



PROGRAM MATERIALS

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Practical Tips for Writing a Successful Appellate Brief

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Practical Tips for Writing a Successful Appellate Brief

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Context and Goals



Briefs Matter Most

Briefs are critical to success; oral argument is exciting but usually not dispositive.

- Many trial and appellate courts prepare tentative decisions before oral argument, based on the briefs.
- Even if there is no tentative decision, judges have read and considered the briefs before argument.
- Arguments not raised and cases not cited in briefs can't usually be broached at argument.
- Briefs are long; oral arguments are short.
- Briefs endure; oral arguments evaporate.
- Oral argument seldom changes the outcome.
- Do not expect to rescue a poorly briefed case at oral argument.
- Put all your effort into winning on the brief(s).

Goals of Brief Writing

Goals: To provide the court with briefs that *help* the court and make it *easy* for the court to rule in your client's favor.



Convey



Convince



Win

Audience for the Brief

Who are you trying to convince?

Judges

- Busy
- Reading a lot
- Handling many cases at once

Law Clerks

- All of the above
- Anxious
- May know nothing about the area of law at issue in your case

Achieve Your Goals

Mantra: Make it easy for your reader!

- Tell a compelling narrative.
- Provide necessary background but don't get lost in minutiae.
- Focus on your strongest arguments.
- Omit weak arguments or dead-ends.
- Make arguments simply and concisely.
- Present arguments logically.
- Use case law to support arguments.
- Provide a clear path to resolution.
- Have a simple and clear conclusion.
- Shorter is better.

Writing Basics



Assumptions About Audience

Should you start with the assumption that your reader is for or against you?

- Neither. Trick question!
- Start with the assumption that your reader is a rational person capable of being convinced.
- Avoid being combative or confrontational (towards court OR other side).
- Limit use of words like “clearly” or “obviously.”
- Avoid telling the court what it “must” do or “cannot” do.

Proper Tone

- Always adopt a civil, professional tone.
- Describe what trial judge or opposing counsel did wrong, but don't impugn them:
 - Don't presume to know opposing counsel's or party's motives, unless they have announced them.
 - Attack the argument, not the person – ordinarily.
 - Doing otherwise could distract judge from the merits of the argument, damage your credibility, or generate sympathy for your opponent.
 - Judges do not like personal attacks on other judges.
 - Remand is always possible.
- When in doubt, tone it down.

Making it Easy for Your Reader

Some lessons from psycholinguistics:

- Long sentences and unclear organization decrease “processing fluency,” which creates negative feelings towards author (and client).
- Passive voice can be useful to reveal (but deemphasize) bad facts.
- Topic sentences are critical to paragraph comprehension.
- Sentence-level structure matters!
 - The last part of a sentence holds the most psychological impact.
 - The beginning of the sentence is the next most emphatic position.
 - The middle of the sentence holds the least impact.
 - Start a sentence with old information and end it with new information.

Writing Process

- Outline arguments (draft headings and subheadings) before beginning to write.
- Revise as you write. Each time you return to the brief, revise it.
- Repeatedly reorganize sentences, paragraphs, and entire sections.
- No first draft is any good – don't get discouraged, just write!

Components of an Appellate Brief



Basic Components

- Cover Page
- Table of Contents
- Introduction
- Question Presented
- Statement of Facts
- Summary of the Argument
- Argument
- Conclusion

Use each of these sections to **HELP YOUR READER.**

(And always pay attention to the rules of the court in which you are practicing – some courts require a jurisdictional statement and other specific components.)

Cover Page

Generally must contain:

- Case name
- Name of court
- Nature of proceeding
- Name of court/agency below
- Title of brief (e.g., opening) and identity of party (e.g., appellant)
- Name, office address, telephone number of attorney
- Appropriate color cover for printed versions (see court rules)

Table of Contents

- The table of contents should tell a story.
 - Should be able to tell the basics of what happened from the headings in the statement of facts.
 - Should be able to identify logical steps of the argument from the headings in the argument.
 - Should be able to discern what you want the court to do.
- If TOC isn't easy to follow, that can reveal structural problems in your brief.

Introduction

- The introduction should capture the reader's attention, explain what the case is about, and make the reader care that you should win.
- Don't just summarize your argument – have a theme.
- This is your chance to be a bit punchy and expressive (within bounds).
- Should be short – two pages max.

