

**TRENDS IN TEXAS SUPREME COURT
BRIEFWRITING**

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CHAPTER 15

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TRENDS IN TEXAS SUPREME COURT BRIEFWRITING

I. INTRODUCTION

This paper is a survey of strategic and stylistic choices that advocates are making in briefs on the merits before the Texas Supreme Court. Among appellate advocates, there are a number of debates concerning briefwriting. For instance, one significant debate over the past decade concerns the form of statements of the issue. Many advocates prefer the traditional approach of framing issues in a one-sentence statement or question. Other advocates favor the “deep issue” approach of using a full paragraph to frame each issue.

The purpose of this survey is not to resolve these debates, but to identify how advocates approach these issues in practice. In the past, surveys have been conducted regarding briefwriting in Texas. But those were a different type of survey, usually in the form of a questionnaire to judges or advocates about briefwriting issues. In contrast, this survey is based on my own review of actual briefs filed with the Texas Supreme Court. It is a survey, not of opinions, but of actual practice,

Part II of this paper briefly describes the survey methodology and how briefs were chosen for the survey. Part III identifies the points of departure among brief writers in Texas and then summarizes how the briefs in the survey came down on each of those issues.

II. METHODOLOGY.

All briefs surveyed in this paper were filed in cases decided by the Texas Supreme Court in the first half of 2007. From those cases, I reviewed briefs with the following characteristics.

A. Types of briefs reviewed.

I only reviewed these specific types of briefs:

•**Briefs on the merits.** I only reviewed briefs on the merits – not petitions for review or petitions for writ of mandamus. I reviewed the briefs of petitioners, respondents, relators, and real parties of interest. I did not review reply briefs.

•**Posted on the Texas Supreme Court website.** I only reviewed briefs posted on the website of the Supreme Court of Texas, which can be found at <http://www.supreme.courts.state.tx.us/>. In the vast

majority of the cases decided in the first half of 2007, all briefs were posted on the website.

•**Full briefs.** I only reviewed briefs that fully developed an argument – not briefs that merely incorporated by reference another party’s brief or a brief in a related case.

B. Board-certified advocates vs. non-board-certified advocates.

I divided the remaining pool of 113 briefs into two groups: (1) briefs that identify at least one author who is certified in Civil Appellate Law by the Texas Board of Legal Specialization; and (2) briefs with no author who is board-certified. These were the percentages for those two categories:

Was at least one of the brief authors a board-certified appellate lawyer?

Yes	39%
No	61%

I reviewed all of the briefs by board-certified advocates. Of the briefs without a board-certified author, I reviewed a random sample of 20 briefs. Throughout this survey, I give statistics for both the board-certified group and the non-board-certified group.

I made this distinction for board certification only because I wanted to focus on trends among experienced appellate advocates. Board certification is not a perfect indicator of experience or quality. Many of the briefs by non-certified advocates were outstanding briefs, in some cases better than briefs by board-certified advocates. Nonetheless, board certification is the most objective and readily accessible marker to identify experienced advocates.

In total, I reviewed 44 briefs with a board-certified author and 20 briefs with no board-certified author.

III. BRIEFWRITING ISSUES AND SURVEY RESULTS.

Each part of this section identifies disputed issues among appellate lawyers about briefwriting and provides the results of the survey for those issues.

A. Table of contents

Some of the most interesting strategic decisions in briefwriting concern the table of contents. The Texas Rules of Appellate Procedure give only general guidance about the items to include in a table of contents. TRAP 55.2(b) requires that a brief on the merits include a “table of contents with references to the pages of the brief.” Tex. R. App. P. 55.2(b). It also states that the table “must indicate the subject matter of each issue or point, or group of issues or points.” Tex. R. App. P. 55.2(b).

Although not expressly required by the rules, most appellate advocates include in the table of contents an outline of all of the argument headers in the argument section in the brief. An outline can serve three purposes. First, the outline can help judges locate specific arguments in the brief. Second, it allows judges to see a listing of all argument headers, which can serve as a summary of the argument in outline form. Third, a detailed outline, with more than one level of substructure, allows the judge to see the logical relationship between primary and subordinate argument headers in the outline.

In the survey, I analyzed several different aspects of the argument section of the table of contents: (1) whether the briefs included any outline at all; (2) whether the outline used phrases, complete sentences or a combination of sentences and phrases; and (3) the length and levels of structure in the outline. I also examined whether the table of contents include the text of each issue presented.

1. Outline of argument vs. no outline.

The survey demonstrated that most appellate advocates are using an argument outline in the table of contents. These were the survey results:

Is there an argument outline in the table of contents?

Board-Certified Advocates

Yes	86%
No	14%

Non-Board-Certified Advocates

Yes	65%
No	35%

Especially among board-certified advocates, the use of

argument outlines was overwhelming. Only six of forty-four briefs did not include an argument outline. Five of these six briefs were short, consisting of between two and fourteen pages of argument. The authors may have chosen not to use outlines because their arguments consisted of only a handful of points.

2. Full sentence outline vs. phrase outline

Among the briefs that use outlines, there are some very different approaches to the outline. One issue is whether the outline should be a collection of sentence-length arguments, or just a listing of phrases that identify arguments.

