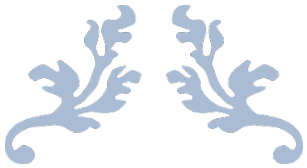

WRITING WORKSHOP

Effective Brief-Writing in the Appellate Courts

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Tips for Every Part of Your Brief

This paper is about improving your brief. We can all say that every part of the brief is important, but when the time is short to actually write, we put so much effort into locating case law, analyzing holdings, and criticizing our opponent that many parts of the Brief get but little attention. Here are some tips to help your write better.

Before you write, consider your audience.

Think about your audience first.

One of the most famous poems in American Literature is "The Road Not Taken" by Robert Frost. But, I think we misunderstand the poem at times. It goes like this – [Slide]

The writer / poet has come to a point where he must decide, and we so often credit him with great courage and determination is taking the "road less traveled" – suggesting that *we* should not be afraid to take a chance when we make decisions. When we read carefully, we see that the traveler is choosing between two paths that are "really about the same", and that his choice has made a significant difference to him.

Persuasive writing, especially when writing to judicial decision-maker is the same. It is the rare case where the Judge has but one option – one compelled path or one compelling result. More often, the decision maker must choose between two options that are "really about the same." But, the decision has significant consequences.

Persuasive writing / Written Advocacy prepares your audience – the Judge or Judges – to first of all *see* that there are two paths, and then to travel down the path that you desire – realizing fully that there will be consequences, but picking the path because it will make a difference. If you let the decision maker believe that there is but one path, you may force a decision you will regret. If you suggest that there is but one path, your experienced decision maker will be suspicious of you.

Why does a lawyer forget about the audience?

Lawyers on both sides of appeals tend to be entrenched in their position. They are always right. They want to prove that they are right. But, trials, as a

means of getting to truth are messy things. Trial lawyers pick and choose facts, law, arguments that they think helps their case. Apart from their ethical obligations, they will do everything to support their side of the case, and to ignore or destroy the other side's version.

Looking at the results of a trial is a lot like watching a Fixer Upper – our claim to fame in Waco, Texas. Like trial lawyers, Chip and Joanna only work on the parts of the house that they want you to see. Like trial lawyers, they are banking on you being totally focused on the ultimate "Reveal" at the end of the show. We all know that there is more to see – the part of the house that they didn't work on. Appellate Judges, I think, know the same thing about their cases that they review, and they will often focus on the things that you really didn't want to talk about.

What is the Judge's view of what is going on?

Judges may not know every fact that brought the case to court, but they can clearly see everything that has happened in court. It's in the record. Judges quite often come to an argument well prepared, ready to ask questions.

Whether you believe that a particular judge is leaning in your direction or leaning the other way, the job is the same.

Think about it this way: You walk into a dressing room, and a woman is struggling with a necklace. The chain is completely knotted. She is trying to unknot the chain, but cannot seem to find the right direction to pull. You, of course, cannot ignore the knots. You want to pull harder. You are sure that you know the way to get it straight, and looking proper.

That's what trial lawyers hand to appellate lawyers. A knotted chain that the trial lawyer insists looks fine. But, you know it's not fine. And, the judges know it's not fine. It is your job to help the court unknot the chain. Don't insist on taking it out of their hands. Don't pull hard because you are frustrated. It's not your necklace, and when you are writing a brief, you are writing for the Court.

Helping the Court

So, what is it that you do to help the Court? The first rule of writing is simplicity: Not simple thoughts, but a simple expression of your thoughts. Only by making things simple can we make them memorable and

persuasive. Simplicity marks the master. Some examples that I first heard in an Irving Younger speech on simplicity: [SLIDES]

Those three passages use a total of 153 words, not one of which might not be spoken in ordinary conversation. One word of the 153 contains four syllables, five contain three syllables, 35 contain two syllables, and 112-almost three-fourths of the whole-are words of one syllable.

For the curious, the Robert Frost poem contains 144 words, and none of them is more than 2 syllables, and none of them are words that would not be used and spoken in ordinary conversation.

