THE QUESTION PRESENTED:
MODEL APPELLATE BRIEFS

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Preface

The appellate attorney has one goal in writing an appellate brief: to persuade the court to adopt the client's position. Telling law students and lawyers this fundamental fact is easy; showing them how to put it into practice is difficult. Our book, *The Question Presented: Model Appellate Briefs,* was written to "show" rather than to "tell."

In determining which briefs to "show" in this volume, we researched briefs that appellate judges themselves said were excellently written. The briefs are from both state and federal courts and address a variety of issues: theft of Native-American artifacts, freedom of speech, securities fraud, and conflict of interest. After the brief(s), we have included the court's opinion so that its relation to the brief(s) can be examined and discussed.

We did not include briefs to the United States Supreme Court in this volume. Briefs to the Supreme Court do not represent issues typically addressed by the overwhelming majority of lawyers. We have, however, included excerpts from some famous Supreme Court briefs in the introductory chapter.

The Question Presented is dedicated to those who teach appellate advocacy. It can be used as a supplement to any of the excellent primers that now exist on appellate advocacy, such as *Winning on Appeal: Better Briefs and Oral Argument* by the Honorable Ruggero Aldisert or *Brief Writing and Oral Argument* by the Honorable Edward Re and Joseph Re. It can also stand alone, especially in an introductory course, because of its introductory chapter.

We hope the materials are helpful and interesting. Good luck!

Introduction: The Art and Science of Appellate Advocacy

"If oral advocacy is an art, brief writing can be called a combination of art and science."
The Honorable Chief Justice William H. Rehnquist[1]

Writing an excellent, that is, *persuasive* appellate brief requires more than merely knowing the rules of appellate procedure, the rules of the court the brief is to be filed with, and the various sections of the brief. It requires learning how to craft every sentence of the brief to logically and concisely persuade the court to accept the client's position, even in the face of apparent adverse authority.

Few lawyers master the art and science of appellate brief writing in law school. There is the story of the first-year associate at a major Manhattan law firm who worked until all hours of the morning to write her first appellate brief. Bleary-eyed from hours at her word processor, the associate placed the finished product on the assigning partner's chair and returned to her office to catch a few winks before the new day began. When she awoke—several hours later—she stepped out of her office only to overhear the assigning partner ranting to another partner about her work. "This brief has no punch!" was all she heard him say over and over again.

Yet it is precisely this "punch" that appellate judges clamor for. Apart from wanting to read briefs that are grammatically correct and typographical-error free, judges want to read well-organized briefs that sting them between the eyes with the client's strongest position.

And so the briefs included in this volume are the ones that appellate judges from federal and state appellate courts told us "punched" them between the eyes. The briefs cover a range of topics: theft of Native-American artifacts, freedom of speech, securities fraud, and conflict of interest. All of the briefs have one thing in common: they captured the attention of the appellate judges deciding the case and played a role in the courts' final decisions.

Part One of this book is an introductory chapter discussing what appellate judges say are the ingredients for a well-written brief. Part Two consists of four chapters; each chapter is devoted to one of the four cases included in the volume. Each "case" chapter includes at least one brief and the appellate court's judicial opinion. We believe that a careful study of these briefs and the corresponding appellate court decisions will help the law student see

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[1] William H. Rehnquist, *From Webster to Word Processing: The Ascendance of the Appellate Brief*, 1 J. APPELLATE PRACTICE & PROCESS 1, 1 (1999).

how a well-written brief can help a judge write the final decision and possibly even decide in the client's favor.

General Principles of Persuasive Advocacy

Appellate judges agree on certain basic principles for writing an effective appellate brief.

First General Principle: Length

A shorter brief is generally more effective. Look at Thurgood Marshall's winning United States Supreme Court brief in *Brown v. Board of Education*. The text of the brief is a mere thirteen pages long, its supporting appendix only an additional twenty-four pages.

Shorter briefs can be more effective for several reasons. First, a shorter brief will keep the attention of a tired and often overworked judge. Second, it ensures that the attorney has focused the court's attention on the strongest arguments and eliminated weaker points. It therefore heeds Justice Oliver Wendell Holmes' advice—"Strike for the jugular, let go of the rest." Finally, a shorter brief is probably more concisely written so that the strongest points shine forth.

