, the statement of facts, the summary of the argument and the argument, we put these up there not to remind you of the basic skeletal framework of a brief but for two reasons.

The first is, this is an example where you must remember to consult the local rules of the court in which you're practicing. And we'll get back to this later in the discussion as well. Different courts of appeals impose different requirements on the advocates appearing in front of them, in addition to these. They usually won't supplement anything that's up on the screen right now. They usually won't supplant anything that's on the screen right now, but they'll supplement it.

For example, there are courts that require you at the beginning of your brief to make a statement about the court's possession of jurisdiction over the appeal. There are courts that require you to state, in a standalone section, why your client has standing to pursue an appeal. There are courts that require you to, at the very beginning of your brief, to identify the three cases most pertinent to every issue you plan to argue on appeal.

So it's absolutely critical, and we'll remind you again later, to always consult the local rules of whatever court you're practicing in, don't just stand on this format as the gospel for any particular appeal. The second reason I put this up here is to remind you of another theme of this presentation, which is every single one of these elements, the question presented, all the way through to the argument, is an opportunity for you to argue your case to the court.

Only the argument is called the argument. But every single one of these has a purpose. And the purpose is, from the very beginning of the issue presented, to bring the court over to your way of thinking. And that happens the way you frame your question presented, and it happens in the facts that you choose to emphasize and de-emphasize in your facts section, and it happens throughout. So that's one of the other reasons I identify that.

Moving over to the question presented, the question presented is the first chance that you have at the beginning of your brief to frame your appeal or to frame your defense of the lower court's ruling. And the reason I'm splitting it up that way is, of course, depending on whether you're for or against what happened in the court below, you're going to write potentially two very different types of questions presented.

And here are two examples, one from an appellant and one from an appellee. And Chris and I went back through our briefs and pulled some examples for you. So this is an appellant's question in a case that Chris handled in the Fifth Circuit Court of Appeals about 18 months ago, an insurance case. The giveaway, the reason you can tell that this is an appellant's question, is the first five words, whether the District Court erred.

That is the sign of an appellant's question. Because the seed that you're planting in the court's mind is one of error. It seems like a tiny little thing. But with brief writing, one of the things to remember is that tiny little things add up to something. And a question presented like this is an appellant's question presented, whether the District Court erred in ruling.

And then you see the rest of the question presented that Chris crafted is designed to lead the court by the nose to the conclusion that our client liked. And ruling that an insurance policy that excludes coverage for any loss caused by flood nonetheless affords coverage for flood losses simply because the flood wasn't triggered entirely by natural causes. The suggestion is that by introducing natural causes, the court is starting to rewrite the policy.

So you're already beginning your argument. You can't quite tell, but that's what the question presented is doing. Appellee's question, this is a question that was crafted by my opponent in an Energy Regulatory Commission appeal. So it was coming up as part of an administrative procedure act appeal, straight up from the agency, from FERC. And my question presented was, I think it had a couple of different parts. It was more narrative. And I'll turn to that next.

But it did something similar to what Chris' question presented did. It talked about how the Federal Energy Regulatory Commission had erred and acted capriciously in the way that it handled this particular issue. Look at what FERC did, whether the Federal Energy Regulatory Commission reasonably directed the petitioner to file additional information and supported the tariff. It makes it sound like it was just another day at the office for FERC.

And again, planting that word reasonably in the court's mind. It looks like a small thing, but it's not. Here's one more approach to a question presented. And this is something that Chris and I use particularly in complex cases where we think a little bit of a fuller recitation of the facts will help us. This is from a Supreme Court brief, a merits brief, that we filed in the spring.

This is more of a narrative. And it begins by setting up the question. So you don't just jump in with the [? whether. ?] You have all of the narrative background, which I won't read for you. Because I assume you all can see it. And then the kicker is at the end. The question presented is whether the court correctly held, based on the record facts, that Taylor was in privity with Herrick.

Two things there, the first again is the reference to correctly held. You all can wager that we were filing a brief in support of the DC Circuit when you see that. And the second is our emphasis on based on the record facts. Because despite the fact that this was at this juncture a merits brief in the Supreme Court, one of our critical arguments was that this was a highly, highly fact specific case, susceptible to a highly fact specific inquiry.

And so we threw that into the question presented for good measure. So that's a different way of writing a QP. Sometimes it proves too cumbersome or a little bit too laborious, particularly if you're the appellee. Sometimes you like the nice tight question presented that I showed you from FERC. But this is another way to do it. All right. Now we're going to move on. Chris is going to talk a bit about the statement of the case.

**CHRIS HANDMAN:** The statement of the case, as Cate mentioned earlier, is really an opportunity to just offer a very brief recitation of the procedural posture and some of the more, you might even call them, generic aspects of the case. And the tragedy is that people often treat it just as that, as a generic throwaway, some necessary part that Federal Rule of Appellate Procedure 28 tells you to include in the brief. And people just put in the bare minimum.

But again, you have to think about every aspect of your brief as an opportunity to persuade. Even if it's a small section, it's another opportunity to be subtle, to offer your own interpretation of the case. And this is an area where you simply identify the parties. You identify the claims that were raised. You point out the procedure. Was there a discovery? Was there a trial? Was this resolved on summary judgment?

And then ultimately, the disposition below, you can imagine this section could take as few as two sentences to write, or you could spend a page and a half. And the problem is that if you're a-- depending on which side you're supporting, you might very well want to spend a little bit more time fleshing out what the nature of that case is. For example, imagine you just won a-- your side won a jury trial after two weeks of intense trial.

Well, chances are you're going to try your best as the appellate to position this case as a re-examination of factual findings made by a jury. And that barring some apocalyptic error on the jury's part, the Seventh Amendment precludes this Federal Appeals Court from second guessing the work of 12 jurors. So your procedural statement of case might very well emphasize the length of the trial.

