Chapter 11

Brief-Writing: The Appellee's Perspective

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I. Introduction

In the English common law of the early seventeenth century, it was considered scandalous to write a brief before oral argument. Since that time, the importance of the brief has changed dramatically. In most courts today, about two-thirds of the cases are decided on the briefs alone. Before the late nineteenth century, the appellate advocate could argue for two or three days, or at least several hours. Today, by contrast, you must write a good brief to earn the privilege of even a 20-minute oral argument.

Most judges report that the briefs determine the outcome in about nine out of ten cases. Because oral argument is waning, the brief may be your only chance to state your position to the court. Even when oral argument is permitted, the oral argument is soon forgotten, but the written brief remains with the court while the opinion is drafted. The importance of the brief, therefore, can hardly be overstated.

Most of the tips for writing a good brief apply equally to an appellant and appellee; but the parties' different appellate positions trigger different standards of review and presumptions. These permit different strategies and techniques in writing the appellee's brief.

II. Preparing to Generate the First Draft of the Appellee's Brief

Although many lawyers do not recognize it, the first draft of the appellee's brief usually can be—and should be—started *before* the appellant's brief is filed. The reason is that many arguments in support of the judgment can be anticipated, regardless of the issues raised by the appellant. Moreover, beginning the appellee's brief before reviewing the appellant's brief ensures that the appellee develops its own theory of the case as to why the judgment is correct and should be affirmed.

A good place to start is to ask yourself, "Why am I writing this brief?" Simply answered, the purpose of brief writing is to persuade the court to decide in your client's favor. Before you can persuade the court to decide in favor of your client, you must inform the court about your case. You both inform and persuade by addressing the two audiences your brief must serve: the judge and the briefing attorney. The judge is the decision maker, who will be significantly influenced by the facts in the record that show justice is on your client's side. The judge primarily wants information and help in reaching a decision. By and large, the briefing attorney will then be responsible for reviewing the authorities and the arguments in the brief to confirm a doctrinal justification, as reflected in a drafted opinion, for the court's decision. As a result of this purpose, the brief has three functions: (1) to do the things that oral argument cannot do; (2) to help the court write the opinion; and (3) to set forth your theory of the case as to why your side should prevail.

With regard to accomplishing the first function—what oral argument cannot accomplish—the brief is the court's first impression of the case and its introduction to the case. In addition, it reveals details about the facts and the law that the ear cannot follow.

With regard to the second function—to help the court write the opinion—the brief must read like a good research memorandum. It must state the facts accurately, provide record references, be complete even with regard to the other side's facts, and answer the court's natural curiosity about collateral matters. The brief must provide accurate and complete citations of the law, as well as deal with opposing cases. The brief also must cover responsive arguments, include relevant text that should be quoted, and be indexed and spaced so that it is easy to read.

The third function—developing the theory of your case—is so critical that it merits a lengthy discussion.

A. The Theory of the Case

Because the court is busy, the judges want to know the minimum amount of information necessary to move the case through the system. To move the case by reaching a decision, the court needs to know the nature of the complaint, the standard of appellate review, the relevant facts, and the policies implicated by those facts.

Before writing the brief, therefore, you should develop a theory of the case, which is the view of the case as a whole that you want the court to have. The theory is necessary to limit the issues, to classify the facts, and to persuade the court of the justice of your client's position. A good theory is simple, is interesting, is supported by the facts, is supported by the law or trends in the law, has equity on its side, reveals the future implications of the decision, and is receptive to the particular court hearing the case.

A good approach to conceptualizing a theory is to put yourself in the place of the judge. John W. Davis, the most famous appellate advocate of the first half of the twentieth century, devised ten commandments of oral argument. The one that has lasted the longest—and that best applies to brief writing—is to put yourself in the place of the judge. That does not mean to put on a robe while you are writing the brief, so that by osmosis you feel like a judge. Instead, you should ask yourself, "If I were an appellate judge, what would I need to know and want to know to decide this case?" In considering this question, remember that judges are professional decision makers: whenever they face a case, they must decide it. Therefore, what they want from the lawyer is help in reaching their decisions. Judges are saying, in effect, "Help us to decide this case that you have brought into our court." The way that you can help the judges most of all is to give them information about the case.

In providing this information, however, you must never lose sight of two parameters influencing the appellate system in America today. One of those parameters is staggering volume; the appellate courts are being inundated with appeals. The second factor is a sense of justice, or at least of injustice.

No appellate judge merely takes the facts, finds the law, and then applies the law to reach a decision. It does not work that simply; it never has, and it never will. Every case can be distinguished from every other case. Law students spend the entire first year of law school learning how to distinguish cases. You have, of course, heard the old observation: "Although there is a distinction, it doesn't make a difference." It makes no difference because—given the view of justice that the court has—this particular distinction should not make a difference in this decision. What tells appellate judges whether to distinguish a case is their sense of justice. "Does it make sense in this situation to apply what appears to be precedent, or do we look a little bit closer to see whether we can find a way to distinguish it or to find another line of cases that arguably applies?"

If you will remember these two concepts, volume and justice, you will find it much easier to put yourself into the place of the appellate judges. You then will be able to write briefs that help them to reach their decisions and that increase the chances that the decisions will favor your clients.