Simplicity has three virtues to aid in persuasion. First, it is lucid. Much of what lawyers say is incomprehensible. Here is an example from an article in a leading law review about entrapment, a doctrine familiar in criminal law. It's in a footnote: "However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute inappropriate police conduct." What does that mean? Maybe nothing. And if it does mean something, you can discover the author's thought only by working through the complexity of the sentence. If we expect to be understood, we must be lucid.

Second, simplicity is candid. Lawyers and judges should call things by their right name and state the real reasons for what they do. Only then will it possible to engage in intelligent analysis and criticism, resulting in the exposure and correction of error. Yet, many of us have fallen into a habit that dishonors candor. We do not call things by their right name, but by elaborate wrong names. We explain our decisions not as what they are, but as something else – easier and always more complicated than the truth.

Then there is Ockham's Razor - Given two ways of saying or doing or explaining something, one simpler than the other, always prefer the simpler. You might put it this way: don't make it more complicated than it has to be. That axiom applies in all intellectual work. Philosophers, mathematicians, scientists, use it to this very day. The simple is more likely than the complex to be true.

Your job in persuasive writing is not to author an opinion. Judicial opinions are poor examples of persuasion because judges fashion the story of the case

in a neutral manner, or maybe slightly slanted so that their decision seems reasonable. They have no responsibility to convince their reader that they are right…they are right because of who they are. Your job is far different. You must tell your story and fashion your arguments to persuade the reader to take a particular course.

That is, ultimately, why legal writing is poorly done – a failure to consider and respect the audience. Consider this legal document: [SLIDE]

The author of this accident release form must have known the audience for this piece of work. It was people who had recently experienced a stressful incident, but the lack of compassion for the audience is staggering. The legal document consists of ***one*** bloated sentence, replete with unhelpful and unnecessary legalisms. Unless the writer intended for the reader to abandon all hope, skip over most of the text that the writer took some pain to craft, and sign anyway, the writing must be deemed a complete failure. And, even if the writer was ***hoping*** no one would read this, it is still a failure, because all that is accomplished is to fuel the dark suspicions that lawyers cannot be trusted.

The Theme of your case.

Your theme needs to catch the reader's interest.

Picture yourself as a Judge…what would you say if one of your colleagues walked into your office and asked:

"What are you doing?

"Reading a Brief"

"What's the Case about?"

Does it matter if you hear, "Drug Company claims immunity from liability even though it obviously could have produced a safer product." or would you rather hear "Guy gets a life-saving drug and complains about minor side effects".

Your job is to manage that two-sentence phrase that the Judge uses to describe your case. These aren't necessarily the right way to characterize

the case, or even ones that you might want to use, but you can see that it has to make a difference.

So, you will spend your time thinking and reading with the goal of finding that overriding idea that makes your argument. Resist the temptation always to be down into the weeds, and dealing with only the facts or law or the comparable cases. Take your impressions, and make a big idea – a theme – about why your side should win.

What is a good theme? Here's the one from *Brown v. Board of Education.* [SLIDE]

Focus on the product, service, or industry involved.

The more you know, the more likely you are to sell something. It's sometimes hard to know what it is you need to be informed about. Is it oil and gas land practice, is it customs or standards in the industry, is it fracking? You have the luxury of time to study, to understand, and to be an expert on a non-legal topic in your case, and to thereby *help* the judges who are to decide your case. Let me read you something from *Gideon v. Wainwright* (right to counsel): [SLIDE]

The practical experience of a practicing lawyer helps the court to understand not just the theoretical role of counsel, but the tasks that counsel performs that make the process fair, that make the result reliable, that make the system adversarial. An adversarial system needs lawyers on both sides in order to work.

Your theme is a slogan – pithy and memorable.

Advertisers, poets, songwriters all know the same thing. If you have a memorable chorus or refrain, then the ad, the poem, or the song will be memorable, and likely successful. Catchy phrases work in legal writing as well as they do anywhere else. Of course, you have to be serious about your slogan or tag-line; these are serious matters under discussion. But, that doesn't mean that you don't put a short-hand phrase for your position to work.

In the *Pentagon Papers* case, the Nixon administration sought to prevent the publican of information about the war in Vietnam. It was a prior restraint case. The Brief in that case says – [SLIDE]

Your case in six words.

