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## THE WRITTEN ARGUMENT ON APPEAL

*Jean Appleman\**

The art of winning an appeal is one of the most difficult phases of the law. The appellate attorney must be a skilled writer as well as an experienced lawyer. He must know how to appeal to the human qualities of the judges, to make them see the "rightness" of his side of the case. A judge, like a juror, wants to render a decision which is not only legally correct but also humanly just. The appellate attorney must be able to analyze the direction in which the law is moving and so present his case. He must thoroughly understand the subject matter in controversy and be able to explain all the complicated matters in simple terms. But above all, he must be able to compose an interesting brief. A boring brief only discourages a judge and encourages him to use it as a cure for insomnia. Indeed, many judges deeply resent the imposition inflicted upon them when they must wade through a long, dry and dull recitation of fact and law. Whether or not such a brief is read, it will fail to convince the court of the justice of the writer's position.

Accordingly, the field of appellate work is a highly specialized one, requiring constant study and practice. For this reason, many trial attorneys wisely turn over their appellate work to a specialist. But sometimes this is impossible. A case may be too small to warrant the employment of an additional attorney. Then the trial attorney himself must attempt to write a skillful and persuasive brief. It is for this reason that this article has been written.

It would be impossible to discuss the aspects of brief writing thoroughly in the few pages available here.<sup>1</sup> Rather than inadequately summarizing the overall aspects of brief writing, this article will discuss one of the most essential parts of the brief, the argument. Regardless of what parts of the brief may be omitted because of the rules of a particular state or the peculiar aspects of one's case, every brief will contain an argument. The purpose of the argument is to persuade the court that because of the facts, already accurately and unargumentatively set forth, and the law, the just result is the one sought.

The argument is therefore the basic element of one's brief. Accordingly, contrary to the statements of some text writers, it should ordinarily be written first. The order of the issues in the argument will determine their order in the other parts of the brief; and, once the argument has been written, one will know which facts are fighting for him, and which against him. The organization of the statement of facts can then be prepared much more easily.

### Formulating the Issues

One of the most difficult problems for the attorney to resolve is what questions to raise or discard upon appeal. He may be filled with just anger every time

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1 For a complete study, see APPLEMAN, PERSUASION IN BRIEF WRITING (in publication).

he thinks of those "stupid" rulings of the judge or the imperfect presentation of his adversary. And, of course, the jury could not have possessed the reasoning faculties of a six-year-old to have come in with the verdict which it did. But it is axiomatic that weak arguments dilute and even drown the good ones. A good argument hidden in a lot of bad ones is about as easy to find as the proverbial needle in the haystack. Alone, it will shine with the luster of a polished diamond.

Not every appeal should be reduced to one issue, although probably seventy-five percent could and would, by this means, receive a more favorable reaction from the court. It is much better to weed out trivial assignments of error than to leave that gardening for the court. If one is in doubt as to the importance of some issue, he should inspect the case reports. If the decisions merely say, "while we do not sanction such conduct" or "perhaps the remark was not proper," the court does not intend to reverse on such points and they should not be raised. But if errors have directly resulted in prior reversals, then they are material. Or if the error would shock or at least startle all men and not merely losing counsel, an appeal might be successful. Accordingly, the appeal should usually be limited to not more than four errors of substantial character.

There is, however, one qualification to this rule. Occasionally one does meet an unscrupulous attorney who does everything wrong. No action of his is free from error. Here, it is not necessary to abandon any worthwhile point since the whole is more than the sum of its parts; the very quantity of errors create their own prejudicial character. The trivia should be discarded and the remaining points, all material errors, set forth in some dramatic fashion, classified for easy understanding. For example, one could spotlight the primary errors by placing them in a category of "errors necessitating reversal" and the others in a category of "errors not to be repeated upon retrial." By this means, while many errors are being alleged, the major points are reduced to only a few.