You know, you might want to emphasize this was a long 12-day trial or 28-day trial during which the court received into evidence 1,362 exhibits and the trial testimony lasted X number of pages. Your opponent might very well want to gloss right over those facts. And so you're statement-- the appellant statement of interest might very well, and strategically, appropriately, downplay some of those points.

But here, again, is an opportunity to take an aspect of the brief that's otherwise formulaic, that most people just simply consider a throwaway, and subtly craft part of the argument. And this is a process of accretion. It begins with the question presented and flows through the statement. And then it flows on into the next statement, which is the next section, which is the statement of facts.

And this is the fuller exposition of the case. And again, the chief error that people make when they put together a statement of facts in a brief is that they simply assume it's put together the facts. They often will write the arguments section and decide to come back later and fill in the facts, viewing it as just the facts, ma'am, sort of obligation. But that's, again, just an unfortunate mistake and really a real missed opportunity.

Because the facts, this is your time to tell a story. And that's really how you should view this. It's an opportunity to spin a narrative, not to spin a yarn or make stuff up, but take the facts as they exist and couch them in a way that is not only subtly biased in your side but is interesting. You want to tell a story that doesn't lull the reader to sleep. And let's just postulate right here.

There is no rule in legal writing that legal writing has to be boring. Legal writing, to be effective, doesn't have to be as interesting as paced. It should actually be interesting at its best. And the facts are your opportunity to do that. That narrative should hopefully hook the judges. No one is going to option the screen rights afterwards. But if it can at least get them through and not only lead you to be persuaded but keep their interest and understand the thread.

And the best fact patterns are the ones where, by the end the facts, you don't even need to read the argument to know what the problems were and why those-- why the rulings were incorrect. And so, again, as Cate emphasized, and as we've been emphasizing throughout, you really need to focus on, again, your objectives and how you're going to posture this, and take the time to really craft the facts.

When I do this, for me, it's one of the most important aspects of my brief. I don't consider the facts any less important than the arguments section. And in many ways, I take a lot of pride in crafting that. Because if I can capture the judges out of the box, you've already gotten halfway through the argument that way. Would you go onto the next slide?

**CATHERINE STETSON:** I did.

**CHRIS HANDMAN:** OK. Excellent. Two points to keep in mind though about a fact section, as I mentioned, you want to structure the facts section so that the court knows which side you're coming out on. And you want to tell a narrative that, of course, doesn't come across as a dry, perfectly bland, and neutral recitation. You want to tell that story. But you also have to be honest, of course. And you have to be considered a fair dealer here.

You don't want to hide facts that are harmful to your case. You certainly don't want to exaggerate the facts in the case, nor do you, of course, do you want to make any of those facts up. The don't hide bad facts is an important injunction to heed. Because you know your opponent is going to raise them. So it's your obligation now.

You might as well deal with them in a way that you have the opportunity to structure them, in a way you can downplay them, in a way that you can dismiss them, in a way that you can tee them up for once you get to the argument section, giving a better understanding about why these facts, as bad as they may be, are legally irrelevant in the long run. So don't hide from them. Just as you can't hide from bad case law, as we'll talk about, you don't want to do that.

The most important thing, of course, in any advocacy, whether at the appellate or trial stage, is to maintain your integrity and your reputation. And once those things are lost in a brief, it's going to be very difficult to dig yourself out of that hole. Finally, the objective, help the court write its opinion. Ideally, you would love to be able to write a facts section that the District Court or the Court of Appeals, depending on which level you're advocating at, could simply, with a few cut and paste jobs, could basically paste it into their opinion.

And as you write that facts you, need to think about how you, if you were the judge, would write this. And if you can write it in a way that helps lead the court along and that gets them to the point where, this is the story that is going to dovetail as seamlessly and as nicely as possible with the legal section you're about to segue into, that's the ideal [INAUDIBLE]. And you can't view them as sort of separates. They're of a piece. You have to evaluate your facts section with the legal Section, which I believe will lead into--

**CATHERINE STETSON:** We will turn to now.

**CHRIS HANDMAN:** --summary of argument. See that was a seamless transition.

**CATHERINE STETSON:** Summary of the argument-- that was a good segue. Yeah, props for that. Summary of the argument, there's not too much more to say other than what's up on here. Purpose, roadmap, length, short, tone, firm but not fiery, two things I'll add. The first is, again, in service of what Chris has called the accretion of these portions of the brief, beginning with the question presented.

The summary of the argument is that transitional moment between your facts which, again, have to be very carefully crafted so they look facially neutral but tell your story, not a story but your story. This is the beginning of that change into advocate mode. It is one of the most difficult, if not the most difficult, elements of the brief to write. And for that reason, I usually chicken out and save it for last.

Both because, at that point, the brief has gelled sufficiently so that I understand where the story's going to end up and because, by that point, I know how to say something a little bit more cleanly and concisely. It's really, really hard to write a short summary of the argument, if you do it well. It's very easy to do it poorly. But writing the summary of the argument is something that philosophies might differ about saving it for last.

I can tell you that it used to drive our former boss nuts when I would save the summary of the argument for last. But I did it anyway. Do you save it for last?

**CHRIS HANDMAN:** I do.

**CATHERINE STETSON:** Do you really?

**CHRIS HANDMAN:** And I actually-- I often find I will-- I save it for last. And then I will-- Roman numeral one of my arguments section, I often will have a-- my first draft, a long introduction section that kind of tees up the arguments going on. That section often--

**CATHERINE STETSON:** And then you move that into the summary.

**CHRIS HANDMAN:** --finds its way into the summary of argument, because it tends to offer those overarching themes. But I always save it for life.

**CATHERINE STETSON:** All right. So the two out of two dentists agree to save the summary of the argument for last. The argument, let me set up a couple main points. And then Chris is going to walk you through some argument headings in a particular case. But here are four main points, a couple of which you've already heard in different guises before. Order your arguments carefully. Land your punches. Fight fair. Don't yell.