At the risk of intensifying the debate on word limits, I will say that you cannot argue your case in six words, but you can catch my interest in your case in six words. Here are some examples:

Before you begin to write, boil your case down to the essential. [SLIDES]

The Issues / Question Presented

The Issue as a question.

Some courts expect the Issues in the case to be presented in the form of a question. Where that is true, you should present a question to be answered by the ruling in the appeal. Follow tradition or local rule where required. But, realize that this has to be the weakest method to present the issue. When you pose a question, especially one that can be answered "yes" or "no" you must be prepared for the reality that your reader may internally answer the question before reading the argument. Having a reader who has already decided the right answer is not the one you hoped for means that persuading your reader has become more difficult.

If you must, try to state the question in a way that the answer is suggested. You can do this by beginning the question with an obvious proposition with which all would agree.

Here is an example. [SLIDE]

An affirmative statement of the issue in the case is more likely to bend your reader.

With an affirmative statement of the issue, you are urging the Court to accept your statement of the proper disposition of the case. It is a sentence that, if it were written in the opinion, would be a sure indication that you won.

In fashioning an affirmative statement of the issue, here are a few things that are helpful:

1. Make it a single sentence if possible.

2. Make it short, if possible.

3. Tie your statement to your theme

4. State the Issue Narrowly – you only need to win this case.

Here is what I am talking about – [SLIDE]

An argumentative statement can be persuasive.

An argumentative statement is longer, but it contains more about the case and is often a better way of putting the issue before your reader. You begin with a global statement, apply the facts to that statement, and then suggest how the case should be decided.

Here is one. [SLIDE]

The Statement of Facts is the story of your case.

Here are some basic rules that make your story easy to follow:

1. Do not use Acronyms or initials.

2. Do not use Petitioner or Respondent or similar procedural designations.

3. Use names if at all possible.

4. You can use nicknames (the insurance company, the driver, etc.)

Where to start your story.

ESPN, the nightly news, and the National Enquirer all understand that the highlight of the story goes first. If in your brief, you tell the story of the case in strict chronological order, or in the order that the witnesses testified, your reader will become bored very quickly.

Every story has a highlight. Shine the light on that highlight first, and then tell the reader how this happened.

Every story has a point of view. Goldilocks and the Three Bears is told very differently from the viewpoint of Goldilocks (the tired, hungry and lost

traveler) than from the viewpoint of the Three Bears (the burglary victims who come upon their trashed home).

The beginning of your story, the highlight you choose, and the viewpoint emphasized all are tied to your theme. Ask yourself first: What must my reader believe in order for me to win? Then ask: What story must I tell in order to get my reader to that belief?

You don't tell the story by the witness, by the exhibit, or by stipulation. Usually, there is a primary source for the key facts, and you tell the story through that key witness, or document – supporting it with corroboration or duplicates.

Which details matter?

We all know that some things in the story are very helpful to your preferred outcome. Your writing, your argument seeking to help your reader reach your preferred result must shine the light on these helpful things. Let me give you an example. We all know the Aesop Fable of *The Tortoise and the Hare*. In the story, there is a challenge race won by the plodding tortoise, and the moral of the story is "Slow and Steady Wins the Race."

There are a number of animated versions of this simple story. Invariably, the animators use the power of pictures to shine the light on certain aspects of the story. The tortoise is often introduced smoking a pipe – like some middle-aged dad from the 1950's. He wears a bowler hat, he speaks slowly and appears just a little slow on the mental uptake. The hare is often introduced with a cigarette dangling from his mouth, wearing tennis shoes, and a leather jacket. He talks fast and seems to be ethically challenged in his encounters with others in the story. So, the visual depiction shines a light on the story and satisfies the viewer that the result of the race is fair, that the tortoise deserved to win, and that the viewer is right to "root for" the tortoise.

The same thing may be said about any story you choose to write in order to persuade your reader to come to a preferred result. You will shine the light on certain facts, on certain basic legal principles, or on specific language in a statute or case law. By doing that, you are not demanding that your reader follows you; you are not insisting that you are right – you are serving your reader's interest in coming to a conclusion on their own.

Although it is somewhat counterintuitive and not very attractive to a trial lawyer, a brief writer knows that the personalities, appearances, and personal quirks of the characters in the story are rarely important. It rarely matters that a party is attractive or not, mean or nice, funny or boring. In a court that is deciding legal questions, the rule is the same for all of us – not for only some of us. It is fair to leave out details that might have been critical to "personalizing" a party for the jury to see.