Some outlines use only phrases to identify the different parts of the argument. A phrase-based outline serves as an index to the argument; it tells the reader where to look for a discussion of a particular subject. But it does not summarize the argument contained in the brief. The following is an example of a phrase-based outline:

1. Texas Hospital Lien Statute
2. Worker’s Compensation Law
3. Analysis

Respondent’s Brief on the Merits at iii, *Daughters of Charity Health Servs. v. Linnstaedter.*, 50 Tex. Sup. Ct. J. 819, 2007 WL 1576045 (Tex. June 1, 2007) (No. 05-0108). The headers in this outline quickly tell the reader where to find particular subjects, such as discussions about the hospital lien statute and worker’s compensation law. But they do not tell the reader what arguments the brief will make about those subjects.

A very different approach is a sentence-based outline. It uses full sentence headers to summarize the main arguments in the brief. The following is a portion of a sentence-based outline:

- I. The Supreme Court needs to correct and clarify the court of appeals’ new test for determining whether a temporary employment agency has furnished labor under the lien statute.
- II. The court of appeals erroneously construed § 53.021(a) of the Texas Property Code to grant a mechanic’s lien to a temporary employment agency that did not furnish labor under a contract for construction of the building.

Petitioner’s Brief on the Merits at iv, *Reliance Nat’l*

Indemnity Co. v. Advance'd Temporaries, Inc., 50 Tex. Sup. Ct. J. 858, 2007 WL 1650681 (Tex. June 8, 2007) (No. 05-0558). These headers are considerably longer and take more time to read. But they also provide the court with more information about the argument the brief is making. They are not mere labels that tell the reader where to find a particular discussion; they are arguments explaining why the court should grant the petition and why the petitioner should prevail.

Thus, a decision to use a sentence-based outline or a phrase-based outline is a decision about the very purpose of the outline. Phrase-based outlines tend to serve more of a pure indexing function. Sentence-based outlines typically are longer and tend to function as a summary of the argument in outline form.

These were the results of the survey regarding these different approaches:

Do the argument headers in the outline use complete sentences or phrases?

Board-Certified Advocates

All complete sentences	76%
Some complete sentences	22%
All phrases	2%

Non-Board-Certified Advocates

All complete sentences	57%
Some complete sentences	36%
All phrases	7%

The majority of the briefs with argument outlines used complete sentences. Among the board-certified authors, an even greater percentage used full sentences. These results reflect that most appellate specialists view the argument outline, not just as an index to locate arguments, but also as a summary of the primary arguments in the brief.

3. Outline length and levels of complexity

Another noticeable difference among advocates' approach to the outline. One measurement of the depth of an outline is its length. Some argument outlines were very short, consisting of only 4 - 5 lines of text. Other outlines were more than two pages long. The length of the outline often determines whether the outline provides the reader with just a quick overview of main points or a detailed listing of each component part of the argument.

Another measurement of an outline's depth is its complexity. In this survey, "complexity" refers to the number of levels of substructure in the outline. Consider the two following portions of outlines:

1. Court of appeals placed new duties on parties who contract with independent contractors, minimizing this Court's prior holdings.
2. Court of appeals should have followed general rule of no duty owed by contracting party to independent contractor's employee.
3. Contracting party had no duty to warn of danger and did not increase risk of injury by providing its safety policy to independent contractor.

Petitioner's Brief on the Merits at iv, *Central Ready Mix Concrete Co., Inc. v. Islas*, 50 Tex. Sup. Ct. J. 971, 2007 WL 1861228 (Tex. June 29, 2007) (05-0940). This example has only one level of structure. It consists of points 1, 2, and 3 with no subpoints.

In contrast the following outline has three levels of substructure:

- I. Brite failed to establish damages within the county court's jurisdiction.
 - A. Brite's failure to plead damages within the jurisdictional limits of the county court was a defect that he was required to cure.
 1. Brite's Original Petition did not demonstrate jurisdiction.
 2. Brite never cured the defect.
 - B. Nothing in the jurisdictional statute permits the exclusion of front pay in calculating the amount in controversy.

Petitioner's Brief on the Merits at iv, *United Servs. Automobile Assoc. v. Brite*, 215 S.W.3d 400 (Tex. 1997) (No. 05-0132). The first level is point I. Under point I is the second level of structure – points A and B. Under point I.A. is the third level of structure – points 1 and 2.

These two types of outlines are very different. A one-level outline is a listing of points, none of which is subordinate to the other. Most of the one-level outlines

I reviewed consisted solely of a listing of points of error, issues, or response points. This approach has the advantage of brevity.

In contrast, an outline with multiple levels of substructure is designed to make visible the logical structure of the argument. This approach allows a reader to see easily which points are the main points, and which points are support for the main points. Although this approach is longer, it provides the reader more detail about the logic of the argument.

The survey considered both outline length and levels of substructure. These were the results:

How long is the argument outline in the table of contents?

Board-Certified Advocates

Less than a page	31%
1 - 2 pages	63%
More than 2 pages	5%

Median length: 1 page

Non-Board-Certified Advocates

Less than a page	38%
1 - 2 pages	62%
More than 2 pages	0%

Median length: 1 page

How many levels of substructure were contained in the argument?

