the bank. Mr. Langille did not, in fact, have a gun. He drove away and went directly to an auto repair shop, where he was in the process of having a new car battery installed in his automobile when he was apprehended by the Calais police. Mr. Langille had not spent any of the stolen money; the Machias Police Department has returned the full $3,574 to Machias Savings Bank.

II. Discussion

. . . .

B. Did the Defendant Meet the Remaining Requirements of Section 5K2.20 for Downward Departure for Aberrant Behavior?

Under U.S.S.G. § 5K2.20, a downward departure may be warranted for aberrant behavior only "in an exceptional case." The Guideline sets forth the specific requirements:

(1) The Defendant may have committed only a "single criminal occurrence or single criminal transaction";
(2) The crime must have been of "limited duration";
(3) The crime must represent a "marked deviation by the defendant from an otherwise law-abiding life."

U.S.S.G. § 5K2.20(b). In addition, the Application Notes provide further factors for analysis: "In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. § 5K2.20(b), app. n. 3. Moreover, the crime must have been committed without significant planning."

Finally, this Court has reviewed case law for guidance on the proper application of § 5K2.20. The seminal First Circuit case on aberrant behavior was decided before § 5K2.20 went into effect. *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *see also United States v. Dewire*, 271 F.3d 333, 335 n. 2 (1st Cir. 2001) (noting § 5K2.20 became effective November 1, 2000). In *Grandmaison*, the First Circuit ruled that in determining whether to depart downward for aberrant behavior, the courts should look at the "totality of the circumstances." *Id*. at 563. The *Grandmaison* Court directed the sentencing courts to consider such mitigating factors as pecuniary gain to the

defendant, prior good deeds, efforts to mitigate the effects of the crime, and the spontaneity and thoughtlessness of the crime.

This Court applies the Guidelines Requirements, the Application Notes, and the *Grandmaison* case to the facts in this case.

C. Guideline Requirements: § 5K2.20(b)

Mr. Langille has met all of the guideline requirements set forth in § 5K2.20(b). This was a single criminal occurrence or single criminal transaction with limited duration. Mr. Langille committed the crime without significant planning. After being denied the loan, he came back shortly and, apart from writing out the threatening note, there is no indication he had planned the crime. He made no effort to disguise or mask his face; to the contrary, he decided to rob the same bank where he had just been and where he had just divulged all his identifying information. He had no firearm or dangerous weapon. He had no apparent plan of escape. Instead of heading out of town, he proceeded to an auto repair business where he waited for mechanics to install a new battery in his car. He was picked up by the police still within the confines of the small city of Calais within moments following the crime, having neither spent nor stashed the money.

The crime was also a marked deviation from an otherwise law-abiding life. Mr. Langille had managed to spend nearly seventy years on this earth without committing a crime. There is no evidence of any prior involvement with the criminal justice system: no felonies; no misdemeanors; no charges.

D. Application Note Considerations

The Court next analyzes the considerations of Application Note 2. There was little direct evidence of Mr. Langille's mental or emotional condition before or at the time of the crime, except the Presentence Report, which stated Mr. Langille had felt "depressed" prior to his arrest due to his financial problems and homelessness. Mr. Langille's employment record substantiated he had worked for various employers up to the year 2002 and had not worked since that time. Mr. Langille's prior good works consisted primarily of his service to his country in the United States Army and the injuries he had sustained during that service. Mr. Langille's motivation for committing the offense was to obtain money for his own use. This factor weighed against him, but was placed in the context of his desperate financial straights.

E. *Grandmaison* Considerations

This Court has addressed the spontaneity/thoughtlessness, pecuniary gain, and prior good deeds factors. There is admittedly no indication of Mr. Langille's engaging in charitable activities; living in a car at the time of the robbery, Mr. Langille was, in this Court's view, a proper object of charity. The final *Grandmaison* factor is Mr. Langille's efforts to mitigate the effects of his crime. The only evidence on this issue is that the full amount of the stolen money was promptly recovered and returned to the bank.