Second General Principle: Organization

Law students and lawyers, both often pressed for time, overlook the importance of this critical element of the well-written brief. Appellate judges do not, as the Honorable William Rehnquist recently underscored:

> When a case first lands on an appellate lawyer's desk, it more often than not is a confusing and complicated jumble of facts, lower court rulings, procedural questions and rules of law. The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing, and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer's client.[2]

Third General Principle: Persuasiveness

The sole purpose of the appellate brief is to persuade the court. It is not an academic exercise. To write a persuasive appellate brief, the attorney must do several things.

First, lawyers and law students must write the brief from the *client's point of view*. Law students, possibly because they do not see and talk to the actual client, have a particularly difficult time writing from the client's point of view. Their questions presented, statements of the case, statements of the facts, point headings, and summaries of the relevant legal rules and policies are often written neutrally so that the reader does not know what side they represent. To write from the client's point of view, law students must take Atticus Finch's advice in *To Kill a Mockingbird*: step inside their clients' shoes and walk around in them.

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[2] *Id.* at 4.

Second, to write persuasively, lawyers and law students must write offensively rather than defensively. Too often briefs focus on presenting and defending against the other side's arguments. While the adversary's arguments must be addressed, the brief writer should first make the client's best case. Furthermore, some commentators suggest that adverse arguments should be addressed indirectly and not attacked head on; interestingly, the briefs in this volume use both approaches.

Third, the law student and lawyer must write with "punch." "Punch" can be accomplished by strategically placing short, succinct, direct reminders of the client's position throughout the brief, particularly in the opening sentence of paragraphs. It can also be accomplished by interjecting the "well-turned phrase":

> The well-turned phrase in a brief can capture a judge's attention, which tends to wane after 60 or so words of legalese; the surprising allusion can set her thinking along different lines. . . . Pepper your brief . . . with relevant metaphors or quotations, and I guarantee the best ones will reappear in the judges' opinions.[3]

Benjamin Cardozo's opinions are famous for their style and memorable quotes. His briefs, written during his career as an appellate attorney, also contain phraseology that seizes the reader's attention. In *Zimmermann v. Timmermann*, a case involving the non-delivery of bonds, Cardozo summarized his client's position in the following terms:

> We are concerned at this time with the interests of justice. The defendants have had their day before a tribunal, where the accused were without the benefit of counsel, where there was no compulsory process to secure the attendance of witnesses, where the rules of evidence were unheeded, and where the power and wealth and influence were arrayed on the side of the complainants. The plaintiffs are now to have *their* day in the calm atmosphere of the courts. They submit the case with the consciousness that they have done no wrong,—unless it be a wrong to have brought the wealth and power of the Stock Exchange before the ordinary tribunals of justice, to be judged, not by the favor of friends and associates, but by the law of the land.[4]

Finally, judges agree that persuasiveness is not making general statements attacking the opponent's brief or person. Direct your disagreement with particular statements of fact, legal rules, policies, and/or applications and present the reason your position is correct instead. Cardozo does this at the start of his argument in *Zimmerman*, stating:

> The defendant's have taken their stand upon the single proposition that not til the full $20,000,000 of bonds had been distributed by Brown Brothers & Company did their contracts mature. Such a construction of the obligations of the parties is without warrant of law. A contract to deliver the bonds when issued is a con-

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[3] Patricia M. Wald, *19 Tips From 19 Years on the Appellate Bench*, 1 J. APPELLATE PRACTICE & PROCESS 7, 21 (1999).

[4] Appellant's Brief at 50, *Zimmerman v. Timmermann,* 86 N.E. 540 (N.Y. 1908).

> tract to deliver them when issued in such reasonable quantities as to render it possible for the promisor with the exercise of due diligence to procure them. To attribute any other meaning to it is to involve the parties in obvious absurdities.[5]

Fourth General Principle: Theme

The appellate court is concerned with applying the law not only in a technically correct manner, but also in a just one. Using a theme in an appellate brief aids the court in deciding whether it is doing justice to the parties in the controversy. This valuable device, however, is often overlooked by both law students and attorneys.

Each of the briefs in this volume articulates a theme. The theme is sometimes stated directly and sometimes indirectly, but it is ever-present. It is interwoven in virtually every part of the brief, even in the question presented and the point headings. It is like the central message in a well-made movie, a message stated in every "scene" and tying the whole brief together.

To identify the theme, law students and lawyers must step back and think about what picture of the client and case they want to present to the court. They must then ask whether the chosen theme will be able to tie all of the different parts of the brief together, including the different arguments that will be made. Finally, they must strategize about how to incorporate this "picture" into each part of the brief.