To develop a theory for your brief that takes into account the concepts of volume and justice, you can follow several steps. First, determine the facts and law upon which the parties agree and then determine the precise facts and law upon which the parties disagree. If the legal principles are broad, the facts are usually the dispositive part of the case; by contrast, if the legal issues are narrow, the legal issues will be the key to the brief. Stated another way, the facts are usually the explicit text if you are arguing factual issues, but the facts usually are the subtext if you are arguing legal issues. In either case, your theory should be the organizing principle of the brief. It should classify the facts and law to put them within an articulable description of justice.

At a minimum, therefore, your theory of justice must arise from the material facts and law. Since the material facts and law depend on the issues to be raised, you need to identify those issues early. But the issues

to be raised also depend on the facts and the law. How do you break this circle? You realize it is not a circle, but a spiral. Few cases are unique, and even unique cases have analogies to prior cases. Initial legal research will start your climb toward a theory of justice that fits the facts of your case.

B. Initial Legal Research from the Appellee's Perspective

1. The importance of the standard of review

The appellee must quickly identify the precise standards of review applicable to the anticipated appellate issues. The controlling standards of review will dictate the theme for the appellee's brief. Since the standard of review usually—but not always—favors the appellee, look for cases that have applied the same standard to affirm judgments.

2. Background substantive research

Unless the anticipated issues are within the existing knowledge of the appellee's counsel, it is wise to begin with background research into the issues. Gaining familiarity with the basics of the areas of law involved will enable the appellee to approximate the most likely position of the judges likely to hear the appeal. In addition, it gives counsel the ability to cross-designate and review the record with an eye toward what will ultimately be relevant to the appellee's brief.

One recommended procedure is first to read all briefs in the court below. While reading them, make notes of any other arguments that come to mind. Perform some basic legal research (read an annotation, treatise, or article) to gain familiarity with the pertinent area of law, unless you are sure you already know enough to spot all potential legal issues. In a large case, you may wish to prepare legal memoranda discussing both sides of the issue, and do this while the court reporter is preparing the record. Then, when the record is available, you can easily plug in the factual references and concomitantly convert the legal memoranda into drafts of the argument part of the brief.

3. Procedural research

Some procedural research may be necessary if there likely will be questions about preservation of appellate complaints or other unusual events. Because the court will rarely consider waived issues, a bit of research into preservation can sometimes lead to a summary affirmance.

C. The Appellate Record from the Appellee's Perspective

1. The importance of the standard of review

Unless you know the controlling standard of review, you may not know what parts of the record are required to affirm the judgment, or even to prevent rendition. For instance, there may be disputed facts. As the winning party at trial, the appellee may be able to prevail on appeal simply by demonstrating that the facts were disputed. Therefore, you should always review the record in light of the standard of review.

2. Cross-designation of the record

Usually the entire record will be forwarded to the appellate court; but some jurisdictions permit the appellant to designate only a partial record, with a corresponding presumption that anything omitted is inessential to the appeal. In this situation, the appellee will almost always want to cross-designate the remainder of

the record. There will be many instances when another part of the record will prove invaluable to demonstrating harmless or invited error, or some other matter supporting less relief than the appellant will request.

3. Mastering the clerk's record of pleadings and documents

Obtain a copy of the clerk's papers from the clerk and have an assistant ensure that everything requested is actually in the record. Also verify the numbering sequence against the proper chronology. Mistakes do occur. If the record is in order and complete, then it is time for you to master it. Review it while making notes about it. You can usually ignore discovery in the transcript, unless discovery issues are in dispute. Answers to interrogatories and request for admissions will not be relevant unless they were read into evidence at trial, in which case they will appear in the reporter's record. (An exception, of course, would be an appeal from a motion for summary judgment.)

I suggest that you flip through the record to see which pages have substantive information that is likely to be of importance. I usually create an abstract by page number of the information. During transcription, my assistant can then note the document in which that information is contained. Frequently, the primary items for future reference will be the live pleadings, the jury charge and verdict, and posttrial motions and responses. Whatever I determine to be the key documents are usually collected for a smaller folder containing the record excerpts to which I refer while drafting the brief.

As with any abstract, you can also assemble a topical variant that consists of separate abstracts for each issue. The ultimate goal is to reduce the massive record into smaller and smaller chunks that can be assimilated as you draft the brief.

4. Mastering the court reporter's record and exhibits

Although many lawyers turn the record over to a junior associate or legal assistant, the best appellate lawyers believe there is no substitute for having the lawyer in charge of the appeal read the entire record or, at a minimum, the parts that will be germane to the appeal. For the appellee, this usually means the entire record, since there may always have been some remark, ruling, or testimony that could render a potential error invited, waived, or harmless. An experienced lawyer will notice things in the record that a less experienced lawyer will not. Many of these will put an issue or ruling in context.

Also to be avoided is the temptation to trust the trial lawyers' recollections about the witnesses' testimony or the important parts of exhibits. If the entire exhibit is in evidence, then any part of it can support the judgment, regardless of whether it was emphasized through testimony. The presumption, perhaps a legal fiction, is that the jury will read through all the exhibits before reaching a verdict. Thus, it is particularly important for the appellee's counsel to study all the exhibits while looking for kernels that might support the verdict or mitigate an appellate complaint.

To master the record of testimony, you should abstract it. This requires reading the record, noting the volume and page numbers, and summarizing what is reported on the page. I usually also include descriptions of the exhibits as they are admitted or rejected. Rulings are easier seen in capital letters. Remarks of counsel can be italicized, so that they are not confused with the evidence. Especially important matters can be bold-faced, and brackets can be used for editorial comments.