III. Conclusion

Based on the record before it and over the objection of the Government, this Court concludes Mr. Langille presented a truly "exceptional case" under § 5K2.20, which justifies a downward departure from the guideline range of sentence of thirty-seven to forty-six months. Mr. Langille's crime is so amateurish, spontaneous, and ill-conceived, and such a marked deviation from his prior life that it has all the characteristics of the foolish and thoughtless act of a man pushed over the brink. The Court concludes that when the Sentencing Commission drafted § 5K2.20 allowing a downward departure for aberrant behavior, it had someone like Roger Langille and his crime in mind.

Mr. Langille's conduct was by no means blameless. He did, after all, rob a bank and threaten to shoot the teller. The fact the teller immediately handed more than $3,000 over to Mr. Langille is evidence she took the threat seriously. This Court concludes a sentence of twenty months in prison followed by three years of supervised release would best balance the congressional sentencing directives set forth in 18 U.S.C. § 3553(a), tailoring as best this Court can the punishment to fit the crime and its perpetrator.

SO ORDERED.

Drafting Considerations

Now that you have reviewed all the materials, it's time to consider strategy from a unique perspective: the position of the judge. We are not talking about some sort of strategy that a judge might employ (such as issuing a ruling in the alternative, for the sake of efficiency, in order to avoid the need to retry a case in the event one issue is reversed on appeal). Instead, our focus is on what a litigator can learn by thinking about the case from the judge's perspective.

For the most part, litigation writing has a primary target audience of one: the judge.[1] Therefore, a litigator needs to write in a way that puts the case in the most persuasive light possible from the judge's perspective.[2] Although this may seem self-evident, it is a common mistake for litigators to forget the judge's perspective and engage in overzealous advocacy that weakens the client's position. For example, consider the following admonition from the court:

> This Court cautions the parties against hyperbole. Plaintiffs' Response begins: "Defendants' endeavor to stay this litigation for an indefinite period of time is an improper tactical maneuver designed to slow this case down, thwart discovery into their well-documented illegal conduct, and stave off the certification of the class for as long as possible." It continues by alleging the Defendants engaged in "cigarette frauds," that the motion for summary judgment is "baseless," that the Defendants' motives are "disingenuous," and that their motion is "misleading," and "preposterous." Provoked by Plaintiffs, the Defendant . . . began to respond in kind . . . . *Far from having the desired emotive impact, the use of over-the-top adjectives only gives pause as to why the parties have resorted to epithets in place of reason*. This Court will address issues of law on their merits, not on the parties' attempts to characterize (or mischaracterize) each other and counsel.

[1] For now, we are putting aside issues of the secondary audience, such as discussed in Chapters 2 and 4, that might involve a desire to influence the public debate or otherwise convince your opponent to settle out of court.

[2] Focusing on the judge as the target audience helps to put many issues into their proper perspective. One example is the importance of accurate and reliable citations. *See, e.g., United States v. Freeman*, 242 F.3d 391, 2000 WL 1745228 at *1 n.1 (10th Cir. 2000) ("We admonish Defendant's counsel that the failure to provide the Court with pinpoint cites to the specific proposition in his authority has not gone unnoticed"). In order to build credibility and avoid wasting the judge's time, a strategic litigator should provide an accurate and specific cite for every factual and legal assertion.

Good v. Altria Group, 231 F.R.D. 446, 447 N.1 (D.Me. 2005) (citations omitted) (emphasis added); *See also Leavitt v. Wal-Mart*, 238 F.Supp.2d 313 n.1 (D.Me. 2003) ("I urge the lawyers for both parties to tone down their rhetoric. It does not contribute to effective advocacy to assert that the other party engaged in "bombast" or made an argument that "would waste the Court's time" or was designed "to insult the intelligence of the reader" or a "desperate attempt to convince this Court" or "ridiculous").

A strategic litigator would never make that mistake. Obviously, the better approach is to evaluate the case from the judge's perspective and consider: What will be the most persuasive? What will make a difference? What should I avoid? When answering those questions, several points will likely stand out.

First, in most instances, you will find that a detailed statement of facts is far more persuasive than a presentation of abstract legal principles. Considering that there is an exception for virtually every legal rule, the judge is looking for you to provide the precise facts that will determine whether the case falls within the category of "exception" or "rule."

Second, judges are not persuaded by conclusory statements or assertions that the court "must" rule a certain way. Instead, judges are looking for the parties to provide the *reasons* that would support a ruling, one way or the other. For example, is your position more consistent with the plain meaning of a statute? Does your opponent's interpretation lead to illogical consequences? Which side's position can better withstand scrutiny?

