

# LAWYERS' LANGUAGE - SOME SUGGESTIONS FOR INCORPORATING TECHNIQUES OF ADVOCACY INTO THE APPELLATE BRIEF

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For most lawyers, legal writing means brief writing. This is the real work of the advocate, when the life or livelihood of the client depends on how well your brief persuades a judge to act in his or her favor.

The appellate brief is the high point of the art, and strict standards of excellence and honesty apply. There is here a sense of history. The appellate brief may speak not only for your client's case, but also to future generations of lawyers and citizens. It is here that the law of the land is changed and defined, that it lives and breathes.

The first goal of the brief is to persuade, to advocate your side of the case. It must be well-reasoned, grounded in precedent and logic, but it must also present a convincing argument. All law students are taught that an appellate brief must be submitted by each party whenever the losing side in a trial appeals to a higher court. The brief tells what the trial was about, and why, as a matter of law, the result was wrong (or right, if you are the appellee). Most students are also taught the basics of legal reasoning, and even some writing skills. Few law students learn to think of the brief as an advocate's document, a tool in the adversary process. Few learn the difference between legal writing which is scholarly and objective, and brief writing, which is, by definition, biased.

We hope this article will help lawyers and law students to communicate better, to write more intelligibly and with a bit of style. But the purpose behind better writing is greater than simple aesthetics. We also want to help lawyers write more persuasively, and so ultimately be more able advocates for their clients.

We begin with some basic points on writing style, and continue with a discussion of all the steps in writing an appellate brief.

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## I. A STYLE THAT PERSUADES

Clear, readable language is more persuasive than obscure and heavy-handed prose. Clear writing that holds the interest is bound to influence a reader more than pages of poorly written argument.

Clarity comes first. When simple words are used in short, simple declarative sentences, the meaning 'shines forth clearly. In the name of clarity, a lawyer's language should be pared to the minimum. Most lawyers have lost touch with this use of plain language, as the public so often reminds us. A good rule of legal writing is never to use two syllables when one will do, and never use two words when one will do.

Eliminate all unnecessary words and phrases. Adverbs, adjectives and modifying phrases can obscure clear writing. Those qualifiers that soften a sentence to oatmeal also conceal its meaning.

Avoid adjectives and adverbs that add no substance. Words like "clearly," "certainly," "really," "very," and "perhaps," are lawyers' favorites. They mean nothing. Usually. The same is true of many adjectives. Use them to add meaning, but not to intensify degree or provide style. Such words weaken your prose. Qualifying nouns and verbs makes the writer appear insecure, without confidence in what he or she is saying.

Avoid meaningless introductory phrases: "It can be seen that;" "One may point out that;" "Obviously;" "Of course."

The brief itself should be short. Most, in their final form, are too long by at least one-third. Techniques that shorten a brief also make it more persuasive.

Use active verbs instead of passive ones. The law wallows in the passive tense:

Soliciting is Prohibited.

Inquiry into a man's thoughts is violative of the first amendment.

The statute was enacted by the legislature.

The offer was accepted by the offeree.

Use of the passive voice should be eliminated.

Edit out all these constructions. They are weak and unconvincing as well as obscure. The same is true of negative, rather than positive sentences. State facts positively.

She stayed home

not, she did not go out.

She neglected the child,

not, she did not take care of the child.

Clear writing is also direct. Too many lawyers are more likely to send the first of these two letters than the second:

Dear Ed,

It has come to my attention that your client has on certain occasions threatened his wife with serious bodily injury. Please be advised that I will be filing an application for an injunction to enjoin him from further entering upon the premises of the family home, unless he voluntarily sees fit to vacate beforehand.

Dear Ed,

Yesterday Mr. Brown came after Mrs. Brown with a bread knife. I'm going to ask the court to throw him out of the house immediately, unless he voluntarily leaves before I can get to a judge.

Ideally, a call will precede this letter so that Mrs. Brown is not sliced up before the next mail delivery. There are times when an advocate seeks obscurity, but this is not one of them.

The pace of writing is also important to the lawyer. The rhythm of a sentence or paragraph is often what propels a reader forward or holds him or her back.

Greater clarity or paring away the modifying words may quicken the pace. The particular words the writer chooses may, likewise, accomplish this goal. The ebb and flow of writing comes from the number of syllables in the words used and their location in a sentence. Tone and pace can be varied and so made more interesting.

A brief is a formal document, requiring a dignified writing style. Dignity doesn't mean dull, muddled, or otherwise obscure. Formality does not mean you cease to argue as an advocate, as forcefully and persuasively as you can.

United States Supreme Court opinions are wonderful examples of legal writing which is concrete, clean and concise in applying theory to specific fact patterns. Supreme Court opinions are well worth reading for their grace and style in handling the most difficult legal issues. You'll soon learn which justices have the finest flair for the language; look for their opinions and study them in order to improve your own work. Notice, for example, in the following excerpts from the high court, how the injection of ordinary words and phrases enlivens the subjects:

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. *Griffin v. Illinois*, 351 U.S. 17, 19 (1956) (Black, J.).

Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 540 (1969).

The makers of our Constitution undertook to secure conditions

favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.

They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

If the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)(Marshall, J.).