One way to do this is by dictation; another is by highlighting and letting a trained assistant then create sentences out of the highlighted material. Another method is to use software that expedites abstracting. You should use whichever method is most effective for you.

Once the master abstract has been prepared, you should consider preparing issue abstracts after the appellant's brief is received. These are separate abstracts focused on each issue. Again, the goal is to reduce the massive record into bite-sized bits of information that can be readily used in drafting the brief.

D. Brainstorming and Legal Analysis from the Appellee's Perspective

Never shortchange the analytical process of developing a theory of your case. It is the hardest part of drafting the appellate brief, but is also the most creative and important. Think and outline *before* you start writing. When you have developed a tentative theory, test it against the hallmarks described in part A, above. If it passes that test, see whether it persuades others. If it does, only then are you ready to begin drafting the component parts of the brief.

1. Generating ideas

One of the most important aspects of brief-writing is thinking. It is also the hardest to describe to a client. After I have performed background research and read the record, I try to devote at least one-half of a day to simply looking out the window, legal pad in hand, thinking about the case. I try not to judge my ideas, but simply to generate as many ideas as possible. Some are about the facts and possible inferences or motivations that could have affected the jury or judge. Some are about the law, other research avenues, or policy arguments. "Why is this the law? Why shouldn't it be something else? Is it sensible, pragmatic? Is it fair?" Some of my thoughts may be about human nature. "Why did the parties act the way they did? What were they trying to accomplish? Why did the jury respond the way it did? Why did they believe one witness and not another?"

Many of the answers are not to be found in the record or the law. They simply are values likely to be shared by the judges reviewing the appeal. By becoming attuned to those values, a theme for the brief can emerge.

2. Grouping the ideas

Once I have generated a multitude of ideas, I try to group them into categories. Some may pertain to factual avenues to explore; some may be additional research trails; some may relate to different issues in the case. Usually I begin this process by drawing arrows to connect related ideas, and some ideas will be relevant to more than one category. Then I rewrite the ideas in groups, so that related ideas visually appear together.

3. Outlining the grouped ideas

From these groups, I begin constructing outlines. There usually will be more than one outline, for I am outlining not only the written draft of the brief, but also the thematic subtext of the written brief.

The thematic outline is based on the sense of justice or injustice that permeates the case. It can be factual; it can be procedural; it can be substantively legal.

4. Outlining the appellant's brief

The outline of the brief itself will concentrate on the actual appellate issues. As a result, the best way to begin preparing the first draft of an appellee's brief is to outline the appellant's brief. If you are the appellee, you must first summarize the appellant's case before you can summarize your own. At the outset, it will be but a skeleton of the brief to come. But there are certain issues worth exploring in any appellee's brief. These are (1) standard of review; (2) standing; (3) preservation of complaints; and (4) harmless error.

I also usually ask an experienced legal assistant to review the appellant's record references against the actual record to see if there are any blatant misstatements, and I have a junior lawyer review and check the current validity of the appellant's references to authorities.

III. Generating the First Draft

A. Assigning Sections

In many firms, more than one attorney will work on the brief. In those situations, the sections should be assigned to attorneys with a background in a particular area. The lead attorney can take the most important issue or be responsible for turning the disparate sections into a coherent whole.

B. Drafting

1. The stream-of-consciousness method

Although the standard techniques of writing generally apply to brief-writing, I recommend beginning with a largely stream-of-consciousness method. This helps to get all potential ideas down on paper. Some will later be discarded; some will be used; some will generate additional ideas.

By already having become familiar with the record and basic law, appellee's counsel can start combining the two through this method. Do not worry about including citations, and do not even worry about being completely accurate to the record. That will come later.

2. Additional research

Once your ideas are on paper, you can begin to evaluate them. This usually requires additional research into the law and record.

a. The law

At this stage, you have substantial familiarity with the appellate record and a decent grasp of the specific issues likely to arise on appeal. Now you can fine tune your research by looking to specific holdings or language supporting your position. Cases already read may need to be reread for more specific gems. Additional research into more specific topics is called for. Research the law on the issues until your sources begin to circle each other. For broad issues, begin with the digests. For narrow issues, begin with treatises. For statutes or rules, use the annotations and procedural guides. Secure boilerplate citations from legal encyclopedias. (Legal encyclopedias themselves should be cited only if the court itself cites those authorities in its opinions.)

To save time later, get the proper citation form as you research. Also, compile copies of critical authorities, for you may find the authority relevant to another point, and you will need to review the authorities before writing a reply brief and presenting oral argument. Index the authorities by topic in a research log, along with a descriptive phrase of the material holding, facts, and procedural posture.

b. The record

After you have conducted further, more refined legal research, it is appropriate to review your abstract of the record to see if specific facts fit the authorities you have uncovered. It is not unusual to find nuggets in the record that initially did not seem important. They suddenly loom large after a new case is found that seemed to turn on a similar fact.

3. Filling in the gaps

If you used the stream-of-consciousness method, then you almost certainly have left blank large sections of your draft. These blank sections required additional authority or record details. They can now be filled in. Equally likely, the new research into the law and facts will have suggested additional paragraphs discussing those items. Now is also the time to draft them.

Upon completion of this, you may still have some blanks or questions to run down. Nevertheless, your first draft is complete.