Finally, remember that your legal writing will be evaluated based on its reliability and precision. Nothing deflates an argument faster than inaccuracy and generality.[3] As a result, check and double-check every assertion.

[3] You should also keep in mind that the judge has a limited amount of time to devote to your case. If you have any doubt about the court's reluctance to search the record on your behalf, consider the following Local Rule in Maine, which offers a clear warning: "The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts" (District of Maine, Local Rule 56(f))(2007).

CHAPTER NINE

Advising Professor Melton

We change your employment. You are now an associate with the private law firm of Zillman and Roth. One of the firm's specialties is employment law, in which your work has concentrated. Several weeks ago the firm was contacted by Professor Herman Melton. Professor Melton had just received a copy of the letter from the Vice President for Academic Affairs to the President (that you drafted in another life!). He was persuaded that the letter and the prior University of Katahdin proceedings meant he was about to be fired.

Your firm agreed to represent Professor Melton. You have become his lawyer. The file materials here reflect what has happened since your representation began. You have also received all of the materials from the files in Chapter Three. You have had several face-to-face meetings with Professor Melton and also have talked to him frequently on the phone. Professor Melton has taken a very active interest in his case and has demonstrated a good layperson's knowledge of higher-education law.

You now need to provide a letter of advice to Professor Melton that summarizes the facts and law that you have found. Most crucially, the letter must recommend to Professor Melton what steps he and you should next take. Prepare that letter.

THE UNIVERSITY OF KATAHDIN

Assistant Professor Herman Melton
Department of Sociology
University of Katahdin

Dear Prof. Melton:

As you may know, the University of Katahdin is required to inform you by the 15th of next month whether you will be offered a renewal of your employment with the university. I regret to inform you that after review of your file, the university will not extend your contract for another year. Your employment relationship with the University of Katahdin will terminate with the upcoming May graduation.

We wish you the best of fortune in your career and thank you for your contributions to the university.

Sincerely,

Susan McBee, President
University of Katahdin

ZILLMAN & ROTH
ATTORNEYS-AT-LAW

President Susan McBee
University of Katahdin
Dear President McBee:

Our firm has been retained by Professor Herman Melton in connection with his employment with the University of Katahdin. We have seen your recent letter terminating Professor Melton's employment after this academic year.

On Professor Melton's behalf and at his request, we now request that you "promptly supply written reasons" for that decision.

Sincerely,

Zillman & Roth, Attorneys-at-Law
406 Katahdin Avenue
Katahdin City

THE UNIVERSITY OF KATAHDIN

Zillman & Roth
Attorneys-at-Law
Gentlemen:

I write in response to your request for the reasons for my decision not to retain Professor Herman Melton at the University of Katahdin following the end of this academic year. I fully endorse the recommendation that I received from my Academic Vice President, the senior academic officer on campus. The Vice President's letter summarizes Professor Melton's record as showing little production of quality published scholarship and below-average evaluations of Professor Melton's classroom teaching by both students and peers. Our obligation to our students and to the taxpayers of the state of Katahdin is to advance to tenure only those faculty members who show outstanding performance and potential in both areas. I regret that Professor Melton's work does not meet that standard.

Sincerely,

Susan McBee, President

To: Zillman & Roth, Attorneys
From: Alden White, Private Investigator
Re: Professor Herman Melton

At your request I have "nosed around" the University of Katahdin campus to gather information on your client Assistant Professor Herman Melton. For a relatively new member of faculty, Professor Melton has a visibility that is most impressive. I read several issues of the campus newspaper. In two issues Professor Melton had letters to the editor taking a strong position against hunting and urging students to make their anti-hunting views known to the Katahdin Legislature. I also saw several other letters discussing previous hunting comments and speeches by Professor Melton. The letters both sided with and opposed Professor Melton's views. The most recent issue of the paper contained an editorial supporting the Melton position against hunting. The editorial included a sentence mentioning "campus rumors that Professor Melton's views may cost him his job."

I used the editorial as an excuse to open discussions with several students at the Student Union. Two of the students had taken classes from Professor Melton. One was strongly supportive of him. The other was lukewarm at best and made it clear that, as a hunter, he was distressed by Melton's views.