Order your arguments carefully. What I mean by that is depending, again, on what side of the case you're on, whether you're the appellant or the appellee, think very critically about a couple different moving pieces of the appeal. Do you have threshold jurisdictional issues that you either need to contend with or to raise right away? Do you have standards of review that are more or less favorable to you, depending on whether you're the appellant or the appellee?

If you're the appellant, you are loving any legal questions that give you a de novo standard of review. If you are the appellant after a bench trial, you are not loving factual determinations that are subject only to a clear error standard of review. If you're the appellee, you flip. If you're the appellee, your entire emphasis, as Chris was saying earlier, should be on how facty the whole case was in the trial court, and how much time the Court took when it labored over making all of its factual determinations, et cetera, et cetera.

So, again, depending on what color brief you're filing, red or blue, you're going to take two very different approaches to how you structure your arguments. You also have to factor in at this stage the strength of your arguments. If there are arguments that you think are very powerful, put them first. Now there's one exception to that. And the exception is a jurisdictional argument.

Even if you think the jurisdictional argument, let's say you're the appellee, and you want to raise a question about your adversary's standing. It may not be a winner. But if you leave it until the very end of the brief, the signal that that sends to the court is quite telling. And the signal is that you don't believe this argument. Because it's a threshold jurisdictional issue that would deprive the court of the ability to hear the appeal. And yet, you as the appellee have saved it for last.

So in that circumstance, where you're talking about a jurisdictional determination, front load it, even if you think in the order of strengths of your arguments it may not be your strongest argument. Land your punches. One of the things that John Roberts was asked after he became a judge is whether now that he had seen lots and lots and lots of briefs from different parties whether he would write his own briefs differently if he returned to private practice.

And the one response that he-- he said yes for one reason. I would have chosen fewer arguments to make on appeal. So when I say land your punches, if you have on appeal five different arguments that you think are pretty decent but only three of them are really good, make the three and leave the two off of the briefs. Because the effect of leaving-- of including those two weaker arguments is to drag your entire brief down.

The judges start questioning your credibility. They start questioning your candor with the court in making choices to include those briefs. And that sounds a little bit jarring, particularly to a client who wants to throw every argument he can into a brief. But it increases your chances of winning on those remaining few arguments if you go with what you know your strongest points are and don't just kitchen sink the thing.

Fight fair and don't yell should be self-explanatory. Sadly, they're not. You would be shocked, or maybe not, at the number of briefs that we see from folks in the Court of Appeals, which has the reputation of being such a-- such a courteous place to practice in, where the lawyers take personal shots at each other. Some people I think go into the legal profession because they like to argue. And those are exactly the sorts of people who shouldn't go into the legal profession.

So fight fair and don't yell. Going into more specifics, I'll turn it over to Chris.

**CHRIS HANDMAN:** Thanks. And before I do, on the don't yell point, please, whatever you do, do never-- do not ever use the exclamation point in your brief. It's just the worst signal to send. There's nothing wrong with having force behind it. But once you start down that path, you might as well start using emoticons in your brief as well. We should try that some time actually.

**CATHERINE STETSON:** We should. That'd be good, a little happy face.

**CHRIS HANDMAN:** Let's talk about the order of argument, because it can really make a difference. And here's-- the next two slides demonstrate the different approaches and the subtle emphases that are going to change, depending on whether you're the appellant or appellee in a given case. This, just by way of background, these arguments come from a Tenth Circuit case I was involved in.

It was a Foreign Sovereign Immunities Act case brought by a corporation headquartered in the British Virgin Islands doing business in China. And it sued, for reasons that I won't bother to bore you with, two Chinese governments, the Sichuan province and a local government there, under the FSIA. Under the FSIA, these sovereigns are entitled to sovereign immunity, unless there is a exception.

And one of the exceptions, the only one they argued, was, when the government engages in commercial activity that has a direct effect in the United States, so if France buys tanks from a contractor here and breaches, then they can sue France. Because it's commercial. And it's going to have a direct effect on the United States. Well, this case also had a procedural wrinkle.

Because these Chinese governments didn't quite understand American procedure and removed their case three weeks late and had to ask the District Court for special permission to remove, which the District Court granted. The District Court then ruled in our favor. And the other side took it up on appeal. So you can see what their argument is. The first argument deals with the threshold question, as Cate was talking about.

The threshold question is whether the District Court abused its discretion in allowing the Chinese governments to remove this case out of time. Well, let's just pause there and emphasize a few points. They began with an argument that has a rather unfavorable standard of review, abuse of discretion. If you have your choice between appealing as appellant a decision which is measured by abuse of discretion or de novo, you're going to pick de novo.

So here they led off with abuse of discretion argument. That normally would be a miscalculation. Except here, you have to factor in that this is sort of a threshold question. Should this have even been in federal court in the first place? We took it from state court to federal court. And we did it out of time, admittedly. And they were saying that was wrong.

So this is one of those situations, like the jurisdictional question that Cate was emphasizing, where it would make no sense to put this at the back end of their brief, after they've just spent 50 pages telling the court why they're right on the merits to suddenly get to page 55 and tell the court, oh, you know all that stuff we said about how we're right on the merits. You don't have to even bother with it. Because this didn't even belong here in the first place.

So it just-- it's kind of an incongruous organization if you put it at the end, even if you don't think it has much merit, which it didn't in this case. But they then go on to the principle merits argument. The court committed legal error in concluding that subject matter jurisdiction was lacking. Heading A, the actions taken by the governments were taken in connection with a commercial venture.

As I mentioned, there was two prongs. They had to show commercial activity and direct effect. And the next thing, item B, the government's actions had a direct effect in the US. And they say, because it forced these American corporations to lose profits, that's their argument. Well, now let's turn to our outline. We, of course, join issue with them immediately on this threshold question.

As appellee, of course, if they're going to say this didn't belong in the first place, it's our obligation to say why it did. And notice what we say, the District Court did not abuse its ample discretion by enlarging the removal period by three weeks. The point here is to emphasize what? Discretion. This is something that-- it's a signal immediately to the Court of Appeals. You have no business interfering with this decision, unless the District Court made some really egregious error.