Writing that persuades is more than merely concise, more than unadorned prose. To make the reader easily understand what is written is only one part of the advocate's job. To sway that reader to your side, to make the reader your ally, that is the other part. A lawyer who wants to persuade must use words that carry impact, carefully selected for their psychological value more than their literary merit.

There has been much research on the effect of words on listeners and readers in the courtroom. There is a great deal to be learned from this research. Even so seemingly small an issue as the use of the definite or indefinite article is significant. A substantially greater percentage of people respond Yes to the question: "Did you see the car with *the* broken headlight?" than the question: "Did you see the car with *a* broken headlight?" after all had seen a photograph of a car with headlights intact.

Positive selection of words has an even greater effect. One group was asked: "How *tall* is the average basketball player?" Another group: "How *short* is the average basketball player?" Those who were asked "how *tall*," responded 79 inches. The "how *short*," group answered 69 inches. "Do you get headaches *frequently*?" was asked of one group. "Do you get headaches *occasionally*?" was the question put to another. The "frequently" group said 2.2 headaches per week, while the "occasionally" people reported only 0.7 headaches per week.

All brief writing must be accurate. As a member of the bar you have an obligation to serve justice. Misrepresentation, even by implication, has no place in any document you produce. However, the use of persuasive language is not dishonest. It is a necessary skill for any litigator, and without it you cannot fulfill your obligations to your clients.

You need never, for example, refer to your client's clothing as

"caked with dried blood." It is enough to say that his jacket was seized by the police without a warrant. The art of persuasion through words has perhaps an unsavory reputation. The word "propaganda" carries with it the connotation of deceit. But that is not what we are discussing here, just the many ways to make your written argument more convincing.

## II. WRITING THE BRIEF

A brief has a formal structure: a table of contents; a list of all cases and other authorities relied on by the author; and excerpts from statutes which the court must interpret or which are significant to the case.

There are also five prose sections: 1) a statement of the issues before the court; 2) a statement of the proceedings; 3) a statement of the facts; 4) a legal argument; and 5) a conclusion. **ALWAYS READ THE RULES OF YOUR JURISDICTION BEFORE YOU BEGIN WRITING A BRIEF.** Formal requirements vary among jurisdictions and among courts within a single jurisdiction. While some courts are lenient about technicalities, others regularly reject briefs printed on the wrong size paper or in the wrong type size.

### A. *Questions Presented*

The Questions Presented, sometimes called the Statement of Issues, is a concise list of the questions of law which the court must decide. The issues should be separately listed in the form of individual questions, which can be answered yes or no. Each question corresponds to one of the major argument sections of the brief. As you pose a question, you should be arguing the answer. Each question should suggest the answer you want the court to reach. For example,

Did the Court deprive the plaintiff of due process of law by treating her as a stranger to her children and denying her the presumption in favor of natural parents that prevails in custody disputes between parents and third parties?

Did a private relinquishment of parental rights signed in Saigon, Vietnam, to get the plaintiff's children out of that country in time of war deprive the plaintiff of all her due process rights as a natural parent?

The Questions Presented are often the first thing the court reads. They must set the stage for a later convincing argument. They must pique the judges' interest and inform them about the case.

Suppose a criminal defendant is appealing from a murder conviction. He claims he was convicted by evidence obtained during an ille-



gal police search. Counsel for the defendant might state the fourth amendment claim this way:

Did the state violate the defendant's fourth amendment rights?

But this tells the court nothing, and does nothing to sway the reader in favor of the defendant. A better phrasing would be:

Is search of a home without a warrant a violation of the fourth amendment to the Constitution of the United States, when the searching police officers have no probable cause to believe the defendant is present, and are acting only on the advice of an anonymous phone caller?

On the other side, the prosecutor might state the same question differently:

Are a knife and several bloodstained pieces of clothing admissible in evidence when these items were obtained by police from the defendant's home after they had been informed that the defendant had just murdered someone and run inside, leaving a car outside with its motor running?

Notice how each writer uses words he wants the court to repeat in its decision. For the defense, was the search a "violation of the fourth amendment?" The prosecution asks if the "evidence was admissible?" These words direct the readers' thoughts. They create a predisposition towards the result the writer wants.

Begin the Questions Presented with your strongest point, the issue on which you are most likely to win. Proceed to your next best issue, and end with the weakest. Some issues are so weak you want the court to pay little attention to them. State these briefly, leaving out some of the detail. There is a standard form for stating issues which is useful at such times: begin with the words, "Did the Court err . . . ?" and then state the action appealed from. Thus, "Did the Court err in omitting testimony of the victim's reputation for violence?" This form is always correct, so use it if nothing else suggests itself.

As the appellee defending an appeal, you should usually, but not always, state the issues in the same order as the appellant. This will be easier for the court to follow. However, if you can argue one point very strongly—an important one in the case—by all means begin with it. You might include an explanation in the text later to help the reader follow the argument:

The appellee will answer the appellant's fourth amendment claim first (Brief of Appellant, page 27) because it is dispositive of all other issues.

or,

Appellee wants to assure this Court, at the outset, that Judge Smith did not act out of bias or prejudice in deciding this case. He will answer the appellant's fourth point first, therefore, and then continue to take up each of the appellant's other contentions, in order.