Board-Certified Advocates

1 levels	16%
2 levels	42%
3 levels	34%
4 levels	8%

Non-Board-Certified Advocates

1 levels	31%
2 levels	31%
3 levels	31%
4 levels	7%

In both sets of briefs surveyed, the typical length of the

argument outline was about one page and the typical outline had two or three levels of substructure. These results suggest that most appellate advocates are using the argument outline, not just as an index to issues, but as a summary of their argument in an outline format. Most advocates also take advantage of outline substructure to reflect the logical relationships between the points in their outline.

4. Including the issues presented in the outline.

One other question in preparing the table of contents is whether the table of contents repeats the actual text of the issues presented, which also appear in the issues presented section of the brief.

Some advocates list their issues presented in the table because this allows judges to look at the issues on the page of the brief after the cover. The theory is that the first question a judge asks when picking up a brief for the first time is: "What are the legal issues?" This approach allows judges to immediately see the issues after opening the brief. Additionally, it is arguable that Rule 55.2(b) requires the inclusion of the issue in the table of contents. *See* Tex. R. App. P. 55.2(b) (stating that the table of contents "must indicate the subject matter of each issue or point, or group of issues or points.>").

Other advocates argue that listing the issues in the table is redundant with the issues presented section, and that it takes up too much space. When a brief lists 10 or more issues, or when it makes use of the deep issue format, the issues presented section can be more than a page long. It may be cumbersome to repeat a lengthy issues presented section in the table of contents.

These were the survey results:

Does the table of contents include the text of each issue presented?

Board-Certified Advocates

Yes	34%
No	66%

Non-Board-Certified Advocates

Yes	45%
No	55%

These results are surprising. Although the rules appear to require the identification of issues in the table of

contents, the majority of briefs did not include them. Board-certified authors were even less likely to include the issues in the table. One explanation may be that the briefs that did not list each issue were more likely to include a detailed argument outline in the table of contents. Many advocates may believe that the argument outline satisfies Rule 55.2(b)'s requirement that the table "indicate the subject matter of each issue or point" without the need to list each of the issues presented.

C. Issues presented.

The Rules of Appellate Procedure also give only general guidance about issues presented. Rule 55.2(f) requires that a brief must "state concisely all issues or points presented for review." Tex. R. App. P. 55.2(f). A statement of the issues is not required in a respondent's brief on the merits. Tex. R. App. P. 55.3(c). The rules leave the most significant strategic aspects of issues presented to the advocate's own preference.

Issues presented are the subject of intense debate among appellate advocates and briefwriting instructors. The hottest issues are the following:

- How many issues are too many?
- How short or long should an issue be?
- Should the issue be framed generally, or should it include important factual or legal details?
- Should the statement of the issues sound objective or persuasive?

The survey suggests how supreme court brief writers are answering these questions.

1. Number of issues.

Many advocates believe that a brief can have too many issues. A petitioner's brief can list so many issues that individual issues are diluted and counsel's credibility is damaged. Judges frequently complain about advocates who present too many issues. Judge Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 24-25 (rev. 1st ed. 1996). Chief Justice Lucas of the California Supreme Court advises counsel to "spend time on issues with potential merit; shotgun approaches that do not distinguish between important and insignificant claims weaken your presentation." *Id.* at 121. Judge Aldisert suggests, in general, when an appellant's or petitioner's brief lists more than three issues, the lawyer's

credibility begins to slip. When a brief lists eight issues, there is a "strong presumption that no point is worthwhile." *Id.* at 120.

Some advocates, however, cite several reasons for including a large number of issues. First, as a general rule, an issue is waived when it is not raised. Second, in some rare instances, counsel may have a strategic interest in demonstrating that the trial judge made many errors and that the cumulative effect of those errors resulted in an unfair trial. Third, in drafting a respondent's brief, the advocate may need to respond to a large number of issues raised by the other side. But even when one of these three concerns are present, it may be possible to group multiple errors or response points under a single issue. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f).

These were the survey results:

How many issues are included in the issues presented?

Board-Certified Advocates

1-3 issues	53%
4-6 issues	30%
7-9 issues	10%
10-12 issues	7%

Non-Board-Certified Advocates

1-3 issues	74%
4-6 issues	21%
7-9 issues	5%
10-12 issues	0%

The majority of the briefs were consistent with Judge Aldisert's advice to raise no more than three issues. A few of these briefs reduced the number of issues by using sub-issues under a more general issue. The percentage of briefs raising more than six issues was very low – 17 percent for board-certified advocates and 5 percent for non-board-certified advocates.

2. Length of issues.

Perhaps the hottest debate over issues presented concerns their length. Since the 1997 amendments to the Texas Rules of Appellate Procedure, appellate lawyers have had more freedom in framing the issues.

Part of that freedom is the ability to depart from the prior convention of one-sentence issues. That freedom has led to two contrasting approaches to statements of the issue.

One approach is a one-sentence issue. The rules provide that the issue may be stated as a question or a positive statement about the legal issue on appeal. Tex. R. App. P. 55.2(f). This one-sentence approach is illustrated by the following example:

Does a liability insurer have a duty to defend its insured against a claim involving an injury allegedly resulting from multiple causes, when the injury would not have occurred, and thus the claim would not exist, “but for” conduct expressly excluded from coverage under the policy?