Harvard Law Professor Laurence Tribe is the master at using themes in his appellate briefs to the United States Supreme Court. Professor Tribe's themes are often articulated right up front. For example, in *Bowers v. Hardwick*, Professor Tribe opens the brief and the Statement of the Case with this sentence:

> At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral.[6]

Similarly, the Statement of the Case in *Richmond Newspaper, Inc. v. Virginia* opens:

> When on September 11, 1978, as the murder trial of John Paul Stevenson began, the Hanover County Circuit Court granted defense counsel's request for an order clearing the courtroom of all members of the public and press, and directing that the entire trial be conducted in secret, centuries of faithful adherence under Anglo-American law to the principle of open criminal trials came to an abrupt end.[7]

In a single sentence Professor Tribe articulates the theme for the brief, a theme that is interwoven into each of the ensuing sections.

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[5] *Id*. at 11.

[6] Respondent's Brief at 1, *Bowers v. Hardwick,* 478 U.S. 186 (1986).

[7] Appellant's Brief at 4, *Richmond Newspapers,* 448 U.S. 555 (1979).

Fifth General Principle: Opportunity

Law students, novice, and even experienced lawyers are sometimes surprised to hear that each part of an appellate brief should be viewed as an *opportunity* to *limit length*, *provide organization*, *add persuasiveness* and *incorporate a theme*. But the attorneys who authored the briefs in this volume would not be surprised, and that is the reason that their briefs stand out.

So, law students and lawyers alike should keep the following post-it on their computers or typewriters:

Every Part of the Brief is an Opportunity
To Limit Length
To Provide Organization
To Add Persuasiveness
To Incorporate a Theme
(Point Headings Included!)

These are the *general* principles for effective brief writing. Now, let's look specifically at how to write each section effectively.

Specific Principles of Appellate Advocacy

Know the Required Sections of the Brief

To know what sections of the brief the appellate court requires, look at both the general appellate rules for the jurisdiction and the specific rules for your particular court. In general, most appellate courts require the following sections in the brief:

Question Presented
Table of Contents
Table of Authorities
Jurisdictional Statement
Opinions Below
Standard of Review
Statement of the Case
Statement of Facts
Summary of Argument
Argument
Conclusion

Let's take a look at each section individually.

Question Presented

The rules for the United States Supreme Court require that the Question Presented be placed first. The Court wants to know immediately what issue lies at the heart of the appeal. While not all courts require the Question Presented to be placed first, they do require that it be close to the beginning of the brief to give the court a glimpse of the nature of the controversy.

When drafting the Question Presented, remember that it is an opportunity to persuade. As a result, make sure your Question Presented includes, where relevant, the governing law, facts, and policies as your client sees them. Where the issue involves statutory law, let the court know it by including the relevant statutory language that is in issue and a reference to the statute itself. For particularly well-drafted examples, analyze the Questions Presented in the *United States v. Gerber* and *United States v. Mulheren* briefs in this volume.

Table of Contents

The Table of Contents plays two important roles in the brief. First, it tells the reader where each part of the brief can be found. Second, by including all the Point Headings from the brief, the Table provides the court with a summary of the entire argument. Because the Table is at the beginning of the brief, it usually gives the court the first view of the client's position and, therefore, is an excellent opportunity to persuade.

Table of Authorities

The Table of Authorities provides the court with an index of the primary, secondary, and other authority cited in the brief. The use of headings to divide up the different types of authority is very helpful here. Be careful to check your citations; a judge's clerk uses the Table to gather and then read the relevant authority, so typographical errors or incomplete citations make a clerk's job harder—and may make the clerk less favorably disposed toward your client.

Jurisdictional Statement

Appellate courts have the power to dismiss a case *sua sponte* for lack of jurisdiction. As a result, appellate courts want to see the basis for their jurisdiction right up front.

Opinions Below

Many appellate judges read the opinion(s) below before they even read the briefs. Here, again, make sure the citations to the opinions are accurate even though the opinions themselves will be included in the Record or Joint Appendix.

Statutes

Some jurisdictions require that the text of any relevant statute be placed in a separate section at the beginning of the brief or in an appendix. If a jurisdiction does not have such a requirement, but the brief involves one or more statutory issues, include the relevant statutory language in the text of the brief, or at least in a footnote. Quoting the relevant statutory language not only makes the court's job easier, but also adds to your credibility, because the court will not think that the text was excluded because the client had something to hide.