Lawyers are inclined to act too quickly and think too little, if they ever think at all. A brief is not written even by a "brilliant" lawyer in a single afternoon; if it is, the product is unworthy both of the client and of the court. Before writing a brief it is necessary to plot out the exact line of attack or defense fully. The brief should contain only one key point with possibly two or three material but subordinate points of attack or defense. Therefore, the lawyer must mull over the case, find the weaknesses and the points of strength on appeal and determine the proper path of approach. His final presentation must be simple, logical, accurate, sincere and appealing to the court's sense of equity. This requires the attorney to allow his ideas to develop over a period of time. He should jot down ideas as they come to him, even developing various ideas in their entirety but taking care not to write the full argument. As he does research upon the facts or the law, more and more ideas will come to him so that his notes should begin to grow and even overlap each other, but it will be simple to organize the material at the proper time. Until this meditating process is complete, a lawyer should not attempt to write his brief. But this process of meditating must not be an excuse for procrastination. The

brief should be finished long before the due date to avoid the embarrassment of late submission, to avoid a hastily and poorly written brief and to set down the ideas while they are still fresh in the lawyer's mind.

When this meditating process has been finished and the material has been organized with the duplication weeded out, the attorney will begin to view the points and issues with detachment. He will see the triviality of certain errors and eliminate them. He will discover that other points are really part of one major issue to be grouped together. Perhaps the court, after refusing to strike certain prejudicial allegations from the complaint, allowed improper evidence upon such issues and instructed the jury upon these issues and the evidence pertaining to them. These errors should not be dealt with separately but together as one strong issue involving the confusion of the jury through the introduction of an irrelevant but prejudicial issue. Similarly, if the opposing attorney was guilty of various forms of prejudicial misconduct, these can still be grouped under one point. This process of integration is simply a recognition of human nature. Just as actions are always correlated with other actions, the rulings of the judge are always intertwined in importance and relevancy. In addition, this process is one means of reducing the number of substantial points to a minimum.

Moreover, it may be necessary to find a new line of attack. If the attorney represents the appellant, his old approach failed to convince someone. Of course, counsel for the appellee must be sure to develop strong defenses against the appellant's attack, whether in the old form or a new garb originated for the appeal. In doing this, the attorney must view the case in its entirety so as to see the full weight of one issue upon another.

It may be helpful in determining the logic and justice of one's position to prepare impartial hypothetical statements, perhaps slanted slightly in favor of one's adversary. Then the attorney should answer these as if he was writing an examination, weighing all of the possible implications on each side thoroughly. It may also be helpful to show them to some other attorney, one who possesses that rare virtue of being a candid friend. If one values a completely honest opinion, he should not reveal his interest in the case. If the impartial expert's reaction upon reading such statements is not immediately favorable to the side which the attorney has embraced, then the attorney is in trouble. Since the rightness of his position should be immediately apparent to the court if the attorney is to succeed, it should equally be clear to another attorney (save opposing counsel).

### The Writing Process

When the meditating, selecting and organizing process has been completed and the notes have been integrated, the argument can be written. There are several different methods for doing this. Some attorneys like to write one draft quickly, not bothering with citations or any other matters which might distract them. Then, once this "inspired" draft is cold, they will write another with great concern for accuracy and detail, incorporating all needed citations and references to evidence. When both of these drafts are cold, they can be interwoven, utilizing only the best of each.

Other attorneys prefer to write one point at a time. This is proper if the attorney remembers to link the points together at the end so that there is no abrupt jump from one point to another. It is generally best to write one "inspired" brief, since this best reflects the sincerity and rightness of one's position, which can be lost so easily when bogged down with details. However, many attorneys, instead of writing a second brief, may prefer simply to incorporate citations and details into the first draft after it has become cold, at the same time improving the style where emotion overcame reason. Whatever method is used, once the argument section has been completed, the rest of the brief can be written rather easily.

With the issues already determined, the attorney must avoid being led off on tangents, whether by following the arguments of the opposing counsel or a side issue developed by the lower court. Indeed, the attorney should clearly indicate why these matters are irrelevant so that the higher court will not itself be led down a similar calf-path. Perhaps opposing counsel failed to raise an issue in the lower court. If so, that fact should be made clear to the reviewing court rather than wasting time answering an irrelevant issue. Where the cases cited by opposing counsel are accurate but immaterial, one might say: "We have no quarrel with the cases cited upon these pages by appellant, as announcing correct principles of law. However, they do not apply here." Then one might briefly state why they are inapplicable under the circumstances. Or the attorney might say, if accurate: "These are all cases from other jurisdictions, and, in view of the Illinois law, we do not deem it necessary to discuss them in detail." The attorney has only so much ammunition. He must be careful to avoid wasting it on immaterial points. But he must be equally careful to convey the impression that, in indicating irrelevancies, he is doing so not for his own sake but to "conserve the time of the court."