Brief of Petitioner Utica National Insurance Company of Texas at ix, *Utica Nat. Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004) (No. 02-0090).

Another approach is Brian Garner’s “deep issue.” A deep issue usually consists of three or more sentences, incorporates enough detail to convey a sense of the story, and ends with a question mark. See Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 1 (1994/1995). In practice, most deep issues include one or two sentences about the relevant law or the key facts of the case, followed by a question that poses the legal issue. The following is an example of a long deep issue:

Defendants/Relators (“Relators”) have made only one order the subject of their mandamus petition, that being the trial court’s order consolidating the claims of five (5) Plaintiffs for trial. That order has been set aside by the trial court. Relators now attempt to keep this mandamus proceeding alive by attacking the adequacy of Real Parties’ in Interest discovery responses, despite Relators’ failure to include either any order from the trial court relating to discovery or any evidence that their discovery arguments have ever been properly presented to the trial court.

•Have Relators presented an adequate record to establish any right to mandamus relief?

•May this Court grant mandamus relief when the record fails to establish that Relators’ discovery arguments have ever been properly presented to, or ruled on by, the trial court?

Real Parties’ In Interest Brief On The Merits at v, *In re: Allied Chemical Corp.*, 50 Tex. Sup. Ct. J. 888, 2007 WL 1713378 (Tex. June 15, 2007) (04-1023).

There are pros and cons to both the one-sentence issue and the deep issue. On one hand, the Texas Supreme Court has expressed the desire that issues be short. The rules require that the issues be stated “concisely.” Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). Also, a short issue takes less time to read. On the other hand, an issue that is too short is often too general and can fail to identify the precise legal question that the case raises. A deep issue format sometimes provides more information about the precise legal issue than a one-sentence issue. But a deep issue usually requires more time to read.

There are two indicators of whether advocates are using traditional issues or deep issues: the number of sentences in each issue and the length of each issue. In both of those categories, these were the survey results:

For each brief surveyed, what was the average number of sentences in each issue in the brief?

Board-Certified Advocates

Less than 2 sentences	72.5%
2-3 sentences	17.5%
More than 3 sentences	10%

Median length: 1 sentence

Non-Board-Certified Advocates

Less than 2 sentences	79%
2-3 sentences	16%
More than 3 sentences	5%

Median length: 1 sentence

For each brief surveyed, what was the average number of lines of text for each issue in the brief?

Board-Certified Advocates

1-4.9 lines	60%
5-9.9 lines	37.5%
10 or more lines	2.5%

Median length: 3.9 lines

Non-Board-Certified Advocates

1-4.9 lines	58%
5-9.9 lines	37%
10 or more lines	5%

Median length: 4 lines

These results suggest that most advocates continue to favor the traditional, one-sentence issue. Although a handful of advocates used some two-sentence issues, very few briefs used more than a few sentences per issue.

3. Level of detail in issues.

One consideration in framing issues is how much detail the issue should provide about the factual and legal aspects of the issue. An issue that is very general gives the court little information about the precise legal question the court is asked to decide. For instance, one brief used this general statement of the issue:

The Court lacks jurisdiction to consider this case.

Valley Baptist Medical Center's Brief in Response to Relator's Brief on the Merits of Petition for Review at v, *Ramos v. Richardson*, 50 Tex. Sup. Ct. J. 974, 2007 WL 1861583 (Tex. June 29, 2007) (No. 06-0336).

In contrast, even a short issue can provide specific details about the legal issue. For instance:

The Waiver of the State's Sovereign Immunity from Suit Under the Wrongful-Imprisonment Statute Does Not Extend to an Assignee of a Claimant Under the Act.

Petitioner's Brief on the Merits at ii., *State v. Oakley*, 50 Sup. Ct. J. 869, 2007 WL 1650892 (Tex. June 8, 2007) (No. 06-0050). This example is specific enough to provide the court with a clear picture of the exact legal question involved.

Other issues work effectively by providing specific factual details:

Could the jury reasonably conclude that USAA acted maliciously in terminating a highly regarded, 24-year employee two years short of his retirement benefits eligibility in an effort to save money rather than retaining him and

transferring him to another open position, and then lying about its ability to do so?

Respondent's Brief on the Merits at ix, *United Servs. Automobile Assoc. v. Brite*, 215 S.W.3d 400 (Tex. 1997) (No. 05-0132).

Of course, an advocate can go too far with details in the statement of the issues. Legal or factual details that are unnecessary or peripheral can make it more difficult for the reader to understand the issue. Additionally, when a petitioner is trying to persuade the court that the petition for review should be granted because the issues are important to the jurisprudence of the state, it may be helpful to frame the issue more generally so that it is clear how the issue affects a wider class of cases.

In surveying the issues presented, I assigned to each brief one of the following levels of factual and legal generality versus specificity:

(1) Very general - the issue presented does not mention any facts, or does not mention the governing legal rule or principle.

(2) Some detail - the issue presented mentions the facts or the governing law in a general or conclusory manner, but does not provide specific details.

(3) Highly detailed - the issue refers to specific facts, or identifies the specific legal rule at issue.

These were the results:

How detailed is the issue presented with regard to the governing law?