And then the second thing, he removed-- he enlarged it by three weeks. We're not talking about enlarging this by several years, as actually some of the cases we were dealing with and contemplated. This was a mere three week discretionary review, nothing to see here, move right along is really the subtext of what this heading is trying to convey. And the court did move right along. And it went on then to argument heading two.

The District Court correctly determined that the governments are entitled to sovereign immunity. Then we break it down. The court's decision, the Tenth Circuit's decision categorically holds that lost profits do not satisfy the direct effects prong. We're saying, we're taking head on their argument on direct effects. They said it was lost profits. And we had a great case that said, no, lost profits simply aren't appropriate.

Let me just refer back. Let me take this, if I can master this slide. If you go back to their outline, you'll see they began it with A and B. A was commercial activity. B was direct effects. Don't, as appellee, feel like you have to follow in lockstep whatever the appellant has done. If the appellant has done it in an order that's most favorable to them, there's no reason why you have to allow them to dictate how you structure your brief.

What we did was, because the strongest argument was direct effects, and you need both, these are conjunctive tests not any one will do, we began with the direct effects. And that's what we indeed won on in the Tenth Circuit. So that's an important lesson as appellee. Don't feel like you're boxed in by how the appellant has structured his brief.

And then the third argument point is just to show, again, how you're not boxed in. You have some latitude. This one emphasizes that there were alternative grounds the District Court opted not to reach them below, because the court felt that we were right for this FSIA reason. But there were any number of reasons. We raised active state and some international comity issues.

The court didn't reach them. But we offered them there as an alternative way for the court to reach the judgment that our client was seeking. So that's an example of how an appellant and appellee structure and how an appellee can position the case so as not to be boxed in. And make sure you're always asserting your most powerful arguments.

**CATHERINE STETSON:** All right. How to write a header. And I-- we isolated this for special attention. Because, among other reasons, I come down a lot in the spring to judge oral arguments that you all do at the end of your 1L legal writing programs. And this is an issue for y'all. I have lost count of the number of briefs that I've read where the header basically is sometimes even a two or three sentence argument.

It is harder to write a short header but so, so much more effective if you look at these three examples. They can't all be as neat and clean as this. You saw the headers in Chris' brief were a little bit longer than this. But this is the ideal. The ideal is to find some pithy recitation that you can do that doesn't take up, for example, and this is not one of your briefs, I promise, the whole screen. This is how not to write a header.

This was in an Eighth Circuit appeal filed by a plaintiff in something called a Medicare secondary payer case. And she made a typo, which I corrected for her. We'll get to that. So the point of the header is just to provide a little bit of a foothold. It's not to make the argument that you're about to make in the argument section. And I want you to bear that in mind as you write your next briefs.

We're going to get into now some do's and don'ts to wrap up. And we've got several examples of each and some examples taken from briefs and from opinions. And I want to start with the most complicated substantive do. And this is important, not just at the brief writing phase, but also in any moot court oral argument. And are you all doing [? Lyle? ?] Is that why most of you are here or other external moot courts?

One of the most difficult things that you have to do, and it's painful and it's painstaking, is to identify the weaknesses in your own argument. It does you no favors, it does your client no favors to drink the Kool-Aid without thinking about what the weaknesses are in your argument. And every single case has them. There are always at least two sides to every story.

So as you are writing, one of the most critical things that you can do is, no matter how long you've lived with this case, no matter how fervently you believe in this particular cause, step back, adopt a neutral more assessing view. And this is where the legal memo training comes in handy and ask yourself the questions that you think would be posed to you by a judge or by the other side as you are writing the brief.

And it's for the reason-- one of the, among other things, the reason Chris identified earlier, which is, in the facts section or in the argument section, why not take the opportunity that you have in drafting your brief, your opening blue brief or your red brief, to identify and diffuse bad facts or bad legal precedents for you? Why wait for somebody else to do it for you, which then puts you in a very reactive, defensive mode? Do it yourself.

And in order to do that yourself, you have to ask yourself those hard questions and write the brief to them. And it can be very, very painful. The thing about doing it, though, is that it buys you instant credibility with the Court of Appeals if you show the depth of your thinking on these issues.

**CHRIS HANDMAN:** A second do, and this is one really we've already said a few times, is to put your strongest foot forward, with certain exceptions. And Cate mentioned jurisdictional exceptions. The Foreign Sovereign Immunities Act exception I mentioned with the removal question is also a notable exception. But by and large, you want to lead with your best arguments.

And that's-- and that also ties into what I also emphasized, whether as appellee or appellant, do not feel like you are bound to follow whatever order the other side has chosen for you. So it doesn't require much more elaboration than that. But that is a principal concern. Because when you look at briefs, you will wonder, why did they lead with this argument?

Why did they not lead with the second or third argument? And part of it, I think, has to do with what Cate just mentioned, which is that there isn't a critical evaluation. There's this reflexive adoption either of the arguments that were raised in the trial court and the order that they were presented in the trial court.

Or there's just some uncritical examination of their own case, where they might think this was a good argument but had they thought a little bit more about it would have recognized the glaring hole in their case that might have counseled against raising it at all, or, if they were to raise it, second or third. And that-- so that's really the key lesson there.

**CATHERINE STETSON:** Write a shorter brief. One of the stories that the judge I used to clerked for tells is never getting to the end of the brief and just really wishing that it were a lot longer. Because he just would love to read more. It is, as I've said again and again, it's much harder to write a shorter brief. It's harder to write a short summary. It's hard to write a short header. It requires you, again, to be critical and assessing about the strengths of your arguments and how you write them.

This is not just a mechanical exercise. It's a craft. And you have to take a certain amount of pride and pay a certain amount of attention to how you craft your brief. The other reason to write a shorter brief is, if you think about it, it also sends a substantive message. And the message is, this case is so easy I don't have to say more. And particularly when you are the appellant appealing legal issues, it shows such confidence in your-- in the rectitude of your position if you can put in a brief that comes in well under the word limits.