In determining the order of presentation, the first point argued should be one involving the primary issue, which, while determinative of the controversy, is capable of being accepted by the court. The attorney should never begin with an unacceptable issue. Whenever possible he should avoid any issue which the court would find difficult to accept, such as the overruling of a recent decision rendered by that court, the declaring of a statute to be unconstitutional or the taking of a position creating a dangerous precedent. When the attorney must employ such an issue, he should not commence boldly and bluntly with it. For if the first proposition set forth by the attorney presents a steep hurdle, the court will hesitate before leaping over it and will approach the remaining propositions warily, becoming shy of the great leaps required. So if the attorney must request the court to create new law, he should begin with a perfectly logical step leading to the desired result by a series of natural and logical steps. It is often wise to break down such a point, particularly if there is only one, into several facets so as to permit this gradual development. The court may be led by such a series of acceptable points to the desired result, a result unacceptable if proposed boldly and bluntly.

The other extreme must be avoided as well. The attorney should never begin with a weak point even if it is perfectly acceptable. The court is likely

to react with a "so what" and go to sleep. The first impression is too vital to waste upon truisms. The attorney must assume that the court knows elementary law. If he desires, he may refer to such principles in discussing subsequent issues where they will fit in without causing boredom. For example, such weak propositions as those concerning the weight of a jury verdict should not be used to commence a brief.

One must make the most of first impressions—startle the court so that one has its full attention. Often this can be done by starting with the strongest issue. Or one can point out a conflict among the lower courts which needs settling, or that this is a case of first impression in the jurisdiction (be sure that it is if this is stated). These practices add zest to the jurists' lives and interest to the case.

Each point should be shown to have some relationship to those before and after it so that the brief flows along smoothly. Linking words may be all that is necessary, for example, "closely related to the last point" or "another fundamental point of difference." Within each point, the argument should flow logically and smoothly along with as few repetitions as possible. The argument should move in a straight line toward its destination with no detours to confuse the traveller. Again, linking words may serve as guideposts to smooth the path. Each point should reach a conclusion at the end, and then not be returned to except in the summary at the terminus of the brief.

### Effective Form

When a judge is presented with fifty or seventy-five pages of discussion, continuing line after line with no pauses, his first reaction is likely to be one of discouragement. This discouragement may prevent attentive study of the brief. But if these pages are broken into concise, compact sections, one point or issue to a section, the reaction is more likely to be favorable. Not only does the brief appear to be more concise and easy to read, but it becomes easier for the judge to retain the train of thought from the beginning to the end of a section. And, for the same reason, if the point has several subfacets, it is best not to lump them awkwardly together. Rather, one may divide the sections into subsections, one subfacet exclusively to a subsection.

Each section of the argument should be preceded by a roman numeral, every subsection by capital letters or some other designation. These numerals and capital letters should be reserved for the parallel sections in the other parts of the brief and not used for any other purpose. Following these designations, the essence of the particular argument should be summarized in a brief heading. If it is possible, one may keep these headings also for the other parts of the brief (except that for the statement of facts, the headings will have to be modified slightly so as not to be argumentative).

The headings should be stated clearly and persuasively. They should not be mere announcements of the subject matter involved in the discussion, but should present its very essence. While such a statement should be concise, usually no more than thirty-five words, it should give the reasons for the argument, for example:

I. The counterclaim of the defendant for personal injuries is barred by limitations because it must be measured as of the date it was filed and not as of the date of the plaintiff's suit.

These argumentative headings are of particular value in the federal courts or any other court requiring the use of an index. These headings will be incorporated in the index, thus giving the court an introduction to the argument. So it can be seen what an opportunity is wasted if the attorney merely lists headings such as "Argument as to the statute of limitations," or even "Defendant is barred by limitations."

### Citation of Authority

When the issues have been formulated and the arrangement of the brief has been determined, it becomes necessary for the lawyer to decide how many citations he will use. In some jurisdictions, citations will appear in two parts of the brief, in a section on propositions of law or points and authorities, and in the argument as well; in other jurisdictions, they will appear only in the argument section. But the rules set forth apply equally whether there are one or two sections. There are a few exceptions where numerous citations are needed to overrule a precedent or to create new law, but generally the more experienced a lawyer is, the fewer citations he will use. Just as the number of issues should be kept at a minimum to avoid dilution, so too should the number of citations.