In any case, list the issues in the order you will argue them in the brief.

### *B. Statement of the Proceedings*

The Statement of the Proceedings, also called the Statement of the Case, tells the court what has happened so far, and outlines the procedural basis for the appeal. It is a short summary identifying the name of the lower court, the nature of the case (civil or criminal, jury or non-jury) the proceedings below and the decision appealed from. For example:

The defendant appeals from his conviction, by a twelve member jury, of manslaughter in the first degree, in the Superior Court of Fairfield County on July 1, 1979. Before the trial, on May 8, 1979, the Court denied the defendant's motion to suppress evidence seized after a warrantless search of his apartment. The defendant's motion to set aside the verdict as against the weight of the evidence was denied on July 15, 1979. This appeal is taken pursuant to §52-263 of the Connecticut General Statutes.

State only the major procedural rulings from which you are appealing, or which are essential to the court's jurisdiction. In the example, the fourth amendment search issue is the basis for the appeal. The denial of the motion to set aside the verdict is added because it must be made and ruled upon before an appeal is taken in this jurisdiction. The statutory basis for the appeal is required by some jurisdictions, particularly when there is no automatic right to appeal.

If the case is procedurally complex, and a knowledge of the details will clarify the points in your appeal, take the time and space to set forth as much detail as you think necessary.

Many lawyers combine this procedural summary with the Statement of Facts. Others separate the two, and there are times when a short Statement of the Proceedings, under separate heading, lets you present a more forceful factual narrative. When facts and procedure are closely interwoven, however, unified treatment is better.

With either form, once the procedural summary is out of the way, you can begin your Statement of Facts, the basis for your appellate argument.

### C. *Statement of Facts*

Here you tell the story of the case, of the events that brought two people to battle on opposite sides in a court of law. You must state all the facts necessary to decide the appeal; you can add any facts that would encourage a decision in your favor.

Each of the facts you have marshalled should be substantiated by a citation to the record or the transcript. Facts, in this context, means facts in evidence at the trial. The appellate court can't base its decision on facts not in evidence.

Never misstate the facts or withhold an obviously relevant fact from the court. It is unethical. Your opponent will certainly inform the court and you will forfeit whatever support or sympathy you otherwise might have gained. An advocate, however, is not an impartial reporter; you are under no obligation to argue your opponent's case. Your job is to present the facts in the most favorable light for your side of the case. Use all the techniques of persuasive writing. (Was there *an accident* or did *the car crash*? Was there a *crime perpetrated upon a young girl*, or did *the defendant kill her*? Was your client *injured*, or was *his arm severed above the elbow*?)

Refer to your client by name. The first time, you may have to use the phrase, "Jenny Jones, the plaintiff-appellant." Thereafter she should be Ms. Jones, never Jenny and preferably not Jones. Your opponent, on the other hand, is almost always the defendant-appellee.

Begin with the most compelling aspect of the case. Without sacrificing logic or order, try to interest and convince the reader early of the merits of your side. Don't wait until the final paragraph to say that your client's arm was broken by the police. If necessary state your key points in a paragraph, and then tell the story chronologically.

Find some moral or philosophical abstraction with which the judge can identify. In a freedom of expression case, for example, you might begin with how your client tried to express himself and how that expression was thwarted by the local mayor. The prosecution, instead, might stress the ideas your client wanted to express, if those were unpopular, or the circumstances in which he chose to express them (a crowded street, a hostile neighborhood).

There are times, in briefs as well as in court, when it is good strategy to confront those facts which are most damaging to your case. You will appear open and honest by bringing them to the court's attention. You can also control the context in which the court learns of the unpleasant facts. In a rape and murder case you can't keep all the details of the crime from the appellate court. You can point out



that the crime was so vicious, and so horrified the community, that no man should stand convicted of it if there is the slightest chance that he is innocent. This is a time for the rigorous application of the standard of guilt beyond the reasonable doubt. You can remind the judges that at the time of the trial, community feeling was so intense that there may have been pressure, however subtle, upon the trial judge to obtain a guilty verdict, even in disregard of your client's basic constitutional rights. In the dispassionate atmosphere of the appellate tribunal, justice can, at last, be done.

That said, beware of overstating the case for your opponent. One defense lawyer we know makes his clients appear more guilty in his statements of fact than the state's attorney is able to do. You must include only those facts which relate directly to the issues in the appeal. Therefore, if you have a strong legal basis for the appeal, but the underlying facts (the 'equities') are against you, stress only the facts which concern your claims of law, and summarize the rest briefly. If you are challenging a coerced confession, for example, the statement of facts should be about police behavior during the arrest, interrogation and confession. The court knows the verdict and the charges against your client. Leave it for the prosecutor to describe the brutal crime of which your client was convicted. If you are appealing a ruling on evidence, you need only report in detail what the disputed evidence was and the court's ruling.

In the following example, one plaintiff was killed and the others injured in a car accident. The defendant was the used car company which had sold the car with defective brakes. The defendant appealed, claiming the court committed error when instructing the jury about a 'missing witness,' the used-car salesman who had actually sold the car. Notice how each side handles the facts of the accident. Each is honest, yet with such different impact upon the reader.