And I'll give you an example drawn from something that one of my colleagues shockingly did, not Chris, relatively recently. He was filing an appeal, a brief for an appellant, so opening brief, after a very, very lengthy and complicated bench trial chock full of facts. His brief made a number of very valid legal arguments. He sought double the word limits to file his brief. He didn't think he could get the job done in 14,000 words. So he went to 28,000.

**CHRIS HANDMAN:** This brief goes to 28,000.

**CATHERINE STETSON:** This brief goes to 28. I was-- I was not supportive of that motion for this reason. If you are the appellant, and you are raising legal issues, and you are coming off of a three-week bench trial, it's absolutely the worst thing that you can do to make the case look heavy and complicated and laden down with facts and explanations and caveats. I think that kind of strategy plays into substance.

You need to show the court that you are so confident in the rightness of your position, you can get away with writing this thing in 11,000 words. You're not even going to go to 11.

**CHRIS HANDMAN:** Next do, again, we touched on this. Be candid at all times. I think that goes without saying. But you'd be shocked, again, at the frequency with which this mandate is ignored. And we have a example just to provide you with a little amusement. This is, I believe, in the Federal Circuit. And you can read for yourself. This is an excerpt from the Federal Circuit's decision.

At oral argument, they had asked counsel about a particular case, which the judges and their enterprising law clerks had found out and thought was pretty much right on point, and asked the council, what about this case? Doesn't it pretty much ruin your argument. And he said, yes, it does. But he--

**CATHERINE STETSON:** But he didn't cite it.

**CHRIS HANDMAN:** But he didn't cite it. He knew all about it. He knew its effects on the case. He knew that it would pretty much undermine the argument. But he decided, there's no reason to include that. Well, that's simply inexcusable. And it's going to earn you the rebuke that this lawyer got, when the court said it noted its significant dismay at this failure. And officers of our court have an unfailing duty to bring to our attention the most relevant precedent.

The fact is, even with the worst of precedents with some perhaps rare exceptions, there's always a way to at least gin up the distinction. And there's always a way to draw a factual distinction if nothing less. And the reality is, you have no other choice. If you want to preserve your credibility not only with that panel but subsequent panels, if you have any interest in doing this for a living and making a bit of an institutional presence of yourself at the court, you don't want to undermine it in a single brief by engaging in that of deception. And that's really what it came down to.

Another-- yeah, another example, again, this is a failure to cite certain facts. This is, I believe, from the DC Circuit. Again, the court goes out of its way to express its dismay. By the way, if you're involved in a case, you want to always avoid having the courts say they have dismay over any of your positions or actions. That's really should have been rule number one of this exercise.

And here, essentially, in between the time that this case became ripe and the time of oral argument, the agency had changed its policy. And no one bothered to notify the court of this change. As you can see, counsel for FERC acknowledged the change only when directly confronted with the decisions at oral argument. We expect more from government counsel. But they also expect more from everybody.

Again, this goes to the whole officers of the court for those of you studying for the MPRE right now. We are perplexed by the failure of petitioner's counsel to alert us in either their brief or at oral argument to the change. Again, anyone worth their salt should notify the court of things that are relevant. And again, I think it goes without saying. But these examples show that it needs to be said.

Another do, read the circuit rules. They are chock full of all sorts of traps. And if you don't, you're going to walk into and get your brief bounced and enjoy the humiliation, if you're the firm, of having the partner say, I just got a call from the Seventh Circuit wondering why our brief has been bounced.

**CATHERINE STETSON:** Hypothetically.

**CHRIS HANDMAN:** Hypothetically.

**CATHERINE STETSON:** Hypothetically, that happens.

**CHRIS HANDMAN:** And you would like to avoid that. And that's not hypothetically. You would concretely like to avoid that.

[LAUGHTER]

And it's a simple way to do it actually. You just have to really pay attention and don't get lulled into complacency. And certainly don't assume that, even if you've become a mini expert in DC Circuit practice and know you could recite off the top of your head all of the idiosyncratic filing requirements they have, that the Ninth Circuit is going to hew to the same standards. Pretty much every circuit has its own unique requirements to one degree or another.

Be very careful and don't assume that the rules that were in operation three years ago when you file your Federal Circuit brief continue to be in force. These rules change rather frequently. Always stay up to date. Again, points that are too obvious to state and yet they need to be stated. Because whether-- because we will run out of time, or, for whatever reason, they don't pay attention to that.

And that's going to contain all sorts of those threshold requirements that Cate referred to. It's going to refer to brief colors, any number of procedural and even substantive aspects about what you need to include in the brief, like a jurisdictional statement even.

**CATHERINE STETSON:** Don'ts, don't assume the court knows everything you do. And the reason this becomes an issue, it becomes an issue most often in two types of cases. The first type of case is where the lawyer has lived with the issue so long that she forgets that other people haven't. And this, again, goes back to our admonition always to remember yourself when you're writing this brief and remember to step back and look at the facts and the arguments and the structure of the brief in a more neutral way.

Ask yourself when you're putting the brief together, what does the court need to understand about these issues? So it happens if you live with the case for too long. It also happens in very esoteric areas of the law, like insurance. This is an example from a real live first page of a brief that was filed in the Seventh Circuit in a reinsurance case. And when I say first page, this is how they essentially lead off their statement of facts.

There are a number of problems with leading off your statement of facts this way. Not only is this absolutely impenetrable, It's totally ineffective. It goes to what we were talking about earlier. You're not gathering any kind of useful information for the court to use in ruling for you later. You're just spewing bizarre acronyms and catch phrases at a court that doesn't understand them.

Here's the kicker. This is, again, another substantive reason for not doing this. If you can explain a complicated area to the court, reinsurance, patent law, something highly technical like an agency action from an environmental-- involving an environmental regulation, the court will love you. The court will trust you. The court will think that you are a fair dealer. And the court will want to rule in your favor, to put it candidly.