I then attempted to contact members of the Sociology Department. Most professors refused comment. Two confirmed "off the record" that Professors Henrici and Melton have been at odds for most of Melton's time at UK. Neither faculty member indicated a willingness to testify on the matter. Neither seemed a strong Melton supporter, despite their harsh words for Henrici's "dictatorial style" of leadership as Department Chair.

Hope this is helpful. I remain available for further work on this and other matters. My bill is enclosed.

To: Professor Melton's Attorneys
From: Martha Baca, Law Clerk

At your request, I did some searching through U.S. Supreme Court cases that may be relevant to our situation. You already have *Board of Regents v. Roth*. Add to that the later opinion in *Mt. Healthy School District v. Doyle*, attached.

Thanks for the chance to work on this. Although I did my undergrad work out of state, Professor Melton is quite a well-known name on the UK campus. His fame has even reached the cloistered halls of UK Law School.

MT. HEALTHY CITY BOARD OF EDUCATION v. DOYLE, 429 U.S. 274 (1977)

JUSTICE REHNQUIST delivered the opinion for a unanimous Court.

. . . .

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons

of bitches," and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum – on a subject which he apparently understood was to be settled by joint teacher-administration action – was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of the reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters, which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by reference to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment" and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with back pay. The District Court did not expressly state what test it was applying in determining that the incident

in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief per curiam opinion.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with back pay.

The District Court made the following "conclusions" on this aspect of the case:

1. "If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew – even in the face of other permissible grounds – the decision may not stand.
2. A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons – the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on "'tact' – that is not to say that the 'tactfulness' is irrelevant to other issues in this case."

At the same time, though, it stated that

"[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure."

Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue, whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision – even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event. . . .

Initially, in this case, the burden was properly placed upon respondent [Doyle] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" – or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusions those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

In your previous writings, you have been part of the University of Katahdin as an employee of the University Legal Counsel who works for the university and is on its payroll. You are now in a different position. You are a private and independent attorney-at-law. You have entered into an attorney-client relationship with Professor Melton. You have done considerable work on the case. It is now time to inform Professor Melton of your factual and legal findings and to suggest what should come next. Unlike in many litigation situations, no statute or regulatory law mandates any particular form of the advice letter. However, consider the following approach to the letter.

1. *The Introductory Paragraph*. You should lay out the circumstances of your representation (e.g., "You have retained our firm to . . ."). This may seem obvious to both you and the client. However, the approach has several advantages. First, the document serves as a helpful record in the files. Imagine that three years from now, a new attorney has a similar case and

wants guidance from the firm's prior employment law experiences. Better to have the record in writing in the files than to try to track down the attorney who handled the Melton matter. Memories fade. Print remains. Second, you want to be sure that the client and the firm understand the exact nature of the representation. For example, Professor Melton may have thought he retained the firm both to contest his termination at the University of Katahdin and to serve as his employment agent as he seeks other employment. You have no understanding of the second expectation. It is valuable to clear up that point promptly.

2. *Summarizing the Fact-Finding Process*. In some instances, the client may have provided most of the facts of the case from the beginning. In other situations, like this one, you are expected to gather additional facts that Professor Melton does not know. You should carefully lay out all the fact-finding work that you have done. Who have you talked to? What documents have you reviewed? This provides necessary context for Professor Melton. This also helps to show that you have earned your fee.

3. *The Factual Story*. Lay out the relevant facts. You will make judgments as to how much detail you want to provide according to the sophistication and the interest of the client. Some clients, even sophisticated ones, may just want "the bottom line." Others will value every detail. As you have become acquainted with the mythical Professor Melton, in which category do you think he would fall? A particular question in the Melton proceedings involves how much material you should directly quote and how much you should paraphrase. You have a considerable factual record already assembled from the paper reports of the university's review of Professor Melton's re-employment. This is material that would likely come directly into evidence if the case should go to litigation. Direct quotation of some of the most relevant material is appropriate.

We would also suggest that the factual material should be presented as neutrally as possible. You may want to explain to Professor Melton that you don't necessarily believe material that is adverse to him. However, he needs to know all of the facts – the good, the bad, and the ugly – that would help decide his case. Even though Professor Melton will have seen some of the factual material, he may not have appreciated the overall case that it presents.