For defendant-appellant:

On August 29, 1978, plaintiff John Locke took delivery of a used 1967 Tempest station wagon he purchased from the defendant, Morris Motors, Inc.. Prior to delivery of said vehicle, it was safety checked by Morris' used car manager, John Knight, and it was put on a get-ready status. The safety check included an inspection of the brake linings, which did not require repair or replacement, and the car was passed as fit for operation.

Although Locke had some difficulties with the car and reported these problems to the defendant several days later, these complaints did not relate to the condition of the brakes.

On the night of September 1, 1978, Locke met plaintiffs Peter Prince, Joel Barnes and Albert Trees at a bar in Bridgeport known

as Brother Hall's. When the parties left the bar, Locke agreed to drive the plaintiffs Prince, Barnes and Trees to the home of a friend, Albert Jones.

As Locke was proceeding east on Stratford Avenue at a speed of 35 miles per hour with the other plaintiffs as passengers, he observed a car passing him on his right at a fast rate of speed. Locke applied his brakes and swerved his car, and his foot was frozen on the brake and gas pedal.

The right rear of his car struck a telephone pole, causing injuries to Barnes and Trees, and the death of Peter Prince.

For the plaintiff-appellee:

Peter Prince was killed in an automobile accident when the brakes failed and the car in which he was riding crashed into a telephone pole. He was eighteen years old at the time. Plaintiffs Joel Barnes and Albert Trees were passengers in the same car and were also injured in the accident. The driver, Richard Locke, was hurt as well.

Only four days before the accident, Locke had purchased the car, a used 1967 Pontiac, from the defendant, a used car dealer. The condition of the brakes at the time of the accident showed that when Locke bought the car the brakes were dangerously worn and rendered the car unsafe to drive.

The day before the accident, Locke brought the car back to the defendant and complained to a salesman named Don that there were odd noises when he slowed down. Don, who had sold Locke the car, discussed the complaint with the service manager, and then told Locke it was nothing, that he should use the car and return it to have it checked after the weekend.

"Don" is the missing witness. Defendant's brief doesn't even mention this fact, but glosses over the incident, saying Locke "reported these problems to the defendant several days later." (Recall there were only four days between delivery of the car and the accident.) The plaintiff, in three paragraphs, has dramatized the accident, evoked the public's dislike of used car salesmen, and introduced Don. The defendant has assured the reader that it inspected the car, and has placed the driver and his buddies out drinking, in a bar, probably in a questionable part of town. He has also told us that another car was partly to blame for the accident. Neither of these statements is in any way unethical, yet they create very different impressions.

The Statement of Facts, and the rest of the brief as well, should present the facts in a clear and concise manner leaning toward formality rather than chattiness. Your own value judgments should be conveyed subtly, by the way you present the facts. Avoid outright

characterizations or opinions. Don't begin by observing that this was the most outrageous and inexcusably unprofessional conduct you've ever observed in a trial judge. You lose all credibility by such language, even if the statement is true.

The writer of the following from a federal appellate brief has not hidden his point of view, but has pursued the matter with some tact:

Stung by the *Jones* decision, the city [defendant] eagerly joined a consortium of Connecticut cities formed in Hartford which offered the hope of insulation from legal liability for its fire department hiring practices, and had the added attraction of federal funding. A total of eleven cities used Intergovernmental Personnel Act Funds to hire Smith Associates, a Philadelphia consulting firm. The central purpose of the consortium was to find a test that would stand up in court.

The fire department study was conducted in 1973 by a Smith employee, P.L. L's qualifications for this task were modest; he was at that time a freshly-minted Ohio State Ph.D. who had not done major graduate work in the area of test validation and was a junior employee at Smith.

Even though the bare facts show no major malfeasance, the reader can feel and readily identify with the writer's contemptuous treatment of the city. The reader shares the writer's opinion of the city, like two reasonable folk conspiratorially enjoying a private joke.

The stage now set, the players identified, we can move to the heart of the brief, the legal argument.

#### D. *Argument*

This part of the brief is the written presentation of the legal reasoning supporting your claims. The writer presents the law, and applies it to the facts of the case. It is the most difficult to write; the most intellectually demanding.

The purpose of the argument is to argue and convince, not to analyze, summarize or discuss. This part of the brief demands careful planning. Before writing one word, spend some time just thinking about the argument. Think through each logical step through which you must take the reader before you reach your conclusion. Identify all the arguments your opponent will make and answer each of them. Imagine how he or she will try to combat each of your points.

Outline your entire argument before you write. Begin with your strongest point; end with the weakest, following the order of the questions presented. Strive for the simplest possible logical sequence: one so simple as to be self-evident. For example:

- A. A citizen cannot be deprived of a fundamental Constitutional right without a prior hearing.
- B. The right to travel in and out of the United States is a fundamental right.
- C. Revocation of a passport is a deprivation of the right to travel.
- D. Revocation of a passport is a deprivation of a fundamental right.
- E. Therefore a passport cannot be revoked without a prior hearing.

or,

- A. Separate educational facilities for black and white children are not equal school facilities.
- B. In Jonestown, all blacks go to Graham School and all whites go to Beecham School.
- C. Therefore, Jonestown does not provide equal educational facilities to blacks and whites.