Standard of Review

The Standard of Review is one of the most important parts of the brief. It determines whether the appellate court has full, limited or very limited power to review the issue

before it. As a general rule, the court's review power is full, or plenary, if the question is one of law; limited if it is a question of fact; and very limited if it is a question of discretion.[8] Where an issue involves a mixed question of law and fact, the court will apply plenary review to the question of law and limited review to the question of fact.

Because the standard of review the appellate court adopts plays a critical role in the court's ultimate decision, it must be drafted carefully. Despite this section's importance, however, many law school writing courses do not emphasize this part of the brief, and some first-year programs do not require that it be included at all. Because this section is so important, the Standard of Review should be taught and practiced in law school.

For a case in this volume in which the Standard of Review creates one of the issues on appeal, see *In re Holtzman*.

Statement of the Case

In some jurisdictions, the Statement of the Case and the Statement of Facts are combined. Whether combined or in separate sections, the juridical history of the case (Statement of the Case) and the story the court is going to review (Statement of Facts) must be set forth early on in the appellate brief.

The Statement of the Case gives the side that won below an opportunity to emphasize that fact to the appellate court. At the same time, however, the side that lost below should try to find whatever it can that was favorable in the lower court decision(s) and emphasize these points to the appellate court.

An excellent example of the losing side making the most of an unfavorable decision below can be found in Professor Laurence Tribe's brief in *Bowers v. Hardwick*.[9] Here Professor Tribe notes the weakness of the authority cited by the district court where his client lost and emphasizes the favorable reasoning contained in the Eleventh Circuit's reversal:

> The district court ruled that Hardwick had standing, but disposed of his constitutional claims in two sentences, by the citation, without more, of this Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). App. 2-3.
>
> The Court of Appeals for the Eleventh Circuit reversed the district court's dismissal, holding that the statute implicates fundamental constitutional rights by regulating citizens' conduct in their own bedrooms, and involves none of the "public ramifications" that attend "sexual activity with children or with persons who are coerced either through physical force or commercial inducement." App. 26. Indeed, the court held, "[t]he activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." *Id.*[10]

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[8] For an excellent discussion of the different standards of review, see Ruggero J. Aldisert, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT (rev. 1st ed. 1996) or Edward Re & Joseph Re, BRIEF WRITING AND ORAL ARGUMENT (7th ed. 1999).

[9] 478 U.S. 186 (1986).

[10] Respondent's Brief at 2-3, *Bowers.*

Professor Tribe does what excellent appellate brief writers do: he finds whatever he can in the opinion below to help his client and crafts it into the Statement of the Case.

Statement of Facts

The attorney's job is to present, not a lack-luster recitation of facts, but a *living, breathing story*. The attorney is the master storyteller, not a mere compiler of information. If the attorney can make the client's facts come to life and capture the court's imagination in this early section of the brief, the court may be willing to follow along throughout the remainder of the document.

The story the attorney/master storyteller recounts is from the client's point of view. Thus, the story told in the appellant's brief and that in the appellee's brief, *for the most part*, should be different.

For an example of how the appellant and appellee can present two very different "stories" of the facts, look at the "stories" in *Palsgraf v. Long Island Railroad.*[11] Every law student is familiar with the case as it is presented by Benjamin Cardozo in his landmark opinion. However, when related in the opposing briefs, more detailed and totally divergent versions of the *Palsgraf* tale emerge.

The brief for Mrs. Palsgraf related the following version of the famous accident:

> It clearly appears that the defendant's two agents, to wit: the platform man and the guard were jointly attempting to forcibly push and pull the passenger on board a moving train. There was no good reason for their acts. The train was equipped with a door and a guard purposely kept the door open to permit the platform man to push the passenger through the opening.
>
> > "He held the door open and the other man on the platform pushed him in" (fol. 117).
>
> In addition, the guard attempted to assist the platform man by pulling the intending passenger on to the platform of the moving train.
>
> > "The platform man tried to push him on and the guard of the train tried to pull him in while the train was in motion." (fol. 85).
>
> While these two agents of the defendant were thus acting in concert the bundle was pushed from the [passenger's] arm. The [passenger] did not drop the bundle of his own volition or from haste, intention or fright, but it was knocked from under his arm by defendant's agent, to wit: the platform man.
>
> > "The man on the station took his arm to assist him in, in grabbing the arm he knocked the bundle out" (fol. 117).
>
> The train was in motion and the guard inside was trying to help his fellow on, and the platform man was trying to help him on from the outside and as he has

[11] 162 N.E. 99 (N.Y. 1928).

the bundle in his right hand the platform man pushed his arm and the bundle fell between the platform and the train" (fols. 75-76).