A good writer pays attention to the perspective of the writer. Most writing is in the voice of the universal narrator – the all-knowing voice that tells each fact in the story. That perspective has certain risks. When YOU are the universal narrator, then YOUR credibility is on the line for the story that is told. It is, therefore, useful to "zoom in" on certain parts of the story and tell them in a different voice. For hotly disputed facts, you can quote testimony, and not necessarily vouch for the truth of that quoted testimony. For critical sections of a document, you need not paraphrase if it is possible to zoom in and take a quote directly from the document. For scientific or technical topics, it is not unfair to use the opinions of the experts in the case to teach the difficult topic.

When you change perspective, you do not risk the writer's credibility when it is not necessary, and deferring to the recorded knowledge of those that your reader would find it easier to believe often enhances the writer's credibility.

And, when you change perspective, you allow your reader to come to his or her own conclusions about the story and the problem presented instead of forcing the reader to either accept or reject the writer's opinions.

Charts, graphs and pictures help.

Which of us has not read a magazine article, or web page that did *not* have pictures, graphs or charts? The complexity of life today virtually demands that readers have these aids in almost every case. Whether it is a simple map, a chart introduced into evidence, a picture of the intersection. All of them make the story easier to follow.

Given that the use of graphics is relatively new, one would assume that there is a limit. Briefs are not graphic novels or comic strips. Not every assertion needs a picture. Nor is it advisable to attempt Newsletter formatting in a

brief. I suggest here that you should not *avoid* useful graphics where it is painfully obvious that they would be helpful.

Summary of the Argument

It's more important than you think.

Experts have called an appellate brief's summary of the argument "the most important part of the brief," its "structural centerpiece," and "your first serious opportunity to argue the merits of your appeal." Yet some advocates draft the section hurriedly at the last minute, and others struggle with how to frame it effectively. For example, Justice Samuel Alito has stated, "It's the first thing I read." Judge Ruggero Aldisert observed that after the appellant's issue statement and the trial court's opinion, appellate judges generally turn to each side's summary of the argument. He pointed out that the summary "will likely create the first, and perhaps last, impression of the Court toward the legal merits of the client's case." Justice Antonin Scalia and Bryan Garner counseled, "[D]on't omit this part—and give it the attention it deserves."

Two purposes are commonly identified for the summary of the argument. The first is to inform the judge about the content of the brief. Judges do not want to read a mystery story, so the summary should provide an overview or "road map" of the argument section. And because the summary may function as a memory aid if some time has passed, the advocate might write it as if the judge will read only that section.

The summary has a second purpose: to capture the court's attention and begin to convince it to rule for the writer's side. The summary section can "be both more dramatic and more argumentative" than the introductory parts of the brief. It "provides the 'flavor' of the case," piquing the judge's interest before the more thoroughly developed argument section. Here counsel can introduce the brief's theme, priming the judges to see the rest of the brief in a chosen light, and "control[ing] the 'feel' [they] get from a case."

Accordingly, the summary should "go beyond mere assertion," and be appealing, not dry. As Judge Aldisert advised, "You'd better sell the sizzle as soon as possible; the steak can wait."

Experts agree that the summary should be short, without excessive detail.

Because the table of contents and the point headings also provide an overview, a lengthy summary of the argument may irritate a judge by seeming repetitive.

The opening lines introduce your theme.

Fisher v. University of Texas at Austin was an equal protection case in which the petitioner alleged that she was unfairly denied admission to the University of Texas because the university considered race as a factor in admissions decisions. Fisher, who is Caucasian, alleged that although she was qualified for admission, minority students were admitted in preference to her, in violation of the Equal Protection clause. The Fifth Circuit held that the university's procedure was constitutional.

On Fisher's appeal to the Supreme Court, her summary of the argument began this way - [SLIDE]

This opening introduces the brief's theme: that racial equality can be achieved only by disregarding race, and that a university's decisions involving race should be measured strictly.