This is how the Seventh Circuit reacted to this brief. This reaction that you see on the screen came at the end of the court's decision. So the court dealt with this complicated reinsurance issue. This is a decision written by Judge Posner on the Seventh Circuit. And he did it in his typically melodic, well-crafted, Posnerian way. And then he dropped the hammer on all of the advocates at the end of his decision.

There's nothing wrong with a specialized vocabulary for use by specialists. But the admonition here is that judges aren't specialists. And their law clerks, these folks who are fresh out of law school for the most part, they certainly aren't specialists. And you need to give them the practical layperson's language to help them through these areas. And that is a huge pitfall that people who have been practicing for 40 years regularly fall into when they write a brief.

**CHRIS HANDMAN:** And just to follow up on that before we get to the next don't, I said earlier that an effective legal brief doesn't have to be boring to be good. It also doesn't have to have sentences that are 12 lines long to be good either and 13 independent clauses set off with commas. There's this sense that in legal writing you have to have these overly complex sentence structures. Not so.

Simple, elegant, precise writing carries the day, particularly when you're dealing with something as esoteric as reinsurance law, which I didn't even know existed or what even knew what it meant before I became a lawyer. Or patent law, I mean these are concepts that are incredibly difficult to digest. You need to break them down into more bite-sized morsels. And that means often writing in a simpler style.

It doesn't mean sacrificing eloquence or elegance or using monosyllabic words. But it means making sure you're presenting these concepts simply. Sentences that are short is going to be so much more effective than that monstrosity of a paragraph that Cate just showed earlier.

**CATHERINE STETSON:** And let me just add that one of Chris' favorite sentences to write in a brief is not so, which is why he said it a minute ago.

**CHRIS HANDMAN:** Which technically is a fragment, I realize. But that's why--

**CATHERINE STETSON:** We'll give you a pass.

**CHRIS HANDMAN:** Which is why, again, you should feel free to have a little bit of creativity in writing. Don't feel you need to say this is not so. Not so is a perfectly acceptable rhetorical device. You can tell I've had this debate with people about this.

**CATHERINE STETSON:** We've gone rounds about this before.

**CHRIS HANDMAN:** And this speaks of-- this is a good segue. Don't cast aspersions on your adversary.

[LAUGHTER]

Don't do that is the short rule. And here's an example from a brief where the party said, in short, the district court's determination that no oral contract existed between the parties was plain error. Why the district court reached so far for the company is a mystery to these plaintiffs. I mean, when you start putting the tinfoil hat on and worrying about conspiracy theories in your brief and suggesting that the district court's in cahoots with a party, you are really finding no quicker way to have your side lose.

It's just-- it's completely ineffective. It is counterproductive. And even if you really believed in your heart that there was some-- the jig was up, no point in raising it. It's not true. You're not going to be able to convince three appellate judges, who probably trust and respect the district court--

**CATHERINE STETSON:** And who may have been district court judges themselves before ascending to their current position.

**CHRIS HANDMAN:** Exactly. So, again, I think these are common sense principles that need to be emphasized only because they're breached every now and then. Another example, this is from a case I was involved in. We had cited-- we were trying to attack the district court's summary judgment ruling and said, here's some other evidence that the court didn't consider.

And the parties-- the other party said this was inexcusable, because this was evidence that was entered in at trial. And they relied on a Tenth Circuit case that suggested the practice might not be kosher in the Tenth Circuit. Well, we were in the Second Circuit. And the Second Circuit had a case directly on point that said this is entirely appropriate. We were sensitive to this question.

And so-- but they, nevertheless, decided not to research the Second Circuit. And they, I guess, just liked a bigger number and went with the Tenth Circuit. And they say, this is wholly improper and should not only be summarily rejected by this court but counsel should be reprimanded for engaging in such conduct. Well, a few things to keep in mind here, you better be sure you're right before you start leveling these sorts of allegations.

Because it's awfully embarrassing. And I think we made a pretty good show of it in the reply brief. Another thing, and this is just on writing. Any time in the same clause you have two adverbs, wholly and summarily, it's-- you're pushing a little bit too hard probably. You can probably-- that's usually a sign that you don't really believe in the argument yourself.

**CATHERINE STETSON:** Chris is Hogan & Hartson's resident grammar diva, just for those who haven't figured that out.

**CHRIS HANDMAN:** As some know actually. And but-- here's the other point. If you start protesting like this, you're going to protest too much. This is a silly procedural question more or less. That this party is going to such great lengths to tell us that-- to urge the court to reprimand opposing counsel, which is a bit of a nuclear strike in law practice, particularly at the more collegial appellate level.

And to do so, it is really suggesting there must be something there. Otherwise, they wouldn't be pushing so hard, unless they're just jerks by their nature, which is possible. But the courts, the judges are probably going to give them the benefit of doubt and wonder why are they so concerned about this. Or at least I think that's a natural human question to ask.

The final point about this is that, it does little good to tell the court to sanction another party. You don't-- with rare exception, you don't want to ask the court to sanction this party in your merits brief. Because if it's really truly bad conduct, the court will appreciate it itself. And it will determine-- it's not going to say, oh, this looks pretty bad. Oh, maybe we should-- well, they didn't ask to sanction. If they want to sanction, they're going to sanction.

Sua sponte, they have that authority. So it does you no good. It only detracts from your own legitimacy and your own sense of being a fair dealer at that court. So barring some grievous ethical error, in which case you should probably deal with it through a separate motion, keep your briefs pure. And if you really need to attack counsel for something that's objectively really wrong, do it through a motion.

But the better practice, of course, is simply lay off the rhetoric. Present your argument as aggressively as you can within the bounds we've been teaching you today.

**CATHERINE STETSON:** And speaking of rhetoric, we've talked a lot about how to craft a brief that really sings and that tells a story. That doesn't mean, as we said earlier, that you should yell or to use rhetoric that's just so over the top that it becomes a little bit of a point of mockery. One of the first briefs that I read when I was a law clerk was a case involving a preemption issue involving the Federal Insecticide, Fungicide, and Rodenticide Act.