4. *The Law*. Having set out a comprehensive and objective statement of the facts, what does the law have to say about those facts? Gather the relevant pieces of law and apply the facts to them. Are some theories of action virtually precluded by the law and facts? Are others highly likely to succeed? Even if Professor Melton may not be a clear winner, is there a basis for negotiations with the university?
5. *The Advice*. For some clients, all that has gone before is just lawyer's work. Their question is: "Counselor, what should I do?" Don't feel insulted. Do you regularly engage your dentist or electrician in long discussions of the nuances of their services to you?

You may have a clear view of the outcome of the case. Your least happy advice may be: "Client, based on all that we have learned, I don't find that you have a basis for action against anyone. I recommend that you drop the matter." If the client presses you harder, you may need to inform her or him that your professional obligations would forbid you from bringing a lawsuit that has no basis.

If you feel that there is some merit in Professor Melton's claim, you have several courses of conduct. You may recommend beginning litigation immediately. Alternatively, you may ask his permission to begin negotiations with the university. On the other hand, you may suggest letting some time pass (being attentive, of course, to any statute of limitations issues) to see what else might develop. Consider, for example, what your advice might be if two weeks from now Professor Melton received an offer from another university for a position with tenure at double his present UK salary.

You may want to spell all of this out in the letter. We would suggest that you schedule another (and possibly final) meeting with Professor Melton to review all matters and to reach decisions on what to do next. If you do recommend a further face-to-face meeting, you should be clear about the need for the meeting and state that your final advice will come from that meeting, in addition to the advice in this letter.

CHAPTER TEN

How to Draft a Motion for Summary Judgment

For the last assignment, we return to the "sculpture" case. As in Chapter Two, you are the Assistant U.S. Attorney who filed the Complaint. At this point in the litigation, however, you have satisfied the prerequisite of a Writ of Replevin, and the court has denied Richardson's venue challenge.[1] You have also completed all your discovery, and it turns out that Richardson is unable to dispute any of your facts. In other words, you are now near the end of the litigation, and there is one last step before preparing for trial: You have the option of filing a Rule 56 motion that would ask the court to grant summary judgment in your favor. Your assignment arrives in the form of the following memo:

[1] Thus, for this assignment, we are going to assume that the sculpture was in Maine at Munjoy Galleries, that the United States requested and obtained a writ of replevin, that the United States served the writ of replevin on Munjoy Galleries, that Munjoy Galleries complied with the writ and turned the sculpture over to the United States, that the United States placed the sculpture in a secure location where it was to be held until the completion of the litigation, and that the court denied Richardson's venue challenge. You do not need to mention any of this when completing the assignment, but to avoid any confusion, those are the assumptions on which the assignment is based.

MEMORANDUM

To: Acting Assistant U.S. Attorney, Civil Division
Fr: Bill Browder, Civil Chief
Re: *United States v. Melody Richardson*

Great work with "the sculpture case." You did a wonderful job of using civil discovery to authenticate documents and prove there is no dispute about any of the facts that support our case. I especially like the way you used a Request for Admission in tandem with Interrogatories and Document Requests to pin down the absence of any contrary facts (see attached Defendant's discovery responses). In addition, thanks for telling me about the recent case summarizing the law regarding the use of Requests for Admission to narrow the disputed issues in a civil case. *Bouchard v. U.S.*, 2007 WL 690088 (D. Me. March 6, 2007).

Considering the rocky start you had in this case (when the defendant challenged jurisdiction and venue), we've done pretty well. You cured the jurisdictional problem by obtaining a writ of replevin, and the court denied the defendant's venue challenge. Now we're ready to win on the merits.

Although I realize you would like to get more trial experience, it seems to me that, with the undisputed factual record you have developed, we can win this case "on the papers" with a simple Rule 56 motion for summary judgment. That would certainly save the time and expense of trial preparation, as well as the need for Alicia Diebenkorn to travel here from Washington, D.C., in order to testify.

Given all that, I would like you to prepare a motion for summary judgment along these lines:

1. Caption: use the same caption as used previously.
2. Center the following heading: "Plaintiff's Motion for Summary Judgment and Incorporated Memorandum of Law."
3. Under that heading, write something like: "**NOW COMES** Plaintiff ("the government"), by undersigned counsel, and hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56."
4. The next heading should be: "**INTRODUCTION**."
5. Under that heading, write one paragraph that summarizes the case from the government's perspective. A theme would be nice. I strongly suggest

that you do *not* write the introduction until after you have written everything else.