IV. Generating the Second Draft

Although the first draft is essential to getting started, the second draft is critical. It is when the mastery of the appellate advocate begins to show itself. In the remainder of this chapter, I show how each part of the brief can be drafted, against the background of volume and justice, to make it a persuasive and helpful brief—a brief that will lead the court to decide in your client's favor. The easiest way to begin generating the second draft is by its component parts. If you experience writer's block, try drafting the cover, preliminary statement, prayer for relief, or even certificate of service to get started.

Cover: The federal requirement is red for appellee, but some courts forbid red, because their clerks use a red file-stamp that would be illegible on a matching cover. Whatever color, the cover should list the cause number; the appellants and appellees; the court from which the case is being appealed; and the name, address, and telephone number of counsel filing the brief. Some courts also require that the cover contain a request for oral argument, if oral argument is desired. The cover should also identify that the document is "Brief for Appellee."

Certificate of Parties and Counsel: Most courts require counsel to list all parties, all subsidiaries, all insurers, and all counsel that have an interest in the outcome of the particular case (though a large group can be listed generically).

Request for Oral Argument: If the court rules require—or if the party fears that the court on its own motion will decide not to grant oral argument—the brief should contain a *short* request for oral argument. This should not be a naked statement that the party requests oral argument. Instead, you should use the request as an opportunity to educate the court as to the merits of the case. If appropriate, you may choose to assert that the appeal is frivolous, that the issues have been recently decided, that the record is short, or that oral argument would not aid the decision-making process because the briefs fully address the controlling issues.

Table of Contents: In the table of contents, each part of the brief should be listed, including the headings and subheadings under the argument. By tracking the different sections in the argument, you permit the drafter of the opinion to set the appellant's and appellee's briefs side by side to determine which arguments are most persuasive on any given issue. If your order of the issues and arguments differs from the appellant's, you should consider including a cross-index, so that the court can quickly locate your responsive arguments.

Index of Authorities: An index of authorities should be specifically divided among cases, constitutions, statutes, rules, treatises and articles, and miscellaneous. Listing the page numbers on which the citations occur is a convenient reference for the busy judge to determine which of the many authorities you have cited are your key authorities, because those usually have more page references than the other citations.

Statement of the Case: The preliminary statement should be very concise, usually one paragraph. Give the court only material details. Usually the statement of the case will include the names of the parties, their posture in the trial court, the trial judge, whether the appeal is from a judgment or other ruling, whether there was a jury, the relief or damages awarded, and that the appeal was perfected. Be sure to include record references.

The purpose of the preliminary statement is to give the court a bare bones procedural grasp of the case: "This is a personal injury case arising out of an automobile accident. The case was tried to a jury. Based on the jury's verdict, Judge I.M. Wright rendered a take-nothing judgment."

Again, put yourself in the judges' place. They may be sitting at home reading briefs because they do not have time to read briefs during the day. During normal work hours, they are writing opinions, talking to briefing and staff attorneys, conferring with colleagues, hearing oral arguments, or giving speeches at seminars. Thus, many appellate judges read briefs at home at night, perhaps with their televisions on, possibly with their spouses and children screaming in one ear, or maybe dealing with other distractions. Those judges want something to distinguish your brief from the five other briefs that they have just finished reading. They want a context to immediately grasp your case, so that they can quickly contextualize the factual information and legal arguments you are about to give them.

When they read that first phrase, "This is a personal injury case," many areas of law that they know are immediately discarded. They start categorizing this appeal in a certain way. The next phrase, "arising out of an automobile accident," lets them discard products liability and construction accidents. They then think of the law of automobile accidents. When you tell them, "The case was tried to a jury," they no longer have to think about nonjury trials or summary judgments and the various accompanying presumptions. The next phrase, "Based on the jury's verdict," tells them the standard of review: this will not be an appeal from a judgment n.o.v. The following phrase "Judge O. L. Wright" gives them the trial judge's name. They may then recall courthouse gossip about, or their personal experiences with, that trial judge. Not all trial judges are created equal, and not all trial judges are reviewed equally. Finally, you tell them the amount of money that has been awarded or the type of relief. This enables the appellate judges to consider the relief you may want on appeal.

Every bit of this information helps the appellate judges to contextualize what will be coming. It accelerates the process of assimilation and understanding, which helps them to deal with the volume of cases. It also helps them compartmentalize the information to come, which will help them to reach a just result.

Statement of Jurisdiction: A statement of jurisdiction is not needed in some courts of appeals, but is a requirement in others. When it is required, unless the appellant states it incorrectly, you can simply say: "The appellee agrees with the appellant's statement of jurisdiction." If you disagree, specify the jurisdictional problem and provide record references.

Issues Presented: Many judges admit that the issues presented rank second only to the statement of facts in importance. Thus, you must be careful in framing the issues. Frame the issues the way you see them, rather than accepting your opponent's characterization.

As appellee, you may choose to follow the appellant's order—but do not follow that order unconsciously. Spend a lot of time planning the order of your issues. If you have an issue that disposes of the appellant's first four issues, lead with it. (Whenever you use a different order or presentation, I recommend using a cross-index to indicate the section of the appellant's brief to which you are responding.) The order of issues usually should match your theory of the case. They can be ordered either from the strongest point to the weakest, or from the complete affirmance points to those securing less relief. To the extent possible, all points should be logically arranged and related. That is why developing the theory of your case is so important.

The issues as stated should be concrete and slightly argumentative. Overly argumentative issues are those that ignore disputed facts or the standard of review. Slightly argumentative, and therefore appropriate, issues suggest the answer but do not demand it. A useful way to accomplish this is to state the issue and then add favorable facts after the word "when...." For example: "The trial court did not abuse its discretion in excluding the defendant's tax return, when it was improperly authenticated and irrelevant without proof of gross negligence."