These propositions may or may not state the actual law at the time you read this. Notice, though, how each statement builds on what has gone before so that the conclusion is inevitable by the time you reach it.

1. *Headings.*—Give each issue covered in the brief a separate numbered heading. The heading states the conclusions you intend to reach as to that issue. In that sense it is a summary of the argument which follows. Thus:

A Citizen of the United States Cannot be Deprived of a Passport Without a Prior Hearing.

A heading is very much a part of the argument. Its words must guide the reader to accept your conclusion as the only reasonable one. The government, for example, might want to counter the last example with this heading:

The Due Process Clause Does Not Demand a Hearing Prior to State Department Revocation of a Passport for Foreign Travel.

In the first example the "citizen" is being "deprived" of something important. In the second, the same individual is "demanding" special consideration. The government's language also reminds us that we are dealing with foreign policy and the Department of State, areas in which judges rarely interfere.

A heading restates the question presented, as a statement and not a question. A well-stated issue will be the basis of a heading. For example:

*Question Presented:*

Is the search of a home without a warrant a violation of the fourth amendment to the Constitution of the United States, when the searching police officers have no probable cause to believe the defendant is present, and are acting only on the advice of an anonymous phone caller?

*Heading:*

The warrantless search of defendant's home violated the fourth amendment because the police had no probable cause to believe the defendant was present and were acting only on the word of an anonymous phone caller.

*Question Presented:*

Does the Due Process Clause permit an element of an offense to be found proven beyond a reasonable doubt when the only evidence in support of that element is the opinion of two medical witnesses, whose opinions are not expressed in terms of 'reasonable probability' or 'beyond a reasonable doubt'?

*Heading:*

The Due Process Clause does not permit a jury to find an element of an offense proven beyond a reasonable doubt, when the only evidence in support of that element is testimony of two medical experts whose opinions are not expressed in terms of reasonable doubt or reasonable probability.

Use subheadings to mark off subdivisions of your major issues. In the passport case, for example, each point in your outline could be a separate subsection, with its own heading. A complex legal argument is much easier to follow when each logical step is separately set off, visually and textually. Several pages of uninterrupted text will strike the reader as difficult, requiring too much hard work and concentration. An argument so hard to understand, the reader thinks, may be wrong. Subheadings and frequent paragraphing promote visual ease and guide the reader along through the text.

2. *Text.*—An introductory paragraph should summarize the main points in each section of the argument:

The United States Constitution guarantees that no one may be deprived of a fundamental right without due process of law. When Mr. Baggins lost his passport, he was deprived of his fundamental right to travel. Without any forum to challenge the government's decision, he was confined forever within the boundaries of the United States.

Succeeding paragraphs should expand upon each legal proposition,



with citations to cases and statutes.

An argument should begin with the most persuasive precedent in your favor. In our example, if the United States Supreme Court recently decided one or more cases on the right to travel, or the right to a passport, begin with those. If there were no travel or passport cases, begin with the most recent law on procedural due process. Do not write a history of the right to travel or the fifth amendment right to a due process hearing. The reader wants to know immediately what the current law is.

Go on to show the underlying reasoning, or *ratio decidendi*, of those cases. How did the court come to hold that the right to travel is fundamental? In what circumstances does due process require a formal hearing? Show, in each instance, how that reasoning demands a certain result when applied to the facts of your case.

Structure your brief so that every paragraph relates directly to your case, either to its facts or to the specific legal issue you are dealing with. Do not try to show off the breadth of your newly acquired knowledge on the subject. Legal argument is often necessarily abstract, but it can still direct the reader to the subject at hand.

A good legal argument relies on both precedent and public policy. A court will not cling to precedent without reason. After discussing the right to travel you might go on to what that right really means (travel where? by whom? by what means?). Don't assume the judge will connect the right to travel with passport regulation. Spell out how control of passports controls where people can go. You will have to meet the argument that the national interest requires some control of foreign travel. You can then conclude that a due process hearing is the best way to protect the nation and still shield the individual citizen from arbitrary loss of a passport.

3. *Use of authority.*—Every statement of law must be supported by citation to some binding authority, either a statute or prior decision. To do this, and still hold the reader to the flow of your argument is the hardest part of legal writing. It is a technique that comes readily with practice, but for the beginner there are some helpful guidelines.

Don't over-rely on precedent. It is only one factor influencing the court. Logic, reason and public policy are the chief persuasive instruments by which case law is made. Stress the reasoning behind your interpretation of the law. Tell the court why your position expresses the public policy of your jurisdiction, or why it will serve some public need beyond the specifics of your case. With an important precedent, explain the facts and the policy reasons behind that prior decision. In

the following example, the plaintiff was arguing that one could be liable for negligently furnishing alcohol to a person who became intoxicated and then injured another:

In *Merhi v. Becker*, 164 Conn. 516, 325 A.2d 270 (1973), the court did impose a duty of care on a social host for injuries caused by the drunken driving of an intoxicated guest. Becker had attended a union-sponsored picnic at which he was served large amounts of beer (as was nearly everyone present). As a result, Becker became intoxicated, got into a fight with another guest, and drove his car into a group of fellow-picknickers, and struck and injured Merhi. The Court held that Becker's intoxication did not preclude a finding that the union's negligence in serving Becker alcohol while he was intoxicated was the proximate cause of Merhi's injury. Even though Becker himself consumed the alcohol, that did not relieve the union of liability for the harm caused the plaintiff.