Again

> "Q. The man standing on the platform with the uniform on, you say, pushed this man in?
>
> "A: Yes. When the man in the station took his arm to assist him in, grabbing the arm he knocked the bundle out.
>
> "Q. Well, did you see the platform man's hand strike the bundle?
>
> "A. Yes" (fol. 118).[12]

Not surprisingly, a completely different story emerged in the brief for the Long Island Railroad:

> The undisputed evidence shows that the man carrying the package and his companion entered upon the station platform in great haste and attempted to board the train as it started to leave the station. That the first of the two men boarded the train without difficulty or assistance. As the man with the package jumped aboard the train he had difficulty retaining his balance and defendant's employees took hold of him to help him and prevent his falling from the train. In his efforts to get safely aboard the train he dropped the package which exploded (fols. 85, 116, 140).
>
> It is clearly established from the testimony of the plaintiff's witnesses that the two men rushed upon the platform determined to board the train. Their actions were voluntary and were not induced by defendant's employees, who it does not appear had any opportunity to prevent the men from boarding the train or to warn them against such action. Moreover, it affirmatively appears that defendant's employees took no part in the passenger's attempt until it appeared that the man was in danger of falling (fol. 85). They then took hold of him and prevented his falling from the train. They had no knowledge or notice of the contents of the package and that they acted prudently under the circumstances is demonstrated by the fact that the man retained his position on the train in safety (fol. 116). Nor does it appear that their action caused injury to any of the persons upon the platform. Faced with such an emergency they cannot be charged with negligence because they elected to assist the man in danger other than stand idly by and leave him to his fate.[13]

Whichever picture the court adopts will affect the final outcome. Accordingly, the version of the facts related by Cardozo's opinion holding the Long Island Railroad not liable is essentially a simplified rendition of the story as presented in its brief.

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[12] Plaintiff-Respondent's Brief at 6-8, *Palsgraf v. Long Island Railroad,* 162 N.E.2d 99 (1928).

[13] Appellant's Brief at 5, *Palsgraf.*

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails.[14]

In contrast, Judge Andrews' dissent adopts the view presented in Mrs. Palsgraf's brief that the negligence of the railroad employee caused the explosion, stating, "Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars."[15]

Some final rules for drafting the Statement of the Facts. One frequently overlooked rule is to write a smashing first sentence to open the Statement and to orient the court to your client's story. See, for example, the opening sentences in the Statements of Fact in the briefs for *United States v. Gerber* in this volume.

Second, the first sentence of every paragraph is an opportunity to create a sound and persuasive structure for this section of the brief. For each Statement of Facts in this volume, pluck out the first sentences of the paragraphs and analyze how they are crafted to structure and persuade. Third, while a chronological recitation of the facts is often logical, do not be wed to that structure if another fits your Statement better. Fourth, use headings in a particularly long Statement to give the reader a psychological rest and to highlight your persuasive structure. As an example, see the *Holtzman* brief. Finally, remember that in drafting the Statement, you are bound by the record and by the findings of fact below. To rely on facts not in the record or not found below—unless the facts are legislative or judicially noticed—will immediately destroy your credibility with the court and probably result in an adverse decision.

Summary of Argument

All law students and lawyers should learn to do the Summary of Argument well. Some appellate judges consider the Summary the most important part of the brief. The Summary "summarizes" the major and supporting arguments in the brief. A particularly strong Summary begins with a smash-bang sentence sometimes referred to as the *exordium*.

Again, the Summaries of Argument in Professor Laurence Tribe's appellate briefs contain powerful openings. Thus, for example, the Summary in *Bowers v. Hardwick* begins:

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[14] *Palsgraf*, 162 N.E. at 99.

[15] *Id*. at 101 (Andrews, J., dissenting).

> The State of Georgia would extend its criminal law into the very bedrooms of it citizens, to break up even wholly consensual, noncommercial sexual relations between willing adults.[16]

The Summary of Argument in *Richmond Newspapers* has a similarly powerful opening:

> For centuries, it has been an axiom of every just society that the people may enter freely into its halls of justice.[17]

Each first sentence not only is powerful, but also embodies the *theme* that is interwoven throughout the rest of the brief.