Most courts require either that the citation of cases be limited to three under a given proposition in the points and authorities, or that the three most important citations be indicated in some special manner (and of course this limitation is reflected in the argument section since all citations appearing in the argument must be set forth in the points and authorities). Since the court has thereby indicated what it considers to be a proper number of citations for a given statement of law, it is likely to consider that a lawyer citing ten or twenty cases is merely too lazy to discover which cases were pertinent. Responding in kind, the court is inclined to read none of the cases, or, if it picks out a single citation at random and finds it inapplicable, it may throw the entire brief aside in disgust and find for the opponent by default.

It is rare to find many cases directly in point. There may be one or two, but other decisions will be, at best, only analogous and tangential. Since courts do not care to read textbooks for briefs, it is best for the attorney to limit his discussion to the most pertinent cases. He should save his text writing for the periodical and lawbook publishers.

In particular cases, the following rules will be helpful: If the law is well settled and the point is included for reference only, only one recent leading case should be cited. Perhaps two could be used if all the decisions have come from lower courts in the state, but one should be certain in such instances that the two cited cases come from different courts. If the law is disputed and the issue crucial, it is generally best to cite two or three decisions. This indicates that the favorable decision upon which the attorney is relying is not a mere fluke but is really representative of the law. There are, however, a few times

when citations will need to be voluminous. If there is no direct authority and analogies are needed, the citations will be numerous since none is directly in point. Another instance is when a question necessitates the use of comparable cases, as where verdicts are challenged as excessive or inadequate or where factual standards are weighed. Unless one is discussing the case at greater length at that point, its use in this way calls for a parenthetical statement of relevant information following the citation, *e.g.*, the amount of the verdict allowed and for what type of injury.

The attorney must also be careful not to overuse citations from other states. Generally, if the law is clearly settled in the jurisdiction of the forum, there is no need to cite authorities from other jurisdictions (unless the law is settled the wrong way). But where the matter is one of first impression or the law is ambiguous, discussion of the decisions of other courts may be helpful. Discretion must be employed. Normally, courts tend to lean upon the jurisprudence of certain states more than others. For example, community property states will not use cases from courts which follow the common law rules in dealing with questions of estates or property. Similarly, a state in one region of the country often prefers decisions from other states in the same region. Usually, a decision by a court in a populous commercial state, which is respected for sound jurisprudence, will be given substantial consideration by any court. Of course, a decision written by a renowned judge, such as Learned Hand or Cardozo, is often of great value. On this subject, there are many valuable decisions hidden away in the *Federal Cases*, decisions rendered by such legendary judges as Story — yet how few of these have ever been cited by an attorney! The basic determination as to which cases to cite depends on the simple question of which decisions support one's arguments.

The attorney should also avoid the common mistake of citing cases from lower courts to persuade a superior court. Often briefs in the United States Supreme Court are filled with declarations of law resting solely upon decisions of the courts of appeals or, even worse, the district courts; similar instances can be found in the state courts. There are only a few occasions when such references may be helpful. The first is to show conflict. To get into many supreme courts, including that of the United States, it is often necessary to show an irreconcilable conflict between the circuits and that one line of reasoning is erroneous. Another such use is to show tradition: "Such a rule has existed for perhaps fifty or sixty years. Would it not be upsetting the applecart to change it now?" Yet any attorney who remembers *Erie v. Tompkins* knows that an argument based solely on tradition is not always successful. The only other occasion when such a reference could be helpful is where a lower court's decision on a question of first impression is so well reasoned as to provide a guide to the higher court. Here the renown of the judge may be the critical factor. Decisions of such men as Learned Hand are certainly appropriate references in any court.

When a very old decision is cited, it is often wise to balance it with a recent one to indicate the stability of the law. But one must not cite every case decided in the interim to show the progress of the law. Not only does such a

practice unjustifiably extend the number of citations and the length of one's brief, but the tendency of courts in setting forth dicta unfounded on the facts, the law or the arguments of the attorneys might well prove both confusing and embarrassing.