Cite holdings and not *dicta*. A holding is the reasoning of the court which is necessary to the decision. *Dicta* are discussions of matters not necessary to the decision. Only holdings are, technically, binding, though the distinction is often ignored or blurred by judges and lawyers. You should indicate parenthetically when the point you are citing is *dicta*.

Never, never string together summaries of cases. Such a style belongs only in a encyclopedia. Make your points in your own words and then state your authority. Thus,

Jurisdiction over appeals from administrative agency decisions exists only by statute. *Norwich Land Co. v. Public Utilities Comm'n*, 170 Conn. 1, 363 A.2d 1386 (1975) When none of the statute bases for an appeal are present, that appeal must be dismissed for lack of jurisdiction.

Fathers of illegitimate children are granted visitation rights or custody, even though they lack any standing under the law as parents. *Doe v. Doe*, 163 Conn. 340, 307 A.2d 166 (1972).

You can summarize more detailed content. But relate it when you can to the facts of the case before the court:

There have been other situations in which, even after adoption, natural parents or other blood relatives have won visitation rights against the wishes of the adoptive parents. *Katterman v. DePiazza*, 151 N.J. Super. 209, 376 A.2d 955 (1978). The adoptive parents in *Katterman* were just as opposed to such visiting as this defendant.

When a case is so similar to your own that it should be controlling precedent, give the court more detail. The very contrast between the weight you give this case and your other citations will emphasize its

importance. Even with such a case, though, make clear the connection between its facts and your own.

Sometimes several cases support your point, and the facts, while worth mentioning, don't require detailed treatment. Use signals, such as *See*, *See also*, and *Cf.* Or string together several (no more than four) case citations, each one followed by a parenthetical note on the facts.

*Zerby v. Warren*, 297 Minn. 134, 210 N.W.2d 58 (1973) (unlawful sale of glue to a minor); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N.E. 102 (1912) (sale of morphine); *Anderson v. Settegren*, 100 Minn. 294, 111 N.W. 279 (1907) (loan of gun to a minor).

4. *Quotation.*—For the legal writer, direct quotation, used sparingly, can be a powerful tool. Most lawyers quote too much. Upon completing the research for any brief, you will have at hand masses of quotes by judges, saying just what you want to say, only better. The temptation is great to string these together with a few well-phrased connectives of your own and hand them to the court. Don't. Quotations should jolt and surprise the reader, regaining lapsed attention. They can do this only when used with restraint. Use the best, and, no matter how painful it is, discard the rest.

Use quotations that add to your argument. Don't quote only because another writer said what you've just said. Make sure the quote contains a new thought, and amplifies your point:

A judge is disqualified for prejudice only when he holds a personal bias or prejudice towards one of the parties, or when he stands to gain, financially or otherwise, from the outcome of the trial. "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial." *In re Linahan*, 138 F.2d 650, 651 (2d Cir. 1943). Particularly in family matters, judges are likely to hold certain ideas and values, based on their own life experiences which may influence decisions. A trial judge "is empowered to exercise reasonable discretion in the conduct of the trial." *Williams v. American Fidelity Co.*, 140 Conn. 572, 581, 102 A.2d 345 (1954). This discretion is particularly broad in rulings on the relevancy of evidence. *National Broadcasting Co. v. Rose*, 153 Conn. 219, 227 (1965). "The question must be determined in each case according to the teachings of reason and judicial experience." *Branford Sewer Authority v. Williams*, 12 Conn. 421, 425, 215 A.2d 123 (1970).

The *Linahan* quote could have come at the end, instead of the middle, but in this form it blends into the argument and adds to the reader's understanding. The last quote is useful, as it explains some

of the reasons behind the rule of judicial discretion. The writer should have eliminated the second quote. It is so self-evident it could be combined with the next sentence without a separate citation: A judge exercises broad discretion in conducting a trial, particularly when ruling on the relevancy of evidence. National Broadcasting Co. . . .

5. *Distinguishing cases.*—In every case there are some opinions holding against you, which must be “distinguished.” This means that you must explain to the court why those cases are different from yours and, therefore, not relevant, even though they may seem similar. Sometimes the facts are so different you can distinguish the case on a purely factual basis. Distinguishing is often facilitated by recalling the definitions of holding and *dicta*, and then classifying language that hurts you as the latter: “The statement from *Brook v. Stream*, cited by defense counsel, is mere *dicta*. That case really holds. . . .” Read all your opponent’s cases, if you are the appellee or if you are writing a reply brief. Most lawyers cite *dicta* some of the time. Cites are sometimes inaccurate. You can, and you should, tell the court in your brief if your opponent has miscited a case.

At times the mere age of a decision is a sufficient distinguishing feature, or the fact that it was decided by a lower court. For example:

Decisions from other jurisdictions cited by my opponent are not binding on this Court. The point has never been decided in Illinois.