Question Presented

- Many federal and state courts require this early in your brief.
- It is your first chance to present your argument.
- In complex cases, may need to briefly state facts so the question makes sense.
- Suggest the answer you want without being too argumentative or conclusory.
- General rule of thumb to phrase question so the answer is “Yes” – but not always practicable.
- Write it after you finish the rest of the brief.

Statement of Facts

- Write statement of facts in light of governing standard of review.
- Write statement of facts before legal argument – doing so may enhance your understanding of the arguments or suggest new ones. Must know the facts to build your legal argument.
- Include facts reader needs to know to understand and evaluate the legal issues. Omit everything else (but don't hide bad facts).
- Present facts chronologically, unless there is a good reason for a different presentation. Don't assume reader will understand connection of dates. E.g., “In 2016, That same year,” But omit dates if they are unimportant.
- Try to weave the facts into an interesting and compelling story. Stories help the reader make sense of facts and events.

Statement of Facts, cont'd

- Try to show the reader the case from your client's point of view, within the limits of unswerving accuracy and completeness.
- Facts should be presented persuasively, but without argument. Persuade through language and facts:
 - Words chosen to describe facts can be more or less persuasive; words carry connotations, e.g.,
 - defendant, insured, hospital, or charity
 - accident, event, occurrence, collision, or crash
- Limit italics, boldface, caps, and other typographical substitutes for persuasive writing; don't shout at the court.
- To preserve credibility, avoid editorializing in the statement of facts; save it for the argument section – even there, it should be limited. Adjectives and adverbs are not your friends here.

Statement of Facts, cont'd

- Be scrupulously accurate in recounting facts. Paraphrasing testimony or documents is permissible, but don't distort meaning. Maintaining your credibility is essential.
- Do not ignore bad facts. Deal with them.
- Cite the record to support *every* factual assertion. Give the court confidence that the brief is reliable.
- Write the facts so the court will want to decide the case for your client.
- Use headings to tell your story. The reader should be able to tell what happened and intuit who should win from the headings alone. . .

Statement of Facts: Tell a Story

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Summary of the Argument

- Provide roadmap to brief
- One of your early chances to convince the court
- Good opportunity to highlight the simplest path to resolution (e.g., if the court concludes we're correct on Issue A, it need not reach Issues B and C)

Legal Argument

- Structure the discussion of each issue as a syllogism.
 - First explain the controlling law or rule without unnecessary detail.
 - Then apply the law or rule to the facts, demonstrating that the law or rule compels the desired conclusion.
- Use headings to support logical structure of argument.
 - Major headings should identify dispositive legal issues and tell the court how to resolve them.
 - Minor headings should lead the the court through each logical step of your analysis.
- Use transitional words and phrases:
 - “however,” “nevertheless,” “on the other hand,” “first . . . , second . . . , third . . .” (See Writing Tip 11.)
 - A busy judge will better understand the flow and sequence of the arguments and the way in which each sentence, paragraph, and section relates to those that preceded it.

Legal Argument, cont'd

- State the standard of review and apply it.
- Disclose bad cases, then diffuse them. Do not ignore them. Do not be an ostrich.
- Never misrepresent a holding. Credibility is key.
- Explain how your client was prejudiced.
- Use pinpoint cites – always.
- Use parentheticals after cases – usually.
- Don't spend much time on things that are common knowledge.
- Use policy arguments sparingly.
- Federal and state citation forms are different. Use the appropriate form.
- Cause of action v. claim for relief.
- Make your arguments, not your opponent's.
- Write in plain English, employing simple syntax; avoid legalisms, words you learned for your LSAT, anything that people at a party would wonder about, and archaic expressions. (See Writing Tips 19 and 20.)

Conclusion

- Keep it short and sweet. Can be a single sentence, and usually should be.
- Tell the court exactly what you want it to do:
 - Reverse
 - Vacate and remand
 - Affirm
- If you want the court to provide instructions on remand, tell it what you want it to say.
- Do not add or repeat facts or legal arguments. No drama.

Common Pitfalls and How to Avoid Them



The draft is too long. . .