Eminent domain was the legal subject in *Kelo v. City of New London, Connecticut*, where the petitioners opposed a local government's taking of private property for use by a commercial entity. Their summary of the argument opened with an appeal to Americans' emotional attachment to their homes: [SLIDE]

Displays of the Ten Commandments on government property were challenged in *Van Orden v. Perry*. In *Van Orden*, the petitioners, who opposed the Ten Commandments display, appealed to emotions against the establishment of religion: [SLIDE]

Defending the display, the respondent also evoked emotion by citing Texas tradition:
[SLIDE]

The endings of the Summary of the Argument reinforces the theme.

In addition to the opening of a piece of discourse, the ending is another key position of emphasis. A striking conclusion to the summary of the argument

drives home the theme. Here's what I mean: [SLIDE]

The Conclusion or Prayer

Make a definite request for relief.

Don't make the Court guess about what relief you want. Reverse and Remand? Reverse and Render? Affirm? Whatever it is, say it clearly in the Brief.

This is especially true if one error would warrant rendition of judgment, and another would warrant a new trial. Clear statements about what judgment should be rendered if the Court accepts specific arguments saves time, and reduces the chance for confusion.

Say something different.

You know you have been itching to find the right place to quote Thomas Jefferson in your brief. You know you wanted to talk about the disastrous consequences of an adverse ruling. Here is where that belongs. In your conclusion, say something you haven't already said.

There is danger here. Your reader is likely tired. Your reader may not even get to the last page. Therefore, saving your best argument to the last page is not a particularly wise strategy if you are a writer who cares about your reader. But, if you say something new; if you conclude in a memorable fashion, it has a chance of leaving a lasting impression. So, shoot for that last memory.

Control the Court's impression of your case

It may be boring to conclude with "Please reverse and render" or "Please reverse and remand." But, that boring ending is at least better than a reiteration of what you have already said. If your brief did not engage the reader through the first 13,500 words, an effort to summarize them in this conclusion will likely aggravate your reader. Better then to just use the conclusion to answer this question:

What do you want the Court to do, and why should they do it?

That is better than a reiteration because at least with a simple conclusion you

have reserved some control over the Court's impression of your case. If you try to write a 500-word summary of what you have already said, you risk a reader who thinks the writer is showing disrespect, who does not trust the reader, or who thinks the writer lacks confidence in what was written in the preceding 13,500 words.

Organizing the Argument

Headings are helpful.

Every argument should have a heading to it, whether it is a restatement of the "Issue presented" or a subpart of your discussion of that issue. Headings are helpful. They make the reader's job easier. They reduce the pain of reading about your grievances. Write them like you are writing the Title of a Book or Movie.

Using Headings accomplishes 2 things:

1. It provides a road map to your thinking about the case
2. It provides an opportunity to be memorable.
    a. Repetition of the same word
    b. Using alliteration (same letter or sound)
    c. Using single words as pictures
    d. Using factors, elements or emphatic legal words
    e. Repetition of the theme

There is a way to organize your paragraphs.

Now, you need to start putting to paper the argument you intend to make. Here is how to do that:

1. Start by stating the issue you are addressing in a neutral fashion.
2. Say when the issue came up at trial, and how it was preserved.
3. Make a clear reference and description of the Court's ruling.

4. If you haven't done so in a global fashion, state the applicable standard of review on appeal.

5. Say specifically what you expect the Court to do.

6. State the reasons you are right.

    a. What facts are peculiarly relevant?

    b. What is the applicable Legal Rule?

    c. What cases or statutes provide support for the rule you have stated? (with statutes or rules, set out relevant portion verbatim)

    d. What are the consequences of the ruling you are requesting?

    e. Say what you need to in order to respond to the opposing party's position, but concentrate on the strength of your position.

7. Conclude your argument on this point memorably, and transition to the next point.

A real sentence outline will write the brief for you.

If you approach brief writing as a 30-day project instead of a 3-day project, you will be able to take advantage of the fleeting thoughts that pass you by during the time you have to write. All of us experience this, but we trust our memory, or our note-writing to keep our thoughts in a single place – which we will ultimately visit when the time to write is right.

Try a different method. Write an outline. It begins with the issues you want to argue. It gets better as you provide more detail on how those issues could be made into winning arguments. It gets better when you apply a structure to your ideas. It is close to finished when you have a sentence that prompts you to expand each separate thought supporting a single issue.