If a case cannot be distinguished, and was decided by the same court in which you are arguing, you must either concede the point or ask the court to overrule its prior decision. Courts do this, and on an important issue it is worth trying to make a strong public policy argument for changing the law. Explore the impact of the prior case. Tell the judges if it hasn’t worked out as they had planned. It’s better to say outright that you are asking them to overrule an older case than to pretend that it is distinguishable.

If none of this works, consider conceding the point. Never feel you must save face by arguing every issue you’ve raised in the trial court, or in your appeal papers. You can always reserve your right to appeal the issue to a higher court. The judges will be grateful you haven’t wasted their time with a losing argument, and will be more receptive to your other points.

6. *Statutes.*—Quote directly from statutes only when:

- 1) You are asking the court to rule on the proper interpretation of a statute; or
- 2) You are relying for your argument on specific statutory

language.

Quote as little of the statute as possible, and summarize the rest:

Kidnapping is a felony under federal law, punishable in some cases by life imprisonment. 18 U.S.C.A. §1201(a).

Connecticut defines a "custody determination" as: "A court decision and court orders and instructions providing for the custody of a child, including visitation rights." Conn. Gen. Stat. §46b-92(2). It does not include a proceeding to enforce or clarify a pre-existing visitation order. This becomes clearer upon reading the related definitions of "decree" and "modification decree" Conn. Gen. Stat. §46b-92(4) and (7), neither of which refers to enforcement proceedings.

Most statutes can be summarized. Rarely has a lawyer quoted, in full, the fourteenth amendment. If the court is familiar with the subject matter, it doesn't need the text set out in your brief. In the following example, notice how the writer simplifies a complicated statutory scheme, and how, at the same time, she makes her point that a privately signed consent to adoption is not a binding termination of parental rights:

Connecticut adoption law requires a court order terminating parental rights of natural parents before considering a child free for adoption. Conn. Gen. Stat. §45-61j. Prior to terminating parental rights, a hearing must be held after notice to the natural parents, and this is so whether or not the parents have signed a consent form. Conn. Gen. Stat. §45-61d. At the hearing there are specific and exclusive grounds for termination of parental rights one or more of which must be found before the child is free for adoption. Conn. Gen. Stat. §45-61f. One such ground is actual consent, not a privately signed consent form but actual consent at the time of the termination. Even if a parent has waived notice of the hearing on termination, the adoption process cannot go forward without a hearing, a requirement which allows the probate court to investigate whether actual consent is present, and gives a natural parent some time to change her mind.

7. *Other sources.*—When a point is based on documentary evidence, you must support it by citation, just as you would a case or a statute.

The plaintiffs James Redding and Ellen Moore claim that their employer, the defendant, has discriminated against them and all its minority employees, based on their race by refusing to promote them to management positions. Mr. Redding was employed by the defendant from 1965 to 1975. He achieved the rank of foreman in 1968, but was later demoted and finally laid off. Personnel Record, James



Redding, p. 1.

Even facts not in evidence can be cited in a brief. Courts are often grateful for sources which support their opinions.

Traffic accidents are the greatest cause of violent death in the United States, and approximately one-third of the ensuing injuries and one-half of the fatalities are alcohol related. In 1975, as many as 22,926 traffic deaths involved alcohol. Third Special Report to the United States Congress on Alcohol and Health, United States Department of Health, Education and Welfare, p. 61.

8. *Scholarly materials.*—Scholarly journals, treatises and the like, are also in the category of materials not binding upon a court, but useful to bolster your conclusions. You may be making a new public policy argument. If a good law journal agrees with you, cite it. A treatise may give the theory behind a rule of law more concisely and accurately than any one case in your jurisdiction. Occasionally you can cite a treatise for a well-known legal proposition, instead of stringing together a lengthy list of cases:

Both duty and proximate cause are issues of law to be decided by the court and not by the trier of facts. Prosser, *Torts* (4th Ed. 1971) pp. 206, 244-45.

Avoid citing encyclopedias. These are research tools, and are no substitute for actual cases.

The following example shows good use of a variety of authorities, woven into the text without interrupting the flow of the argument.

The Court was incorrect in its statement as to the purpose and effect of §30-86. Because it is intended for the protection of the public, violation of that statute is negligence as a matter of law, or negligence per se. *Wright v. Brown*, 167 Conn. 464, 468-9, 356 A.2d 176 (1975). Section 30-86 and its predecessor §4293, were enacted for the protection of the public at large from the dangers posed by persons unable to control their behavior due to the consumption of alcohol. The statute reads as follows:

§30-86. *Sales to minors, intoxicating persons and drunkards.* Any permittee who, by himself, his servant or agent, sells or delivers alcoholic liquor to any minor, or to any intoxicated person, or to any habitual drunkard, knowing him to be such an habitual drunkard and any person, except the parent or guardian of a minor, who delivers or gives only such liquors to such minor, except on the order of a practicing physician, shall be subject to the penalties of §30-113.

It is extremely doubtful if these provisions in our Liquor Control

Act [4293, now §30-86] were intended to guard an intoxicated person from personal injury. Rather, they were passed in pursuance of a broader public policy for the protection of the public at large. *Noonan v. Galick*, 19 Conn. Supp. 308, 310, 112 A.2d 892 (1955) (emphasis added).