Board-Certified Advocates

Very general	2.5%
Some detail	40%
Highly detailed	57.5%

Non-Board-Certified Advocates

Very general	5%
Some detail	53%
Highly detailed	42%

How detailed is the issue presented with regard to the facts?**Board-Certified Advocates**

Very general	47.5%
Some detail	35%
Highly detailed	17.5%

Non-Board-Certified Advocates

Very general	63%
Some detail	26%
Highly detailed	11%

In some instances, these results reflected the particulars of the case rather than any briefwriting trend. For cases involving an issue of statutory construction, the particular facts of the case are rarely important. In other cases, an explanation of the precise legal issue requires the mention of one or two specific facts.

Although the level of detail was in part a function of each particular case, the survey suggests some patterns. First, the issues presented typically provided more detail about the governing law than about particular facts. This may reflect the reality that the Texas Supreme Court has discretionary jurisdiction based largely on whether the legal issue in a case is important to the jurisprudence of the state. Thus, petitioners were more likely to cast the issue in terms of a particular question of law than as a question that turns on particular facts.

Second, board-certified advocates were more likely to include factual and legal detail than their non-board-certified counterparts. This reflects that experienced appellate advocates understand that an issue framed too generally is not helpful; whereas, an effective issue is more likely to include some level of detail about the law, the facts, or both.

4. Neutral issues vs. persuasive issues.

A final strategic consideration in drafting an issue is whether to phrase the issue (1) neutrally, or (2) positively and persuasively. The rules do not speak to this question. See Tex. R. App. P. 55.2(f). On one hand, many advocates follow the approach required by the Rules of the U.S. Supreme Court, which provide that a statement of the question presented “should not be argumentative.” U.S. Sup. Ct. R. 14.1.(a) (1991). These advocates frame the issue neutrally, placing themselves in the position of a judge trying to decide fairly and objectively what the

case is about.

On the other hand, before the 1997 amendments, the Texas Rules of Appellate Procedure required issues to be stated as positive points of error, which usually began with the phrase, “The trial court erred in . . .” As a result, many appellate advocates in Texas who practiced in the point-of-error period favor the traditional approach – a positive statement about whether there was error, or a question that strongly suggests the answer to the question. A survey of Texas appellate judges indicated that 58 percent preferred a positive statement of the issue that suggests the answer. Daryl L. Moore and Amy Hennessee, *Judicial Response to the Questionnaire*, in STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 5, at 1-2 (2003).

The survey results were as follows:

Are the issues presented framed in a manner that sounds neutral or do they provide the answer to the question?**Board-Certified Advocates**

Neutral	31.5%
Nudge the reader toward the answer	10.5%
Provide the answer to the issue	58%

Non-Board-Certified Advocates

Neutral	20%
Nudge the reader toward the answer	32.5%
Provide the answer to the issue	47.5%

A slight majority of the briefs surveyed provided the answer to the issue. In other words, they presented the issue as a positive argument, or a question that on its face had only one answer.

Interestingly, the board-certified advocates tended to follow one extreme or the other. Although 58 percent provided the answer to the issue, almost a third of their briefs framed the issue neutrally, without even nudging the reader toward the answer. These results suggest that most appellate advocates continue to use an approach based on the old point-of-error practice, which made a positive argument for the advocate’s position. But a substantial minority have moved to the opposite side of this debate in the decade since the rule change. Over

time, the use of neutral issues may grow.

D. Statement of facts.

Rule 55.2 provides that petitioners' brief on the merits "must state concisely and without argument the facts and procedural background pertinent to the issues or points presented." Tex. R. App. P. 55.2(g). Respondents are only required to provide a statement of facts if they are "dissatisfied with the statement" in the petitioners' brief. Tex. R. App. P. 55.3(b). Although respondents can skip the statement of facts, almost all of the respondents surveyed used the opportunity to tell their side of the story.

1. Objective vs. argumentative.

What is meant by Rule 55.2's requirement that the statement of facts be stated "without argument"? Should a statement of facts sound neutral or objective? Or can it reflect a slanted view of the facts that favors a party?

The answer to these questions depends on what is an "argument." The most obvious type of argument is an inference or legal conclusion made from a fact. For instance, it is permissible to state in a statement of facts:

Jenny Francis testified that she saw Smithers' car run the red light.

But it may be improper argument to conclude that Smithers ran the red light based on an inference from the evidence:

Because Francine Jones had a green light as she crossed the intersection from the cross street, Smithers necessarily ran a red light when he entered the intersection from the perpendicular direction.

Similarly, it may be is improper argument to draw a legal conclusion in the statement of facts:

Smithers' negligence was established by Jenny Francis's testimony that she saw Smithers' car run the red light.

Legal concepts, such as negligence, rarely appear in statements of facts because they may constitute improper argument.

There appears to be some disagreement among experienced advocates about whether Rule 55.2(g) prohibits less obvious types of argument, such as the use

of adjectives and adverbs that slant the story in favor of the advocate's client. Some advocates follow the advice of Professor Steven Stark: "Adjectives are opinions about facts and therefore generally don't belong in a fact section." Steven D. Stark, *Writing to Win* 106 (1st ed. 1999). Similarly, adverbs can constitute opinions about facts. Of course, adjectives and adverbs are appropriate when they are contained in quotes from witnesses' testimony. They are also appropriate when the adjective or adverb is not a characterization of the fact, but an objective, observable fact, such as "the light was red."