6. Instead of a typical "background" section, the next heading should be: "**STATEMENT OF UNDISPUTED MATERIAL FACTS**."
7. Under that heading, include all the facts necessary for the government to win on summary judgment. The length of the factual statement is up to you, but I estimate that you need only about fifteen to twenty factual sentences. Feel free to use the facts from the Complaint that you previously drafted, but I would respectfully suggest that you do not need *all* of the facts from the Complaint. Don't include extraneous facts. For example, there is no need to include the fact that the sculpture is worth $50,000 because that makes no difference to the outcome. Instead, focus on the *material* facts (the ones that make a difference), as supplemented by any facts you need to provide sufficient background so the reader can understand what happened. As usual, I suggest you present the facts in chronological order.
8. Each factual sentence should be separately numbered. However, the rest of the brief (the introduction, the standard for summary judgment, the argument, etc.) is *not* numbered. Each factual sentence needs a supporting citation at the end, such as (Diebenkorn Decl. ¶ 2) or (Diebenkorn attachments at page 3).[2]
9. The next heading should be: "**STANDARD FOR SUMMARY JUDGMENT**."
10. Under that heading, include the following, verbatim:

> Summary judgment is appropriate where the record developed by the parties shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P.56(c). Defendant must make a preliminary showing that no genuine issue of material fact exists. *Santoni v. Potter*, 2002 WL 1930000 at *1 (D.Me. Aug. 19, 2002) (Singal, J.). If Defendant succeeds, Plaintiff must contradict the showing by pointing to specific facts demonstrating that there is, indeed a trial-worthy issue. *Id.* A factual dispute is genuine or trial-worthy only if a reasonable jury could resolve it in favor of either party. *Id. See also Rivera-Marcano v. Normeat Royal Dane Quality*, 998.

[2] Please note that in some jurisdictions, the court requires the Statement of Undisputed Material Facts to be set forth in a separate document entitled "Statement of Undisputed Material Facts." For this case, for the sake of simplicity, we are going to include everything in a single document.

> F.2d 34, 37 (1st Cir. 1993) (party opposing summary judgment must point to "concrete, admissible evidence").

11. The next heading should be: "**ARGUMENT**."
12. Under that heading, draft a paragraph that begins by quoting the Maine replevin statute. In the same paragraph, explain how that statute applies to the facts of this case.
13. In the next paragraph, use the following quotation (verbatim) to explain the general legal landscape:

> The federal government cannot abandon property. *United States v. Steinmetz*, 763 F. Supp. 1293 (D.N.J. 1991), *aff'd*. 973 F.2d 212 (3d Cir. 1992). "It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials." *Id*. Furthermore, the government's ownership interest in property is not divested by inactivity, neglect, or unauthorized intentional conduct by government officials. *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.*, 277 F.2d 308 (9th Cir. 1960); *United States v. City of Columbus*, 180 F. Supp. 775 (S. D. Ohio 1959). Congress has the exclusive authority to acquire and dispose of federal property. U.S. Constitution, Article 4, Section 3, Clause 2. *See also Allegheny County, PA v. United States*, 322 U.S. 174 (1944).

14. In the next paragraph, *apply* those general principles to the facts of our case.
15. In the next paragraph, describe the one specific case that we rely on for summary judgment: *United States v. Steinmetz*, 763 F. Supp. 1293 (D. N. J. 1991). Explain what happened in that case and why. Don't get distracted by a lot of the facts and law in that case that might not apply here. Present *Steinmetz* in a way that makes sense to someone who has never read the case. Make sure to include some pithy quotes from the case that you will use to apply the legal principles of *Steinmetz* to the facts of this case.
16. In the next paragraph, *apply Steinmetz* to this case.
17. The next heading should be: **"CONCLUSION**."
18. Under that heading, write something like: "For the foregoing reasons, the Plaintiff respectfully requests that the Court grant this motion for summary judgment."
19. At the end, include a place for the date and your signature. Feel free to use the same one as you did in the Complaint.
20. I expect the entire motion would be about five to six pages long.