And the brief of the appellant began, this is a case about injustice. And I thought to myself, no, this is a case about the Federal Insecticide, Fungicide, and Rodenticide Act. Calling it a case about injustice put me at some distance from the appellant's brief, because I couldn't take them seriously after that point. And that was the first sentence. So be careful when you use the rhetoric, because it tends to backfire in a big way.

Here are two examples of backfiring in a big way. Example one, ten days before trial the district court slammed the courthouse doors to these plaintiffs. If I never have to read a brief again that talks about slamming the courthouse doors, I will be a happy camper. Overused phrase, strike one, high rhetoric, strikes two, three, and four. These plaintiffs are mystified at the lower court's ruling.

This is the same case that Chris mentioned earlier. This was the theme of the plaintiff's briefs, that the district court was in cahoots with the defendant, a pharmaceutical company. And that is not a theme that's going to go over well with any appellate judge. Second example, respondent has prevailed in this litigation by chance because of the randomly chosen composition of the particular appellate panel.

Here's a memo. All appellate panels are chosen randomly. That's the way it works. And to assign that kind of random selection to relegate it to caprice casts such aspersions on the Court of Appeals as to be laughable. This was in a cert petition that was filed against one of Chris' clients.

**CHRIS HANDMAN:** It also signals that you don't really know what you're talking about. I mean, as Cate said, all panels are randomly assigned. So to kind of attack that is going to signal to the court that these jokers really don't know-- they don't do this for a living. And they don't really know what's going on. And if we can't trust them to basic procedure, probably means we can't trust them to do other things as well.

**CATHERINE STETSON:** Right. One last don't, and this is a huge, huge pet peeve of mine and of the judges that I've worked for. Don't make mistakes. And I'm not just talking about legal or strategic errors or hiding bad facts or other things we've been talking about. I'm talking about silly things like typos and proofreading. And when I talk about proofreading, I don't mean let the little machine that lives in the computer do the proofreading for you.

Because the little machine that lives in the computer doesn't get some things right. It doesn't know whether the apostrophe goes between the T and the S or after the T and the S when you write it's. Because the little machine doesn't know how you're using it. You have the responsibility to proofread, not the machine and not people who are working for you. You should be proofreading your documents.

You would be appalled at some of the things that we've seen, including my favorite was a caption that was filed by an agency lawyer that referred to the Court of Appeals in which the case was-- the brief was being filed as the District of Colombia Circuit. Colombia is a very different place than the District of Columbia Circuit. And the huge error on the cover page of the brief got passed over by whoever looked at it.

Don't do it. You lose credibility with the court with every single proofreading error that you make. It's just not worth it. It's such-- so easy to fix.

**CHRIS HANDMAN:** And this is the real closing coda here, which is, after you proofread, you revise and keep revising. And these briefs are not one draft phenomena. You need to craft your brief. You need to go back to it. You need to keep constantly refining the argument. And we can't emphasize enough how important that is to simply crank out the first draft and to think, wow, this looks like a pretty persuasive piece of advocacy is flattering. But it's probably wrong.

It might do the job to some degree. But it can always be better. And it can be shorter. It can be tighter. You can identify arguments. You can position them, craft them in a way that's going to be more palatable to the court. There are always ways. And you should always continue to refine that work, as with any piece of writing. But at the appellate level and certainly in our practice, Cate and I take an immense amount of pride in the written word.

And I hope anyone who is engaging in a brief will share that same concern for making sure that what they convey on paper is going to be as great an expression as they possibly can do. And that can only come about through careful revision and critical examination. And then the proofreading and the proofreading again, as Cate mentioned, you don't want to mar an otherwise intellectually fabulous brief with a few sloppy careless errors.

And again, the grammatical checker and the spellchecker, they are poor substitutes for the old fashioned way of reading it very closely. And it can get to be a bit of a hassle to proofread yet again a 50-page brief. It takes some time. But it's time well invested. And it's certainly something that I think we always expect. And I think the judges expect it.

**CATHERINE STETSON:** And these admonitions hold true even if it is 3:30 in the morning and you have to turn in your brief the next morning to the moot court board. You still stay up until 4:00 and get it done right. If you're going to turn it in, get it done right. Thus endeth the lesson.

[APPLAUSE]

We have a little time for questions. [INAUDIBLE]

**CHRIS HANDMAN:** Sure.

**AUDIENCE:** If the judge-- if you know the judge or [INAUDIBLE] reads the briefs in reverse order, does that change how you lay out your briefs or your [INAUDIBLE] strategy at all?

**CATHERINE STETSON:** It's hard-- let's see. If you know-- the question is, if you know the judge starts with a reply brief, as you often-- as judges often do, does it change the way you set up your opening? I don't think it does, except when it comes to the reply. You want to make sure the reply brief in general probably is a little bit more of a standalone creature. You don't want to make assumptions, again, about acronyms or esoteric language.

Find a way without reprising your entire opening brief to set a little bit more of the scene maybe. But that's a pretty-- you know, you should do that in a reply anyway on the assumption maybe that it could be the first brief that's picked up. Because you never quite do know.

**CHRIS HANDMAN:** I mean, that's my-- one, it's rare except in maybe the DC Circuit to even know who the panel is going to be when you write your briefs.

**CATHERINE STETSON:** That's true, too. Yeah.

**CHRIS HANDMAN:** So it's really a-- you're playing the odds if you try to engage in that. Another thing, too, is I'm not really sure how I would do it differently. Because I hope my reply brief-- it's like picking up book three of the Harry Potter series. You should be able to pick it right up and understand the whole history that's led up to it right until then. It doesn't mean you recite the whole thing.

But the reply brief should be able to position your arguments in a way that someone coming to the case immediately will be able to grasp. They may not understand all the nuances. And hopefully those citations in your reply brief to your opening brief will lead the way. But I don't think I would write my reply brief any differently. I would hope that that judge would be equally-- find it equally accessible as anyone else.