The survey reflected a wide disparity of styles in the statements of facts. For instance, some statements were barely distinguishable from legal argument:

To begin, Quigley's statement of facts ignores the distinction between generating and consulting geologists and dismisses Bennett's work as a generating geologist. This greatly distorts the record on a very critical point because the central and hotly debated factual dispute at the heart of this case is whether . . . Bennett was a consulting or a generating geologist. . . . Because Bennett did not claim an express agreement giving him an overriding royalty interest, Bennett sought, under quantum meruit and fraud, restitution damages based on the value of the services he performed. Under the law, that is an appropriate measure of fraud damages, as they were submitted, without objection, to the Jury: "the reasonable value of compensable work at the time and place it was performed."

Respondent's Brief on the Merits at 1, *Quigley v. Bennett*, 50 Tex. Sup. Ct. J. 861, 2007 WL 1650698 (June 8, 2007) (No. 05-0870). At the other end of the spectrum are statements that tell a story from a completely neutral perspective. Some statements even told the story in a way that creates some sympathy for their opponent. Consider the following statement filed by the Solicitor General's office in a case where the state was asserting sovereign immunity against a claim of wrongful imprisonment:

In 1990, Christopher Ochoa and Richard Danziger were wrongfully sentenced to life in prison for related crimes that they did not commit. Danziger was convicted largely on Ochoa's testimony, which incriminated

Danziger. Ochoa, who maintained that certain officers of the Austin Police Department coerced a confession from him and caused him to implicate Danziger, cooperated with the prosecutor as part of a plea agreement that spared Ochoa exposure to the death penalty. Making matters worse for Danziger, after being imprisoned, an inmate attacked him, and as a result of the attack, he suffered a severe brain injury, leaving him mentally incapacitated.

Petitioner's Brief on the Merits at 2, *State v. Oakley*, 50 Tex. Sup. Ct. J. 869, 2007 WL 1650892 (Tex. June 8, 2007) (No. 06-0050) (citations omitted). This statement read neutrally, or perhaps even sympathetically toward the other side.

In the survey, I reviewed statements of facts and assigned them to one of three categories:

(1) Neutral. The statement of facts contains no legal argument and few or no argumentative adjectives or adverbs. The statement reads like an objective story, not an advocate's slanted version of the story.

(2) Slightly argumentative. The statement avoids legal argument, but it is easy to determine which side it favors. The statement is likely to include some argumentative adverbs, adjectives, or asides that favor one side, but these do not rise to the level of legal argument.

(3) Argumentative. The statement includes legal argument. It does not read like an objective story.

The survey results were as follows:

Is the statement of facts framed in a manner that sounds neutral or argumentative?

Board-Certified Advocates

Neutral	21%
Slightly argumentative	50%
Argumentative	29%

Non-Board-Certified Advocates

Neutral	25%
Slightly argumentative	40%
Argumentative	35%

The statements of facts varied greatly in the degree of argument they contained. Although non-board-certified advocates were more likely to have an argumentative statement of facts, 29 percent of the board-certified advocates.

In both categories of advocates, the highest percentage of briefs were slightly argumentative. These statements of facts did not employ outright legal argument, but they did little to disguise that their version of the facts were slanted in favor of their side's position.

Although the majority of statements of facts had some slant, about one fourth of the briefs included statements that, on their face, sounded neutral. These advocates followed to the letter the court's prohibition against argument in the statement of facts.

2. Introductory paragraph.

In recent years, a small minority of briefs had begun to use introductory paragraphs at the beginning of the statement of facts. These paragraphs can serve one of two functions.

First, an introductory paragraph may be used to provide an overview of the facts, remind the reader generally of the issue in the case, and provide some context for analyzing the facts that follow. The following paragraph is a good example of this approach:

The essential facts of this case are simple. The litigation has had three phases. Phase One involved a series of class actions brought by individual policyholders against the Farmers Insurance Group. Phase Two involved an injunction and enforcement action brought by the Attorney General against different parts of the Farmers Insurance Group, and based on different issues than the claims asserted in the policyholder class action. Phase Three witnessed the commingling of these separate proceedings The Attorney General's enforcement action was independent from the numerous class actions brought by individual policyholders, but Farmers made it a condition of settlement that the Attorney General convert his enforcement proceeding into a settlement

class action, capture the pending class claims, and release all the claims of the individual policyholders. The question presented is: “Can he do that?”

Amended Brief on the Merits of Respondents Gilberto Villanueva and Michael Paladino at 1, *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417 (Tex. 2007) (No. 05-0169).

Second, an introductory paragraph may be used to explain disagreements with the statement of facts in the court of appeals’ opinion or the statement offered by the other side. For instance:

Gym-N-I’s factual statement is incomplete. Moreover, virtually all of the factual assertions throughout Gym-N-I’s brief do not have record references. This Court should disregard the many statements of fact in petitioner’s brief that lack a record reference. Accordingly, Snider presents the following statement of facts.

Respondent’s Brief on the Merits at 1, *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905 (Tex. 2007) (No. 05-0197).

The survey addressed whether the briefs used an introductory paragraph in the statement of facts.