- Eliminate unnecessary or repetitive facts or arguments.
 - Eliminate facts that do not bear the on legal issues.
 - Repetition is a common problem among inexperienced brief writers. Remember that court will see key points at least twice—in the Summary of Argument and again in the Argument. Further repetition is usually unnecessary
- Eliminate unnecessary footnotes. Footnotes are our enemy.
- Eliminate or shorten block quotes. Block quotes are our enemy.
- Eliminate string cites, especially for noncontroversial propositions.
- Cut every needless word.
- Save anticipatory arguments for reply brief.

The draft raises too many issues. . .

- Eliminate weak issues.
 - Evaluate both the error and the prejudice; if both cannot be shown, issue is probably weak.
 - If opponent can easily answer it, issue is probably weak.
 - Including weak issues risks giving your opponent an opportunity to distract the court from your stronger issues and to undermine your credibility.
 - Do not raise on appeal all the issues from the trial.
 - Unless the case is very complex, if you have more than three major issues, you may want to consider refining your approach.

Paragraphs are confusing. . .

- Use topic sentences!
- Red flag when a paragraph occupies most or all of a page.
- Break up paragraph, so that separate points are addressed in separate paragraphs.
- One sentence paragraphs can be effective to make a key point. They stand out.
- Paragraphs are our friends. Use them.

Statement of facts is weak. . .

- Make sure facts are recited in correct sequence, usually chronologically.
- Check for too many or too few subheadings.
- Use interesting words/language.
- Minimize acronyms. (See Writing Tip 17.)
- Refer to parties by name, not “Appellant” or “Respondent.”

Argument doesn't flow. . .

- Reorganize argument to follow IRAC structure (Issue, Rule, Application, Conclusion).
- First make affirmative arguments, then distinguish adverse cases (even in respondent's briefs).
- Make better use of transitions. (See Writing Tip 11.)
 - Place transition sentence at beginning of new paragraph, not at end of previous paragraph.
- Check for gaps in the argument. Have you assumed the reader knows a fact or argument that you know but have not adequately disclosed or explained?
- Do not preview the following section in final paragraph of previous section.

Quotes, commas, and emphasis. . .

- **Quotes**
 - If you use an embedded quote, use double and single quotes (or “cleaned up”).
 - Put period or comma inside a quote.
 - Always note deletions, and don’t be devious about them.
- **Commas**
 - Use serial commas (the Oxford comma).
- **Emphasis**
 - If you emphasize something in a quote, be sure you note that.
 - If something has already been emphasized in a quote, be sure you note that.
 - Use sparingly.

Writing Tips



Writing Tip 1

Use forceful verbs rather than noun/adjective phrases.

- AVOID: Counsel's argument is indicative of his approach to the case.
- BETTER: Counsel's argument demonstrates his approach to the case.

- AVOID: The court found there was a failure of due care on defendant's part.
- BETTER: The court found the defendant failed to exercise due care.

- AVOID: The parties held settlement discussions.
- BETTER: The parties discussed settlement.

- AVOID: The jury engaged in deliberations.
- BETTER: The jury deliberated.

- AVOID: The defendant filed a notice of appeal.
- BETTER: The defendant appealed.

Writing Tip 2

Avoid wordy expressions or long words when a succinct alternative is available.

– **AVOID:**

- Blatant misstatement
- By means of
- Explicitly states
- Free and clear
- In order to
- Limitations
- Needless to say
- Prior to
- Some period of time
- The fact that
- The giving of the instruction
- The instant case
- The question as to whether
- The same time period
- There is no question but that
- Under the provisions of
- Until such time as

• **BETTER:**

- Misstatement
- By
- States
- Free
- To
- Limits
- [Then don't say it]
- Before
- Some period
- That
- Giving the instruction
- This case
- Whether
- Simultaneously
- Unquestionably [Or don't use at all]
- Under
- Until

Writing Tip 2 (cont'd)

Avoid wordy expressions or long words when a succinct alternative is available.

– **AVOID:**

- Assistance
- At what point in time
- Attempt
- Commence
- Facilitate
- In close proximity to
- In other words
- In the event that
- It should be noted that
- Pursuant to
- Since or as
- Specifically
- Subsequent to
- True and correct copy
- Utilize
- Whether or not

• **BETTER:**

- Help
- When
- Try
- Start
- Help
- Near
- [Rewrite the sentence]
- If
- Notably [Or don't use at all]
- Under
- Because
- [Rewrite the sentence]
- After
- Copy [Three words are not better than one]
- Use
- Whether

Writing Tip 3

Do not label your contentions as such, simply state them.