Statement of Facts: The statement of facts is usually the most important part of the brief. For one thing, it convinces the court of the justice of your client's position. For another, most experienced appellate judges have some idea as to the applicable law, but they do not know the facts of your particular case. A persuasive statement of facts should make the judge want to decide in your favor—without reading any more of your brief. Consequently, in writing the statement of facts, you must know the record completely.

Almost one-half of your time in preparing the brief should be spent in learning the facts and drafting the statement of facts. The law very often can take care of itself, but the statement of facts is the heart of the appeal. If the court becomes receptive to your position by the phrasing of the statement of facts, the court is going to become more receptive to the legal arguments you are making. Even with a tough argument on the law, you at least will have the judges leaning your way. They will be looking for ways around the legal problems, rather than automatically stopping at them.

Be careful about accepting the appellant's statement of the facts, even if it is complete and accurate. A good advocate should be able to redraft the statement of facts in a way that sounds persuasive to your client's position, without being unduly repetitive of the appellant's statement of facts. You also can demonstrate how the appellant has emphasized material in a manner different from the emphasis really existing in the record. Of course, if the appellant has misstated a fact, you can point that out to devastate the credibility of the appellant's brief. Usually understatement is the best way to do this, rather than flatly accusing the other party of deliberate misrepresentation.

A great statement of facts is comprehensible and interesting, neutralizes unfavorable facts, and satisfies the curiosity of the court on peripheral facts. There are certain techniques to achieve such a statement of facts. One technique is to draft the statement of facts after you have sketched the arguments you wish to make; this ensures that you raise only facts that are material to the argument. Adding needless details in the statement of facts weakens your brief, because appellate judges have a tendency to try to recall every fact that you state. When you give them immaterial facts, you distract them from the key facts. If there are inferences to be drawn or more details that are pertinent, work those into the argument section later in the brief.

Given the volume of cases before the court, you should edit, trim, and reduce the statement of facts as much as possible. Omit not only all immaterial facts, but also all immaterial details about the material facts. Nearly all cases can have their material facts stated in no more than four pages. More details than that are simply more than most judges can absorb at the outset. If you cannot state the facts within four pages, you should question whether the facts you are stating are really material. This is especially important for an appellee, since the court already will have read the appellant's statement of facts. You, therefore, should not fight over immaterial details or unimportant variations. Instead, select a few key facts to emphasize or to portray in a different light. At the same time, however, be aware that many court rules permit the court to accept the appellant's statement of facts as true, unless disputed by the appellee.

Excessive length is frequently generated by the addition of too many needless details, such as dates: "On or about such and such date this happened." Usually the dates are irrelevant, although in some cases a certain contract issue may depend on when an offer expired or an acceptance occurred. But it truly does not matter on what day an automobile accident occurred or when a contract was entered into, unless you have a statute of limitations or prejudgment interest question. The same is usually true about colors of things, what the weather was like, and the parties' full names.

Again, think of the judges reading the brief at home after having just read four other briefs. They have a large amount of information to assimilate at one sitting. All these facts are new to them, even though you have lived with the case for several months or years. The judges have a natural reaction that everything you include is

important. When you give them needless details, you overwhelm them. The information cannot be assimilated, and the key facts that show the justice of your position become lost in the torrent of details.

A second technique for an effective statement of facts concerns its organization. If the appeal is simple, or if you have successfully interrelated the issues into a thematic presentation, usually a chronological order is best. By contrast, if you have a large case with disparate issues that cannot be thematically related, then the facts can be marshaled topically. For a lengthy statement of facts, moreover, topic headings can be useful.

Similarly, when writing a statement of facts, never simply list the witnesses and describe their testimony. Instead, you should highlight the key facts and skip contextual or unnecessary details. Because credibility is an issue exclusively for the jury, the name of the witness and his expertise often is irrelevant to the appellate court unless there is a *Daubert* issue.

A third technique concerns the tone and selection of facts. Use the standard of review in writing the statement of facts. If it is in your favor, you can draw reasonable inferences from the facts in the record; thus, you can usually afford to admit the presence of disputed facts, because you are the appellee and the jury has decided in your favor. Nevertheless, the statement of facts should be different from the argument, because your credibility as an advocate is at stake. You can add certain background facts to show the justice of your position, but you should avoid the use of emotional words in a statement of facts. Instead, use clarity and organization to be persuasive. The clever use of conjunctive adverbs, such as "although," "nevertheless," and "however," can also be effective in juxtaposing information.

If the specific facts are bad for your client, you will need either (1) to manipulate the level of linguistic abstraction or particularity until you reach facts that can be stated in your favor, or (2) to show procedural barriers to the decision impelled by the facts. The force of unfavorable facts sometimes can also be diminished either by placing them in context or by stating them in footnotes. Regardless, you must be candid about bad facts, using good facts to offset them. If the unfavorable facts cannot be refuted, you should consider settling the case.

A stylistic technique to make the statement of facts interesting is to tell a story that has characters and a plot. In telling this story, it is useful to summarize the critical facts in the first paragraph. Then, in subsequent paragraphs, state the key facts in a topic sentence, adding details in the remainder of the paragraph. It is useful to give labels to the parties, rather than procedural phrases such as appellant or appellee. "Plaintiff" or "defendant" is better, and probably best is "the widow," "the bank," "the insurance company," and the like. For ease of comprehension, jargon should be explained, and you can even attach a glossary as an appendix.