Does the statement of facts include an introductory paragraph to provide context to the facts?

Board-Certified Advocates

Yes	24%
No	76%

Non-Board-Certified Advocates

Yes	20%
No	80%

The survey reflects that the introductory paragraph is a tool that is used in only a small minority of the statements of facts.

E. Summary of argument.

The Rules of Appellate Procedure require that briefs on the merits include a summary of argument. Tex. R. App. P. 55.2 (h). The rules make two suggestions about

the summary that arguably result in some tension about how to approach the summary. First, the rules express a preference for a short summary. Rule 55.2(h) requires “a succinct, clear, and accurate statement of the arguments made in the body of the brief.” Tex. R. App. P. 55.2(h).

Second, the rules appear to contemplate that the summary would do more than simply restate the issue or the main points. Rule 55.2(h) provides that the summary “must not merely repeat the issues or points presented for review.” *Id.*

Most appellate advocates strike some balance between these two suggestions, trying to avoid a summary that is too long, but providing enough detail that the summary is more than just a restatement of the issues. As a result, appellate advocates take some very different approaches to the summary of argument. The two issues surveyed concern the summary’s (1) ideal length, and (2) its level of detail.

1. Summary of argument: length.

For a summary of argument to be “succinct,” how long can it be? A recent survey of appellate judges showed that one third responded that a summary should never be more than one page. Moore and Hennessee at 2. More than two thirds said a summary should never be more than two pages. *Id.* My review of supreme court briefs reflects that brief writers have a different view from judges about how long their summaries should be.

How long was the summary of argument?

Board-Certified Advocates

No summary	7%
1 page or less	18%
1.1 - 2 pages	36%
2.1 - 3 pages	20%
3.1 - 6 pages	18%

Median length: 2 pages

Non-Board-Certified Advocates

No summary	0%
1 page or less	40%
1.1 - 2 pages	50%
2.1 - 3 pages	10%
3.1 - 6 pages	0%

Median length: 1.4 pages

The survey reflects that many advocates had a difficult time complying with the judicial preference that summaries be no longer than one or two pages. Surprisingly, summaries by board-certified advocates were even less succinct. The median summary by board-certified advocates was two pages in length; whereas, the median summary by non-board-certified advocates was only 1.4 pages in length. Also surprising was the fact that a greater percentage of board-certified advocates failed altogether to include a summary.

2. Summary of argument: detail.

Some briefs include only the most general summary of an argument's conclusions. The following is an example of a portion of a more general summary:

In this case, the trial court did not err in denying the Petitioner's plea to the jurisdiction because the Petitioner did not occupy the premises on which the Respondent was injured and because the Respondent's First Amended Petition alleges facts which give rise to a claim for gross negligence against the Petitioner. Therefore the Recreational Use Statute does not preclude recovery by the Petitioner against the Respondent for the injuries resulting from the operation of the sprinkler system by the Petitioner.

Respondent's Brief on the Merits at v, *Stephen F. Austin State Univ. v. Flynn*, 50 Tex. Sup. Ct. J. 943, 2007 WL 1861268 (Tex. June 29, 2007) (No. 04-0515). This summary provides the general conclusion of the brief, but it does not provide any details regarding the law governing the plea to the jurisdiction, nor does it mention how the respondent's injuries resulted from the "operation of the sprinkler system."

On the other end of the spectrum are summaries that include very specific details about the facts and law at issue. For a summary to be persuasive and convey the heart of the argument, many advocates believe that it should not be a general list of the argument's conclusions. Many advocates believe that an effective summary should identify specific and persuasive reasons for the advocate's position, even if the legal and factual support will require substantial development later in the body of the argument.

This is one example from part of a two-page summary that contains specific details about the governing law and the relevant facts:

The opinion by the Corpus Christi Court of Appeals is in accord with the harmful analysis mandated by Texas Rule of Appellate Procedure 44.1. The Court of Appeals opinion was based upon a meticulous review of the entire record which showed that the continued interjection of the irrelevant fact that Dr. Eubank and Dr. Rothchild had once been parties to the lawsuit resulted in prejudice or probable injury and that it was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

Respondent's Response Brief on the Merits at 8, *Bay Area Healthcare Group, Ltd. v. McShane*, 50 Tex. Sup. Ct. J. 866, 2007 WL 1650767 (Tex. June 8, 2007) (No. 05-1069). This detailed summary identifies the rule governing the harmful error analysis and identifies why the alleged error was harmful.

In surveying the summary of arguments for the level of detail, I assigned to each brief one of the following levels of factual and legal generality versus specificity:

(1) Very general - the summary may provide the conclusions of the argument, but it does not support the conclusion by discussing any facts, nor by identifying the governing legal rule or principle.

(2) Some detail - the summary discusses the facts or the governing law in a general or conclusory manner, but does not provide specific details.

(3) Highly detailed - the summary refers to specific facts or identifies the specific legal rule at issue.

These were the results:

How detailed is the summary of argument with regard to the governing law?

Board-Certified Advocates

Very general	0%
Some detail	12%
Highly detailed	88%

Non-Board-Certified Advocates

Very general	5%
Some detail	55%
Highly detailed	40%

How detailed is the summary of argument with regard to the *facts*?