- **AVOID:** Defendant contends the trial court committed reversible error.
- **BETTER:** The trial court committed reversible error.

Writing Tip 4

Avoid negative phrasings. State the point affirmatively whenever possible.

- AVOID: The plaintiff did not fulfill his duty to mitigate damages.
- BETTER: The plaintiff failed to mitigate damages.

- AVOID: A defendant cannot be liable for punitive damages if the jury does not find by clear and convincing evidence that he acted with malice, fraud, or oppression. [*Confusing double negative.*]
- BETTER: A defendant can be liable for punitive damages only if the jury finds by clear and convincing evidence that he acted with malice, fraud, or oppression.

Writing Tip 5

Generally, prefer active voice sentence construction (subject-verb-object).

- AVOID: It was decided by counsel to present expert testimony.
- BETTER: Counsel presented expert testimony.
- AVOID: The tentative decision was adopted by the court without change.
- BETTER: The court adopted the tentative decision without change.

Under certain circumstances, the passive voice is appropriate. Use the passive voice when you want to focus the reader's attention on the object rather than the subject:

- The President was impeached. (*Compare*: The House of Representatives impeached the President.)
- The company was never notified of the settlement offer. (*Compare*: The insured never notified the company of the settlement offer.)

Use the passive voice when the subject is unknown:

- The file was lost. (*Compare*: Someone lost the file.)

Use the passive voice when you wish to obscure or deemphasize the subject:

- The CIA agent's identity was disclosed. (*Compare*: The White House disclosed the CIA agent's identity.)

Writing Tip 6

Pay attention to the order of words/ideas within each sentence.

- ***Place the most important fact or idea at the end of the sentence.***

- The judge went duck hunting with the vice-president in January 2018. [*Emphasizes when they went duck hunting.*]
- In January 2018, the judge went duck hunting with the vice-president. [*Emphasizes who joined the judge.*]
- In January 2018, the vice-president went duck hunting with the judge. [*Emphasizes who joined the vice-president.*]

- ***Place modifiers next to (or at least near) the words they modify.***

- AVOID: The judge served on the police commission, the superior court, and the court of appeal for 20 years.
- BETTER: The judge served on the police commission, the superior court, and, for 20 years, on the court of appeal.

- AVOID: The plaintiff was a passenger in a taxicab assaulted by the driver.
- BETTER: The plaintiff, a passenger in a taxicab, was assaulted by the driver.

- AVOID: Defendant appeals the trial court’s ruling that he was liable on the ground he was responsible for his employee’s conduct. [Is the “ground” the basis for the appeal or for the trial court’s ruling?]
- BETTER: The trial court found defendant liable because he was responsible for his employee’s conduct. Defendant appeals.

Writing Tip 7

Use “there is . . .” or “it is/was . . .” sparingly.

- AVOID: There is no private right of action under Insurance Code section 790.03.
- BETTER: Insurance Code section 790.03 creates no private right of action.
 --OR--
 A plaintiff has no private right of action under section 790.03.

- AVOID: There was no substantial evidence to support the judgment.
- BETTER: The judgment was not supported by substantial evidence.
 --OR--
 No substantial evidence supported the judgment.

- AVOID: It was held in J.C. Penney that there is no insurance coverage for child molestation.
- BETTER: J.C. Penney (or, The J.C. Penney court) held section 533 bars coverage for child molestation.

Writing Tip 8

- *Avoid hyperbolic adverbs (e.g., blatantly, obviously, clearly), which are the tools of a lazy writer.*
- *Demonstrate; don't characterize.*

Writing Tip 9

Use concrete language, i.e., language that is direct, clear, and specific.

- AVOID: It has been suggested that we minimize the utilization of excess illumination.
- BETTER: We should turn off the lights.

Writing Tip 9

Keep subject and verb close together.