Argument

This portion of the brief is probably the most difficult to write. Here the brief writer must combine law, facts and policies in just the right proportion; create a tightly knit organization; craft every sentence for maximum persuasiveness; and demonstrate the client's story to be a winner under the relevant law and applicable policies. In writing this section of the brief, use: (i) point headings; (ii) thesis sections; (iii) first sentences; (iv) supporting legal rules; (v) adverse authority; (vi) relevant policies; (vii) a theme; and (viii) the facts.

(i) Point Headings

Point headings state the major arguments and supporting subarguments for each section of the brief. They are specific statements combining the relevant legal rules and facts from your client's perspective. They should not be overbroad, vague or so general that they could appear in any one of a thousand briefs. They provide both organization and persuasiveness to the brief.

An example of a point heading that clearly summarizes the brief writer's legal position is the first heading from Thurgood Marshall's brief in *Brown v. Board of Education*:

> The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions.[18]

The most important clause in the Point Heading is the frequently AWOL "because" clause. Appellate judges bemoan the failure of brief writers to give the reason for the arguments they make both in the text of the Argument and in the point headings. If a major point heading does not have minor subheadings, the "because" clause must be included in the major heading. Where the major heading has minor subheadings, the "because" clause is included in the subheadings.

Analyze the point headings for the appellate briefs contained in this volume. All of them state both the client's position and the *reason* for that position.

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[16] Respondent's Brief at 4, *Bowers*.

[17] Appellant's Brief at 9, *Richmond Newspapers*.

[18] Appellants' Brief at 6, *Brown v. Board of Education,* 347 U.S. 483 (1954).

(ii) Thesis Section

Where the Argument contains both major and minor headings, consider using a thesis section between the two to give the reader a roadmap of the reasons supporting the major contention. The thesis can summarize the issue to be addressed in this portion of the brief, your conclusion on the issue, and the reasons for your conclusion. Each reason will be a summary of one of the minor headings to follow.

(iii) First Paragraphs

The first paragraph following a major or minor heading can be used as an opportunity to persuade. Brief writers often construct their first paragraphs to set forth relevant legal principles and/or policies. When possible, however, consider using your first paragraph to capture the court's attention rather than to merely set forth dry legal rules/policies.

(iv) First Sentences

The first sentence of each paragraph in the Argument is critical to the organization, unity and persuasiveness of the appellate brief. When writing a first sentence, ask yourself the following questions:

- Does the sentence state the topic I intend to focus on in this particular paragraph?
- Does the paragraph that follows flesh out what is stated in the first sentence?
- Is the first sentence directly related to the major or minor point heading in this portion of the Argument?
- Does the first sentence support that major or minor point heading?
- Does the first sentence connect to, or logically flow from, the paragraph preceding it?
- Is the first sentence stated in the most persuasive way?

Both trial and appellate judges criticize briefs as being poorly written, poorly organized and unpersuasive. Rewriting first sentences to meet the above criteria is a sound step toward writing both an organized and persuasive brief.

(v) Supporting Legal Rules

All too often appellate briefs are written defensively rather than offensively. Instead of defending against your client's position first, set forth your client's strongest position first and then directly or indirectly address the adversary's position. This offensive strategy requires that you set forth the supporting legal rules first.

Finding the supporting legal rules may require creativity, such as using a trend in the law to support your position or interpreting controlling authority broadly or narrowly. In *Muller v. Oregon*, Justice Brandeis developed his argument based on a trend in the law, stating, "The statute under which the information herein was drawn is only one of the innumerable instances wherein the legislative arm of the state has in its wisdom invoked and applied the police power of the state, when the best interests of the state at large demanded it."[19]

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[19] Defendant in Error's Brief at 7, *Muller v. Oregon,* 208 U.S. 412 (1908).

The important points here are to present the relevant legal rules offensively rather than defensively and to rely on creativity within the bounds of credibility in interpreting legal rules when not much authority exists in favor of your client's position.

(vi) Adverse Authority

For ethical and credibility purposes, the brief writer must inform the court of adverse legal authority from the controlling jurisdiction. Where no controlling adverse authority exists, it is probably also advisable to inform the court of persuasive adverse authority.