Writing a sentence outline gives you the kind of writing prompt that sends you along an organized path. You will then find that your research is finding cases to support your argument, rather than wandering among a raft of computer searches for inspiration. You will also find that you have less

verbiage reciting the facts and holdings of cases, and more verbiage that helps your reader.

Editing Your Work

You cannot expect to edit your brief completely on a single pass through it. Be organized about your editing work. Here are three steps (you can use more) to systematically edit your work.

At least, use spell check and Grammarly.

It is painfully obvious when a writer has not bothered to check spelling. Spell check is not perfect, but it catches a lot of obvious errors. It's free and requires little input from you. Use it.

Grammarly is a computer grammar checking program. It's available on the internet, and you can pay a relatively low fee to use a more advanced version. The point of this program is to find grammar errors that you normally would locate, but you can't even see anymore because you have read the brief so many times. Drag the file to the Grammarly website (www.grammarly.com). It will work on your file while you wait. It suggests changes – which you can accept or reject. It saves the file to the website, and you download the corrected version to your computer. You have just edited your brief.

At some point, you have to check your citations.

As tedious as it may be, you have to check your citations. Lexis Advance will give you a report if you upload your brief. But, that will only tell you if the page number and name you have cited is correct. That may be enough for those who are consistently in line with technically correct Bluebook format. Incorrect page numbers or case names infuriate the reader that is trying to evaluate your argument. So, at least make sure that your reader is given sufficient information to find the source that you are citing.

Before you finish, read your argument for consistency.

Before you file a brief, read it for consistency. If you have planned your writing with a sentence outline, now is the time to make sure that outline is logical and internally consistent.

Now is the time to re-order your arguments so that your best argument is up front. Now is the time to drop the weak argument(s), especially if you need the words to meet a word count limit. Now is the time to make sure that the headings move the argument forward, and help the reader.

And, at least one editing pass should be devoted to creativity. Maybe you have finally come upon a pithy and memorable statement of your theme. Maybe you can improve the opening or closing lines of your summary. Maybe you can better state the Issue Presented. Leaving these until the end shouldn't force you to rewrite the whole; it should improve the whole.

From Brief to Oral Argument

Oral argument requires a plan. Many experts have told us that we cannot write out an argument and read it during the time permitted. But, as painful as that might be to watch, it is even worse to go into an oral argument without a plan.

The first plan is to choose the issue(s) to argue.

Even the advocate who presents 3 or less "issues" in the brief will be lucky to mention all of them. Think carefully about what would most concern the court. And, know which issue is your weakest. Those two things (concern for the consequences of the ruling, and weak issues) are the ones that the panel members will talk about.

While you may not refuse to talk about a particular issue, you can make your best effort to keep the panel talking about the issue you *want* to talk about. In your first moments, tell the panel what you intend to address. Sometimes, they will let you have at least a part of the allotted time to say what you want to say. When given the opportunity to control the oral presentation, take full advantage – again by planning what you will say if the panel lets you.

The facts are actually quite important.

It is common for the court to dispense with a recitation of the facts at the beginning of oral argument. The panel is familiar with the facts and appears to want to talk about the law. Resist!
The facts are what makes your case different from every other case in the category of cases. It may be true that there is a common thread of analysis for most employment cases. If you let the court wedge your case into a

particular category, you can only expect the particular result that usually follows. For example, if you let the panel believe that this is a "sufficiency of the evidence" case for the appellant, you're probably going to lose – those cases don't get reversed very often.

The argument that leads the panel to believe that the case is different from the "run of the mill" case is the one that gets attention, and perhaps a different result. The facts make the case different, so never let loose of them – even if you have to wedge them into law arguments.

Make the opening of your argument count.

Watching or listening to oral arguments reveals one relatively consistent truth. Panels do not routinely interrupt counsel with questions right after "May it please the court". There is often a lapse of time between the formalities of beginning the argument and the time that questions begin in earnest.

That is *your* time. You get to say what you want to say about your case. And, whether it is the facts or your view of the law that will drive the panel to a preferred result, this short time is the time that you will most likely be able to distinguish yourself and your case. Don't be caught in a pregnant pause – waiting for a question.