- AVOID: Mr. Smith, who had been employed by the company for ten years and who had never received a negative review, was terminated without warning.
- BETTER: Mr. Smith was employed by the company for ten years and never received a negative review. He was terminated without warning.
- Corollary: *Avoid lengthy parenthetical phrases. Better to break the sentence in two.*

Writing Tip 11

- *Make liberal use of transitions (first, second, finally).*
- *Note the difference in tone of: between, and, further, but, therefore, still, however, since, nevertheless, nonetheless, etc.*

Writing Tip 12

Avoid the “not. . . because” sentence construction; it is ambiguous.

- **AVOID:** Defendant was not named in the first cause of action because he distributed the product. [*Implies defendant was named in the first cause of action.*]
- **BETTER:** Because he only distributed the product, defendant was not named in the first cause of action.

Writing Tip 13

Make lists; use parallel structure.

- AVOID: The statute requires the insurer to either provide the insured with advance notice of cancellation or renew the policy.
- BETTER: The statute requires the insurer either to provide the insured with advance notice of cancellation or to renew the policy.

- AVOID: Negligence requires proof of a legal duty, breach of duty, and that the breach caused damage.
- BETTER: Negligence's elements are: (1) a legal duty; (2) breach of that duty; (3) causation; and (4) damages.

Writing Tip 14

Eliminate unnecessary use of “that”; where you do use “that,” respect the difference between “that” and “which.”

- AVOID: The point that defendant makes is that the policy that it issued did not cover the loss that plaintiff suffered.
- BETTER: Defendant points out that the policy it issued did not cover the loss plaintiff suffered.

- BUT: Plaintiff contends *that* the trial court erred by excluding the evidence and *that* the ruling prejudiced his case. [*“That” preserves the parallel structure and makes clear two contentions are being discussed.*]

- AVOID: Defendant fails to address the issues which need to be addressed.
- BETTER: Defendant fails to address the issues that need to be addressed.

NOTE THE DIFFERENCE IN MEANING:

- The office, which has two conference rooms, is located in Los Angeles.
- The office that has two conference rooms is located in Los Angeles.

Writing Tip 15

Avoid using the same word twice in a sentence when the word changes meaning.

- AVOID: Mr. Jones, who represented the plaintiff, represented to the court that he would rest his case by noon.
- BETTER: Mr. Jones, who represented the plaintiff, assured the court he would rest his case by noon.

Writing Tip 16

Check for faulty pronoun references.

- AVOID: The judge and the plaintiff discussed *her* schedule. [Whose schedule?]
- BETTER: The judge and the plaintiff discussed the judge's schedule.

- AVOID: Defendant argued it is settled law that it need not produce the report because it is privileged. [*Confusing use of “it” to mean different things; also, unnecessary “it is”; also, ambiguous “not . . . because” construction.*]
- BETTER: Defendant argued that, under California law, the report is privileged and therefore need not be produced.

Writing Tip 17

Use acronyms sparingly.

- AVOID: The CSX ran into the GJC in KCMO.
- BETTER: The train ran into the jeep in Kansas City, Missouri.
- BUT: Well known acronyms are fine: FBI, IRS, and NLRB.

Writing Tip 18

Delete “of.”

- AVOID: The discussion of her illness was brief.
- BETTER: Her illness was briefly discussed.

Writing Tip 19

No Latin.

- AVOID: E.g., supra and infra.
- BETTER: E.g., above and below.
- BUT: Sometimes it cannot be avoided: res ipsa loquitor.

Writing Tip 20

No legalisms.

- AVOID: Hereinafter, aforesaid, thereafter, wherefore, etc.

Writing Tip 21

Break some rules.

- It is OK to split infinitives.
- It is OK to start sentences with a conjunction.

Writing Tip 22

Cut redundancies.

- ~~Actual facts~~
- ~~Advance planning~~
- ~~Alternative choice~~
- ~~Completely eliminate~~
- ~~Connect together~~
- ~~Crisis situation~~
- ~~Current trend~~
- ~~Depreciate in value~~
- ~~Final conclusion~~
- ~~For the purpose of~~
- ~~For this reason (Thus)~~
- ~~In all cases (Always)~~
- ~~In most cases (Usually)~~
- ~~In order to~~
- ~~Joint collaboration~~
- ~~Past experience~~
- ~~Postpone until later~~
- ~~With the possible exception of~~