The damage from adverse authority can be diminished in several ways. First, address adverse authority only after you have presented favorable law and facts. For example, in *Brown v. Board of Education*, Thurgood Marshall dealt with *Plessy v. Ferguson* only after presenting his client's arguments.

Second, distinguish the adverse authority based on the facts, the issue and/or the holding, which can be interpreted broadly or narrowly. In *Brown*, Thurgood Marshall handled the adverse case *Gong Lum v. Rice* by stating:

> *Gong Lum v. Rice* is irrelevant to the issues in this case. There a child of Chinese parentage was denied admission to a school maintained exclusively for white children and was ordered to attend a school for Negro children. The power of the state to make racial distinctions was not in issue.[20]

Third, distinguish by a trend that developed after the adverse authority was decided. Thurgood Marshall used this technique as well, stating, "*Plessy v. Ferguson* is not applicable. Whatever doubts may once have existed in this respect were removed by this Court in *Sweatt v. Pointer*. . . ."[21]

Fourth, distinguish adverse authority by emphasizing social changes that have taken place and here made the legal rule out of step with the times. For example, in *Dawson v. White & Case*, the New York Court of Appeals stated that a blanket prohibition against recovery of good will as a partnership asset was no longer the law in the state because of social and economic changes in the times.

Whether you use the above or other methods to diminish damage from adverse authority, be sure to craft the first sentences of the applicable paragraphs to ward off the damage. Analyze the briefs in this volume to see how the various authors did just that. Finally, where possible, interpret the adverse authority in such a way that you can argue that it is actually consistent with your client's position, and inconsistent with your adversary's.

(vii) Relevant Policies

An appellate court wants to make a "just" decision based on relevant legal and/or social policies. Many arguments, however, fail to use supporting policies in drafting the Argument.

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[20] Appellant's Brief at 11, *Brown*.

[21] *Id.*

The Brandeis Brief from *Muller v. Oregon* provides a famous example of the policy argument:

> More than twenty states of the Union, including nearly all those in which women are largely employed in factory or similar work, have found it necessary to take action for the protection of their health and safety and the public welfare, and have enacted laws limiting the hours of labor for adult women.
>
> This legislation has not been the result of sudden impulse of passing humor,—it has followed deliberate consideration, and been adopted in the face of much opposition. More than a generation has elapsed between the earliest and the latest of these new acts.
>
> In no instance has any such law been repealed. Nearly every amendment in any law has been in the line of strengthening the law or further reducing the working time.[22]

Try to interweave the policy with your discussion of the law and facts. Even though the "Brandeis Brief" and some briefs included in this volume separate out policy arguments, generally all legal rules are based on policy and so your legal arguments should be intertwined with your policy arguments.

(viii) Theme

Policy arguments also help to create, or at least support, the underlying theme for the appellate brief. Remember the theme is like a thread that holds the fabric of the entire brief together. It crystallizes for the court the reason that your client should win.

For example, suppose the issue in an appellate brief is whether a statute criminalizing threats to the life of the President requires that the criminal defendant not only make the threat, but also intend to carry it out. The government's theme would be the national security interest in protecting the President; the criminal defendant's would be the freedom of speech concerns in finding criminal culpability. Each side would weave its theme into every section of the appellate brief.

(ix) The Facts

Many briefs do not make effective use of the client's favorable facts. Unless the issue is a purely legal one, such as whether state and federal concurrent jurisdiction exists, the Argument must use the facts to show the court why the client should win. The brief writer should be careful here to explain all the steps in the writer's analysis so the court is not left to connect the dots itself.

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[22] Defendant in Error's Brief at 16, *Muller*.

Conclusion

The Conclusion contains the prayer for relief, that is, the relief you are requesting from the court. Some attorneys also use the Conclusion to reiterate in summary form the major arguments in the brief.

A word of caution for law students who decide to include such a summary. Very often law students muff here, failing to accurately summarize the points they made in the Argument or reiterating their position at too great length. In the beginning, the law student should probably opt for the prayer for relief alone.

Some Final Thoughts

Just two.

Write the brief for the naive reader, that is, assume the court knows nothing about the law and facts involved in the case. You must make connections clear, fill in the dots so to speak.

Second, be careful to eliminate typographical errors. Judges read enormous amounts of material on a daily basis. To their trained eye, every typographical error—including citation errors—stands out and, therefore, distracts. The appellate brief writer does not want to *distract*, but to *attract* the judge's attention. Believe it or not, even proofreading is part of the persuasive process.

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