Finally, the statement of facts should be neither exaggerated nor loosely paraphrased. Quotations should be used sparingly in the statement of facts. Particularly pithy phrases can be quoted, but by and large, use accurate paraphrasing. The statement of facts *must* be accurate, objective, and have record references for every assertion. No exceptions exist for this requirement. A major pet peeve of appellate judges is the assertion of facts without record references. To avoid irritating them, have a record reference for every fact. The only way to do this is to read the record. Nevertheless, you can write your brief from an abstract prepared by a trustworthy associate, as long as the final draft is cite-checked to the record and the lead attorney personally reviews key record references. You may even have been the trial lawyer, and you may think you know what the facts are, but you still must review the record to plug in those record references. It also is good technique because your memory will not be exact.

Summary of the Argument: Because of the volume of cases, most courts require a summary of the argument preceding the argument. The summary should be a succinct condensation of your arguments, rather than a mere repetition of headings. Nevertheless, the summary of the argument should not be just a mere topic sentence rendition of the arguments you make. Instead, use the summary of the argument to explain your theory of the appeal: what happened below; why did you win; why should the case be affirmed? The summary

should have no citations, unless one or two authorities are dispositive. You can also use the summary as an analytical overview to set the stage for your argument.

A proper summary provides a punchy two- or three-page overview to the busy judges. Some judges do not always get around to reading the entire briefs in a multijudge court. The case may be assigned to one judge who will do most of the serious study. The other judges may have just cursory familiarity, and they may read only the summary. Even for the judge who studies the entire brief, the summary provides an opportunity to quickly understand the heart of your appeal. When reviewed before oral argument, the summary also gives the busy judges an opportunity to refresh in their own minds what your case is about and why you should win.

Argument: Even in the argument section of the brief, excessive length is a problem because lawyers tend to believe far too much in the power of argument. Lawyers also raise too many arguments, instead of selecting their best arguments. Accordingly, you should analyze the arguments—which ones look good, which ones look weak. Under any given issue, put your best arguments first. Winnow the arguments as ruthlessly as you winnowed the issues and facts. It is a safe bet that if you cannot win on your strong arguments, you certainly cannot win on your weak ones. Also beware of arguments that are inconsistent with other positions you are taking in the same brief. Do not let your opponent demolish your position with your own arguments.

After you have identified your arguments, you must decide how to present them. The key to writing a persuasive brief is to outline the structure of your argument and make it thematic by following your theory of the case. Focusing the court on the precise legal arguments and then drafting arguments that flow together produces a persuasive brief.

A good way to approach this thinking process is simply to sit down and start outlining. Try to look for the absolute least that you must accomplish to win. For a moment, forget about all the great things you would like to do. Instead, ask what is the minimum that will produce a happy client. Organize the brief around that minimum. Grasp the least that you have to accomplish to win the case, and go all out to accomplish it. Refine the point for decision to make it small and palatable to the court. Give the court easy ways to help you.

Classify the type of appeal mentally. Are the facts in dispute? Is the application of the facts to the law in dispute? Is the law in dispute? Then brief the case accordingly. If the general principles of law are given but the facts are disputed, simply outline the law and concentrate on arguing the facts. If the facts are undisputed, but the application of the law is disputed, set forth what the law is and why it should apply by arguing policy and fairness. If it is a case of first impression or you are trying to overrule existing law, argue policy and wax eloquent.

Think also about the structure of the points and how you are going to structure the arguments within the points to make the brief effective. A well-written brief is like a chainlink fence—it is interlocking. Everything relates to everything else, and you will have many cross-references. There are several advantages to an interrelated, thematic brief. First, it is very hard for the court and opposing counsel to find a weakness when everything is tied together. Second, it makes the brief much more persuasive. Instead of sounding like a bunch of little jabs, it is a right cross to the face. Third, it strengthens arguments that are individually weak. If you think hard enough and limit your issues and your arguments, you can almost always interrelate your arguments into a theme that presents your theory of the case. To do this properly, you must winnow your arguments. The more arguments you have, the less effect any one argument is going to have. It takes some courage, and you have to communicate with your client. In many instances, you will have to sell this approach to your client. Still, it is the best way to win an appeal.

This thinking and outlining process is very time-consuming. In a big case, it can take days of very intense mental effort; but in any case—even the smallest case—you will benefit by spending two or three hours doing nothing but thinking and outlining.

Once outlining is complete, a general form for writing the argument section of the brief is to state the issue, tell how it was waived, mention the standard of review, set forth the elements or applicable law, restate the material facts, apply the facts to the law, discuss the cases or authorities, and finally present the equities and policy arguments. Argue inductively by stating your conclusion and marshaling the evidence to support it. Develop your arguments before you deal with adverse arguments. You also can deal with your opponent's subsidiary arguments or authorities in footnotes. Still, you must face your weaknesses and deal with them, unless you have no response and there is good reason to believe the weakness will be overlooked.

Rather than respond point-by-point, you should also affirmatively present your case in the argument, and incidentally respond to the appellant's argument at the same time. Avoid arguing from a defensive posture. Your biggest advantage is that you won in the court below. Use that advantage whenever you can, by turning the appellant's argument into a factual one that the appellant has already lost. Use the standard of review in your argument. As the appellee, *begin* your argument with cases in which the standard was not met.