If it is necessary to cite more than two or three decisions under a single proposition, whether in the points and authorities or in the argument itself, it is better to set them forth in such a manner as not to appear to overburden the court by such a "mass" of cases. One method is by restating a proposition in different language, having the same or nearly the same meaning and putting appropriate citations under the second or third statement. A better device is to subdivide the main proposition into several component parts and put the relevant cases under each one of the subdivisions.

The attorney must be meticulously accurate in his use of citations. If the court discovers that the cases do not hold as he claimed or that his use of them is otherwise erroneous, the attorney will lose its confidence — and the case (moreover, courts, like elephants, never forget). Every citation must be Shepardized to see if it has been reversed, overruled, limited or even partially distinguished. A case which has been reversed should never be cited unless it was reversed upon another issue. Even then, this fact must be clearly stated in one's brief. Otherwise, his opponent will enjoy every moment of his courteous but firm correction of his adversary's mistakes.

It is most important, particularly in cases where the facts are all-important, that the relevancy of the decisions cited be made immediately apparent to the court. The mere recital of legal principles enunciated by cases is futile and not understood in context with the facts of those cases. Therefore, such facts must be set forth succinctly but accurately to show why the court's ruling as engendered by those facts either supports counsel's position or does not support his adversary's.

### Conclusion

Once the argument is completed, the attorney will compose the other portions of the brief. He must set forth the facts in a persuasive, interesting, but unargumentative fashion. Often he must also set forth a statement of the issues or questions to be decided in the case. There may be such other matters as a jurisdictional statement, summary of the argument and index. Even the least of these sections must be carefully written if the brief is to present an overall impression of excellence. Each section should follow the organization of the argument, whenever possible. For example, it is extremely helpful to the court to find that the facts are presented in the same order in the statement of facts as in the argument. Indeed the rules of most reviewing courts insist upon this. This is logical. If the issue is sufficiently important to be placed first in the argument, surely it has not lost importance by the time one writes the statement of facts. Again its very importance will cause it to be discussed first. The same is true of the other parts of the brief. By following the same pattern of presentation, a unity of thought and persuasion develops which can be achieved in no other way.

But the mere writing of the particular sections of the brief comprises only a part of the lawyer's task. For if the attorney is to write an outstanding rather than a routine brief, he must pay attention to such details as will capture the court's attention and imagination. The lawyer must know how to use quotations, both from relevant decisions and from the classics, how to use analogies to explain a difficult argument, how to argue for the development of the law or, conversely, for the protection of *stare decisis*. Every appellate advocate must become an expert in the use of words, knowing the nuances and shadings found in various synonyms. All of this is, of course, a lifetime study.

It can be seen from this discussion that a great deal of work is involved in the writing of a brief in a reviewing court. Nevertheless, it is worthwhile. The average lawyer is involved in only two or three appeals in his lifetime. They are terribly permanent things in which his name and in which his success or lack of success are printed and permanently bound for posterity. In a sense, the brief and its sequel, the opinion, are monuments either to his ability or to his lack of care. If the case is worth appealing or worth protecting on appeal, then it deserves to be treated with the utmost care and skill. (And the appellee has no more reason to be complacent than the appellant — it is easy to lose a verdict or judgment if not properly protected.) Moreover, the client deserves the best. The purpose of litigation is to win; there is no reward for second place. The practice of many lawyers in failing to familiarize themselves with the rules, or in handling something beyond their capacities, or in dictating something the day before it goes to the printer does not discharge their duty as advocates. Too often briefs which lawyers have dictated in part and hand-written in part and sent in that condition to the printer are filed without having been proofread and corrected. We attorneys have no right to criticize physicians who leave sponges in the bellies of patients if lawyers are equally cavalier of the rights of their clients.

In writing his brief the lawyer must be careful never to stoop to insincerity or dishonesty in the presentation of the facts or the law. Such behavior will permanently cost him the respect of the court before which he must try many cases other than the particular one in question.

In addition, as the canons of ethics point out, the attorney owes a duty to the court as well as to his client. He is an officer of the court. As such, he bears the responsibility of helping to shape the law in the proper mold. The court, being so heavily overworked, is generally dependent upon the attorney's presentation for its guidance. So if the court is to write a masterly opinion, it must receive a masterly brief. In effect, therefore, it is the attorney, not the court, who creates new and good law — or who, conversely, helps to make bad law.