See also *Bania v. New Hartford*, 138 Conn. 172, 177-8, 83 A.2d 165 (1951). Since Linda Slicer was a member of "the public at large" and her injury was the type of danger the statute seeks to prevent, Burger's breach of §30-86 constituted a breach of the duty of care he owed to Slicer.

9. *Rewriting*.—Persuasive writing requires extensive rewriting and editing. Remember, the best argument is the shortest. Edit out all extraneous syllables, words and phrases. Edit out unnecessary explanatory text. Make sure each point is arranged in the best possible logical order. Mistakes in grammar and word usage are inexcusable.

The following paragraph, in its original form, is far from the worst example of a brief that hasn't been properly edited:

~~In the instant case, the Court was faced first with the initial task of determining had to determine what rights are validly asserted pursuant to under Vietnamese law. The defendant Friends for all Children claimed the right to proceed with the petition for appointment of a statutory parent pursuant to the provisions of under Conn. Gen. Stat. §45-61j of the Connecticut General Statutes. As can be seen, it is the position of the agency The agency claimed that as provided under that section the relinquishment agreement signed by the natural parent in Vietnam was valid when executed, was duly authenticated, and consistent with under Vietnamese law, served to render rendered the children free for adoption as that term is used in the Connecticut statute.~~

~~Based on the expert testimony adduced upon this trial, there was no question nor is there any disagreement on appeal All parties agree that a Vietnamese biological parent had the capacity to execute a could relinquish ment of her parental rights. in her children. The disagreement among experts involved the question of We disagree about whether Vietnamese law recognized a right in the parent parent's right to revoke. The narrow question of law thus remaining is whether Vietnamese law recognized a substantive or procedural right of revocation sufficient at the time of the Connecticut trial to preclude further adoption proceedings for adoption within this form. It is submitted that the answer to this question is not complicated and is clearly answerable under the unwaivering and clearly articulated policies and holdings of the Connecticut courts.~~

Assuming, for the purpose of argument, *arguendo*, that Vietnam recognized that a right of revocation, was recognizable under the laws

~~of Vietnam the dispositive question remains whether comity will recognize such a right. It is well settled in this jurisdiction that In Connecticut there is no implied or express right of revocation will be recognized in child custody matters if such recognition revocation would serve to deprive this forum's Connecticut courts of their inherent equitable jurisdiction to determine child custody consistent with the paramount standard of best interests of the children.~~

The edited version is not perfect, and the author's logic is faulty, but at least it is clearer, stronger and much easier to follow. Sentences similar to the last sentence in the second paragraph should be deleted from every appellate brief. If the matter were so simple, the parties wouldn't be in court. The words have no meaning at all. Lawyers usually say things like this about their most difficult point. They irritate the court and destroy credibility.

Get a good reference on grammar and usage, and, when you're uncertain about a word, look it up. No lawyer should be caught confusing tenable with untenable, among with between, infer with imply, or, as in our example, recognizable with recognized. Improper spelling is even worse. Your clients have a right to assume that you have mastered spelling and grammar.

### E. Conclusion

Some courts require a summary of argument as a conclusion to every brief. Others demand only the simple and straightforward: "For all of the foregoing reasons the defendant respectfully requests that this Court reverse the decision of the court below and set aside the verdict." This ending is unpretentious, and admits that you have nothing more to say. It also places the burden of decision-making where it belongs - with the appellate court. Many lawyers like to end with a more substantive conclusion, highlighting the policy considerations and precedents governing the case.

While the other sections of the appellate brief are flexible in size - they can be as long as necessary to fully present your side of the case - the Conclusion is rarely longer than a single paragraph. If your case has not been made and documented by now, it won't be won in the Conclusion.

The following conclusion, from a certiorari petition to the United States Supreme Court, sums up a complex double jeopardy case. Its original language and its synthesis of several arguments into one statement make it effective. It adds something new without starting the reader off on a new train of thought:

When the Connecticut Supreme Court ruled that the trial judge's

acquittal was reviewable, it accepted the *Jenkins* 'assumption' as controlling. But even the author of that assumption could say no more in its support, when overruling *Jenkins* in *Scott*, than that it had not previously been 'expressly repudiated.' *Id.* at 437, n.7. It is time for this Court's 'vastly increased exposure to the various facets of the Double Jeopardy Clause' to include hearing an adversarial, 'case or controversy' presentation of the reasons why a trial judge's acquittal for insufficient evidence is beyond review. This Court has long held that a judgment of acquittal is final and that review of same infringes upon the Double Jeopardy Clause. A preexisting jury verdict of guilty should in no way affect the trial judge's entry of an acquittal when that acquittal is founded on insufficient evidence.

The prosecutor's conclusion, in response to the above cert petition, was:

For the reasons stated, Respondent urges that the petition be denied.

And it was. Which may or may not support our main point: that writing which is clear, concise and direct is also effective.

Of course, an excellent brief does not guarantee winning an appeal. We suggest only that good writing is part of being a good advocate; that striving to write more persuasively should be part of the work of every lawyer. In an appeal, as in all other aspects of a case, we can never insure success on the merits. We can, however, give our clients a creditable, and an honorable piece of work.