**CATHERINE STETSON:** It is a good practice for a law clerk, if you all are thinking about clerking, to start with the reply brief. That is useful in those circumstances to read backwards. But it's hard to figure out if you do it any differently as a lawyer, knowing that it's going to be read first. The answer is probably no but certainly good practice from that side of the bench. More questions.

**AUDIENCE:** I had a question about dealing with-- you mentioned a couple of times dealing with if you've got a lot of-- say you've got a really complex regulatory scheme that has to be explained. And the court isn't going to have all the background. And parts of that regulatory scheme are things that you're going to focus on, and parts are what your opponents are going to focus on.

And, yet it's more-- it makes it more intelligible to write it out perhaps more like a memo style where you explain the whole regulatory regime and then make your arguments off that. Does that bother you? Do you feel that that gets in the way of presenting your argument? Or is it better-- in other words, is it better to kind of split it up and maybe diminish the prominence of the parts of the regulatory scheme that are favorable to the other side?

Or should you give it all out at once so that it makes more sense to the court, then make your argument?

**CHRIS HANDMAN:** Well, it's a great question. And I guess, like so many law questions, that, you know, the depends probably comes in. There's no one size fits all. But here's the way I might handle what you're talking about. When you have a complex regulatory or statutory scheme, I think it's helpful to ventilate that in the facts section, in the background section to give-- because that's I think quite fair.

If your case is involving this regulatory scheme, well, you can't meaningfully evaluate the facts unless you know how those facts fit into that scheme. And I think you see that often in briefs where you set forth here's the way the scheme works. And of course, as you do so, heed our admonition to make sure you're posturing, even there in the facts section, the background section, a way in which it looks like the court's going to know how you've teed that up, how they should view that regulatory regime.

When you get to the argument section, you've now already canvas-- you've already set that forth. And you can refer back to it at times. And of course, you can't just simply say, go see the whole thing. You'll have to quote from those provisions that are favorable to you. You'll have to distinguish those that are going to be cited against you. But that background, that whole or context, will have already been set forth in your brief and tee up what you're going to say in the argument. At least that's the way I think I would handle it.

**CATHERINE STETSON:** Yeah, I mean the one thought that occurred to me right at the end of your question, I think you kind of answered it yourself. Because you said, or should you do it in the way that makes the most sense to the court?

**CHRIS HANDMAN:** Right.

**CATHERINE STETSON:** And I think if that's-- if that's what you're confronting, you know, do I-- do I kind of posture for like an advocate or do it in the way that makes no sense to the court? Always choose door B. One way to do it so that you don't-- so that you don't run the risk of bogging down your factual narrative or the story is oftentimes in a complex regulatory appeal, you break your facts section into two subsections, one statutory and regulatory background.

And that looks an awful lot like a memo. It has the statute from whence the regulation sprang, the regulation, and the history of the regulation, and so forth. And you can do that without too much mustard on it. Because you're just, as you said, if you're the first one getting the opportunity to put these regulations in front of the court, do it straight and do it all. So that you can't be accused of backloading anything that could hurt you later.

Deal with the impact of the bad sections later, but get it out in the statutory and regulatory background in those circumstances.

**CHRIS HANDMAN:** But-- and I think that's exactly right. But even there, there are, again, subtle-- facts sections you have to play it straight. But there are opportunities to subtly inject a bit of advocacy in there. For example, you can set forth the scheme. You can dryly say, here's what this provision says. And here's what this provision says. It's also equally factually true to say, Congress introduced this provision in response to this particular concern.

Well, if that concern is something that you think would animate the judges in your favor, or if you think it's a particularly compelling equity point that is at issue in your case, well, that's a good thing to say. It's factually true. It actually gives a little more color. It allows the court to view these in a richer context. And it lets you position that in a way that propels your argument ultimately.

**CATHERINE STETSON:** Yeah, that's a good point.

**AUDIENCE:** Maybe one-- one last question for the panelists. I just have one quick question myself.

**CHRIS HANDMAN:** Sure.

**AUDIENCE:** You mentioned putting your best foot forward and focusing on those specific arguments that you're strongest on. I just wondered if you could comment on whether you think that that equally holds in the district court level as well as the appellate court. Because it seems that there's more opportunities to lose issues on appeal [INAUDIBLE] issues in the district court.

**CATHERINE STETSON:** You know, that's true. That's absolutely right. And that's a good distinction. You can make considered choices when you get to the appeal about what arguments are your strongest, what you're most likely to prevail on, what might bog you down when you start throwing in lesser arguments. But your point, I think, goes to a waiver issue.

Which is, when you're in the trial court and you have only one opportunity to make all of your arguments to the trial judge or forever lose that opportunity on appeal, your calculus becomes much, much different. And you take kind of a broader array of issues. That array, depending on the resolution and depending on the standard of review that gets afforded those issues, then tends to funnel down on levels of appeal.

But you're absolutely right. In the district court, it's a very different type of inquiry.

**CHRIS HANDMAN:** Yeah, that's exactly right. But be that as it may, it's not an invitation to be indiscriminate. I mean, you still want to bring a critical eye to that. Because put yourself in the position as if you've lost and now on appeal, if you wouldn't bother to raise it on appeal, think long and hard about whether you want to raise it in district court. There are borderline calls. And the district court is the time to raise it if you're going to raise it at all.

Because, as Cate said, it's going to be waved forever. But, you know, you might imagine a case in which you could raise theoretically eight or nine or 10 different arguments. Well, you might want to raise only two or three in the appeals court and maybe try to find your six best, or your five best at the district court. It's not to say there aren't going to be situations where you want to raise all of them and go across the board.

But you do still want to have some editing function in what you're going to raise.

**CATHERINE STETSON:** Yeah, I mean if your argument stinks in the district court, it's not going to smell any better in the Court of Appeals. But on the margin, if there's a borderline call, you call in favor of the argument in the District Court for the reason that you identified.

**CHRIS HANDMAN:** Absolutely.