The argument section should have headings and subheadings that are argumentative sentences. This means that they should be reasoned. They should contain some concrete facts, the law, and the conclusion in one sentence. They should be an "opinion kernel," suitable for selection as a digest headnote.

Every legal proposition should have authority to support it, but string citations should be avoided. Limit citations to those you expect the court to read. The test is materiality, not relevance. You are not trying to show how much you know, but you are trying to advance the arguments you need to make to win. Accordingly, concentrate on authorities from your court or authorities that it must obey. Secondary authorities are useful as "*see also*" cites for policy arguments. When citing cases, use only the best authority. If the best authority is not necessarily binding and is old, you may wish to add one citation to a new case that relies on the old authority to show that it is still viable.

When citing cases, moreover, cite to the specific page where the holding is located. A parenthetical explanation following the case citation is very useful. If one or two cases are especially controlling, you may devote a paragraph to their facts. You also should distinguish important adverse authorities or say why they are wrong. When facing adverse controlling cases, you can check the briefs in those cases to see whether the issues were poorly reasoned or presented.

You also should know your court. Is it familiar with this legal issue, or does it need more or an introduction to this area of the law? Likewise, can the court do what you need it to do? If it cannot overrule binding precedent, then you must argue that the binding precedent is distinguishable. Remember also that you are writing for two audiences, the judge and the briefing attorney. Thus, you need to provide more basic details for the briefing attorney, who usually is a recent law school graduate. The more experienced judge will usually skip over the hornbook citations.

If you have a sound argument, but cannot find cases addressing that argument, do not be afraid to use it (as long as you do not find well-reasoned cases rejecting it). Principles, policies, and equities will prove more persuasive than the mere citation of authority. Despite all temptations to the contrary, you should state cases completely accurately and then argue for an extension to your fact situation. Do not stretch the holding of the case itself. If the case law is inconsistent, you may have to outline the historical evolution of the cases. You also should review concurrences and dissents to see whether the rule upon which you rely is being questioned.

But whenever possible, try to give the court easy doctrinal justifications to support the decision your facts call for. You can use dialectics to argue any position, and you can find analogous authorities for any argument. Therefore, it is more important to argue principles, equities, and policies than to simply rely upon case law. Cases

get distinguished, ignored, or overruled when they lead to an unjust result. Instead of merely citing cases, use cases as examples of the justness of the principles or to show recognition of the policies that you are articulating.

You must work at this process, because you probably were trained backwards in law school. Lawyers have a tendency to rely too heavily on what the cases or statutes say. The proper approach is, instead, initially to ignore the case law and the statutes. Begin by asking yourself what is fair in this case. Articulate a reason why a result in favor of your client is just and pragmatic. Only then should you go to the authorities for support.

Appellate decisions, reflecting the common law for hundreds of years, are only the appellate courts' grappling with different situations in trying to reach a just, sensible result. Written opinions tie this into a system of law, so that courts do not decide everything *ad hoc*. But the course of the evolving common law—why distinctions are made among cases—is that the courts are trying to reach just and workable results. Maybe the facts in a prior case were just different enough that the prior holding should not control the present situation. That is when the courts make a distinction, and good courts will articulate a sound reason for that distinction.

Most lawyers simply do not argue enough policy in their briefs. You need to articulate continually the policies that are implicated by your facts. To help the court, you must provide the information needed to make just decisions. As mentioned, because the courts are busy, they do not always have time or information to discover the policy ramifications of their potential decisions.

This analysis occurs in the appellate courts; it happens in the judge's mind. You might as well take advantage of it while you are writing the brief. The best way to take advantage of this insight is to ask yourself what is fair and pragmatic under your facts and then to go to the case law, rather than *vice versa*. If your position is really fair and sensible, 99 times out of 100 you will be able to find case support. In the other one time out of 100, you will find analogies that support it. If you can articulate why a result for your client is fair and workable in your case, you will find the court accepting your analogies. You will find the court accepting the distinctions you make. Or in an extreme scenario, you will find the court overruling a hundred years of precedent to change the law in your favor.

If the lower court has written an opinion or made findings of fact, use it. Show why your case is just and why the lower court or jury adopted it. You can also give additional citations beyond those given in the lower court's opinion. Furthermore, you can attach a copy of the opinion or findings as an appendix to the brief.

Do not forget to raise procedural impediments to the appellant's issues. Search for whether error was preserved, but do this selectively by concentrating only upon clear waivers. Do not accuse the party of waiving each point, when it appears that some of the issues were preserved, even though they could have been preserved more clearly. Do not get in a position of nitpicking the appellant's brief. If you can establish a point of law by quoting from an authoritative case, quote it and move on. If you can destroy a "no evidence" point by quoting a limited amount of testimony, do it and move on.

Ironically, when the appellant's brief is poorly done, the court may look closer at the case to ensure that a party does not suffer for the attorney's malfeasance. Unless justice clearly favors your position, you need to file a strong response, but you may wish to avoid overkill in your brief—or the court may sympathize with the appellant. Try to describe the outcome as a result not of counsel's malfeasance, but of competent counsel doing the best job possible with a weak position.

Turning to style, a brief should, of course, be well written. Aside from the usual rules, the goal is to be explicit and clear. Short sentences expressing one thought *per* sentence are helpful. Always be concrete: tie your discussion to the lower court's action and the record. Use definite rather than indefinite articles. Use value-laden nouns and verbs, rather than adjectives and adverbs. Be assertive, but not strident. Use selective understatement and emphasize by restatement in different words that build to a conclusion. Then follow the point by quoting authority or the record. Use few quotations and trim them when you do use them. If part of the quota-

tion is harmful, explain it in a footnote. If you are using a block quotation, it greatly aids the reader to summarize the point of the quotation in the text as a lead-in to the quotation.