Board-Certified Advocates

Very general	34%
Some detail	37%
Highly detailed	29%

Non-Board-Certified Advocates

Very general	40%
Some detail	45%
Highly detailed	15%

The survey reflects that the summaries were more likely to specify the governing law than they were to discuss any specific facts. It also reflects that the board-certified advocates were more likely to be more specific about the governing law and the facts than their non-board-certified counterparts. These results may explain why the summaries by board-certified advocates tended to be longer. When given the choice between keeping the summary short and fleshing it out with persuasive detail, the board-certified advocates were more likely to choose detail over brevity.

F. Argument.

The Rules of Appellate Procedure provide few constraints, and little guidance, about how to draft an argument. Rule 55.2(i) requires that the argument section “must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” Tex. R. App. P. 55.2(i).

Most of the significant decisions regarding argument are discussed earlier in this paper – decisions such as how many issues to argue, whether to employ an argument outline with argument headers, and how to structure the argument headers. But there were two remaining issues concerning the argument that I surveyed: (1) whether to employ a separate argument section concerning jurisdiction or the importance of the case to Texas jurisprudence; and (2) whether to use visual aids in the brief.

1. Whether to argue the importance to the jurisprudence separately.

One strategy decision in drafting a brief on the merits is whether to include a separate section setting forth the reasons for the Texas Supreme Court to grant or deny review. Briefs on the merits usually are filed before the court decides whether to exercise its jurisdiction. Thus, it might be expected that most briefs on the merits would focus on the reasons for the court to choose to exercise its jurisdiction.

The most common and important ground for Texas Supreme Court jurisdiction is the importance of the issue to the jurisprudence of the state. Moreover, even when importance is not a ground for jurisdiction, it is always a significant factor in a court of discretionary jurisdiction.

Thus, petitioners may increase their chances for the review by including a separate section on why the Court should grant review and why the issue is important to the jurisprudence of the state. Similarly, counsel for respondent may want to include a separate brief section arguing why jurisdiction is not proper, why the case cannot answer the issue raised by the petitioner, or why the issue raised by the petitioner is not important to the jurisprudence of the state.

In surveying this issue, I did not consider statements of jurisdiction that made only conclusory statements about the grounds for jurisdiction. Instead, I examined the briefs to determine whether any part of the brief contained a detailed argument regarding jurisdiction, particularly separate sections about whether the case was important to the jurisprudence of the state. I also examined the location in the brief where advocates included any separate argument about jurisdiction.

These were the results:

Did the brief contain a separate section, or a separate part of the argument, that argued importance to the jurisprudence or some other grounds for jurisdiction?

Board-Certified Advocates

Separate argument about importance or jurisdiction	34%
No separate section, but jurisdiction was woven into the argument	16%
No argument about importance or jurisdiction	50%

Non-Board-Certified Advocates

Separate argument about importance or jurisdiction	35%
No separate section, but jurisdiction was woven into the argument	5%
No argument about importance or jurisdiction	60%

If the brief contained a separate discussion of jurisdiction or importance, where was it located?

Board-Certified Advocates

The first section of the argument	20%
The last section of the argument	13%
In the statement of jurisdiction	47%
Stand alone section of brief	7%
Summary of argument	7%
Statement of the case	7%

Non-Board-Certified Advocates

The first section of the argument	43%
The last section of the argument	57%

The survey reflects that half of all board-certified advocates, and 40 percent of the non-board-certified advocates, included specific arguments about jurisdiction or importance to the jurisprudence somewhere in the brief on the merits. But there was no agreement where to include this discussion. The more common locations for an argument about jurisdiction were the first or last sections of the argument section, as well as in the statement of jurisdiction. Perhaps over time, some consensus will emerge about where to place the argument about jurisdiction.

2. Visual aids.

Although most trial lawyers are well aware of the importance of visual aids with juries, appellate advocates have long been hesitant to use visual aids in legal briefs. The Rules of Appellate Procedure contain no prohibition on charts, photos, or other visual aids. With computer programs, it is now easy to create charts or graphs to explain complex legal rules, case law holdings, facts, and data. It is also possible to insert relevant diagrams and even photos within the text of a legal brief. I have heard a number of judges say that a visual aid may be far more persuasive than pages of textual argument.

So are appellate advocates using visual aids inside the body of their briefs?

Does the body of the brief use any visual aids?

Board-Certified Advocates

Yes	5%
No	95%

Non-Board-Certified Advocates

Yes	5%
No	95%

The survey reflects that, in both categories of advocates, the use of visual aids in the brief remains very rare. Nonetheless, the types visual aids that were used in briefs are instructive:

- In an appeal concerning the consolidation of multiple cases, various charts were used demonstrating the discovery responses by each of the plaintiffs concerning the nature of their claims
- A photocopy of a page from a court of appeals opinion.
- A timeline.

Despite the survey results, advocates in the future may want to explore the possibilities of representing arguments in a more visual form.

IV. CONCLUSION

In drafting brief on the merits, most of the issues of debate concerning brief style remain hotly debated by the appellate community. Although a few areas reflect the consensus of the community, most of the issues concerning brief style remain open to a number of different approaches. The stylistic and formatting differences between appellate advocates in the Texas Supreme Court remain largely unresolved.