Use few footnotes, and use them primarily to list a string citation of cases from other jurisdictions, to give extensive record references, or to explain a calculation. Meet adverse facts and law head-on, and give the court a way to side with you. You can seldom ignore the appellant's weak or frivolous arguments, but you may wish to relegate them to footnotes. Boldface, italics, and exclamations should be used sparingly because they imply that you do not believe the court is paying attention to your brief. Also avoid flowery rhetoric and hyperbole. Shouting does not persuade; it merely irritates. Vitriolic attacks on opposing counsel or the appellant only backfire. Because judges are allergic to overstatement, adopt an objective tone.

Finally, be creative. You can, for example, use a table to summarize the testimony of witnesses or to show the similarity of facts in a "white horse" case. You can use photographs, diagrams, maps, chronologies, and quotations from a contract or statutes on the left-hand flap of the brief for easy reference by the court.

Conclusion: Use a formal conclusion only with a long brief and then confine it to one paragraph that flows directly from the summary of the argument.

The prayer for relief in the conclusion is often taken from a form: "Appellant prays that the case be affirmed and that the court give all other relief to which we are entitled." That general prayer does not always work. Some of your issues may involve a case in which certain damages should be disallowed or injunctive relief formed. You might have a personal injury case in which there is no evidence of future disfigurement because the plaintiff just had plastic surgery. Spell out to the court that it should subtract a specific amount of money from the damages or delete prejudgment interest in a certain amount. You may want a limited remand with instructions to the trial court. Be explicit about the relief you want. In other words, state your prayer much as you want the mandate from the court of appeals to read.

V. Producing the Final Draft

Almost as much time as was spent in planning the theory and structure of the brief should be spent in editing it. The final phase is devoted to polishing the style and persuasiveness of the writing. Here is when grammar, writing advice, and headings become particularly important.

In editing the brief, cut the length and edit ruthlessly by omitting all needless details. Edit until you run out of time. To edit your own work, it may be helpful to read the brief into a dictaphone and then play it back. If you can follow the brief orally, then it is clear. You can also ask someone else in your office who is unfamiliar with the case to read the brief to see what parts are unclear. The goal is complete transparency, so that your thoughts are clear.

During this stage, shade the facts in the argument, add transitions, and carefully revise headings. Aside from the wording of headings, determine whether all the paragraphs in a section actually relate to the heading. Then, within paragraphs, make sure that your topic sentences actually introduce what follows and that your conclusions are explicitly stated. Edit also to ensure your diction is appropriate and your grammar is correct, so that the court is not distracted.

VI. Formatting, Cite-Checking, Proofreading, and Appendices

Despite fatigue and time pressure, you must not rest with the final draft alone. Proofreading and final preparation must be thorough, else the weeks of hard work be negated by a shoddy appearance. Check your citations to the authorities and the record. Also ensure that the headings correspond to the index pages. Verify

that the authorities remain good law. Consider whether you need to use an appendix for the lower court opinion, the jury's verdict, findings of fact and conclusions of law, key cases or statutes, or exhibits that you wish the court to have readily available. Use a binding that will lie flat and that has a blank page on one side for the judges to make notes. Double-spacing, as the rules require, makes it easier to read, and a lot of blank space between headings is comforting to readers. Before signing the brief, have an assistant ensure that the copies have been made cleanly, that the pages are in the correct order, and that none have been omitted.

Some courts now require a certificate of compliance, which verifies the number of words, font size, line spacing, and the like. Consult your local rules.

VII. Filing and Service

Writing the brief is fun, but useless unless it actually is filed. Therefore, you must ensure that the brief reaches the court by the appropriate time and in the appropriate manner. Many jurisdictions have rules treating mailing on the due date as filing by that date, *provided* the court receives the brief within ten days. Under that rule, you should calendar the ten-day safety net to ensure that the court received the brief within that time frame. If it did not, then you will need to move for an extension of time, proving that the brief was timely mailed but has apparently been lost in the mail.

Likewise, the brief must be served on all counsel in the manner required by the rules. Under evolving technological advances, polite counsel will consider e-mailing a copy of the brief to opposing counsel when it is filed, in addition to the normal method of service.

Similarly, more and more courts are requiring counsel to submit a diskette containing the brief in electronic form. Some counsel are occasionally filing briefs in CD-ROM format. Predictions include a future of e-mail briefs. ©All these are discussed in the chapter on technology. Thus, you should keep abreast of changes to your local rules and technological advances.

VIII. Conclusion

Writing a brief as the appellee is often easier than writing a brief as the appellant. Except in the rare case of a ruling as a matter of law, the standards of review and presumptions usually favor the appellee. Nevertheless, writing the brief can be challenging, because a good appellant's counsel can make the case look like one of the few deserving to be reversed. The good appellee's counsel will counter this by demonstrating not only that the appellant received a generally fair trial, but also that the appellant deserved to lose on the merits. This can require some ingenuity in many cases. Accordingly, it is a skill that benefits from top-flight appellate advocacy.

Drafting an appellate brief is always hard work because it requires creativity and stamina. Yet it is one of the most fulfilling tasks of the profession, for it enables lawyers to advance the cause of justice and to improve society by advancing the debate about what rules of law should govern us all.