

PREPARING TO WRITE AN APPELLATE BRIEF

by Raymond P. Ward

Successful advocacy depends on hard work and preparation. This truism applies not only in the trial court, but also in the appellate court. The most important tool for persuading appellate judges is the brief. An appellate advocate cannot write a persuasive brief without thorough preparation, any more than a trial lawyer can give a persuasive closing argument without thorough preparation. The purpose of this article is to describe a step-by-step method for preparing to write an appellate brief—a method that has proven successful to other appellate practitioners. Writing an appellate brief can be a daunting task. I hope that this article will provide a roadmap of specific, concrete steps that can be taken to get a handle on the project. This article is written from the perspective of the appellant. However, most of these steps will benefit the appellee as well.

The overall goals of this method of preparation are (1) to produce a better work product, and (2) to save time over the long haul. The method described below involves a lot of work before writing the first word of the first draft. The preparation is time-consuming. However, I believe that time invested in preparation is well spent. The final product will reflect the hard work and preparation, thus enhancing the chances of winning. The writing process itself will be much more efficient because the writer has invested the necessary time learning the material and getting organized first. Thorough analysis of the issues before writing results in a better first draft of the brief, which in turn saves time by sub-

RAYMOND P. WARD is a partner with Sessions & Fishman, LLP in New Orleans, LA. He practices in the areas of product liability defense, general tort defense, and appellate advocacy. He is a member of the Louisiana Association of Defense Counsel, the Defense Research Institute, and the Appellate Advocacy Committee of DRI.

stantially reducing the time spent editing and rewriting.

OBTAIN AND REVIEW CURRENT COPIES OF ALL APPLICABLE STATUTES AND RULES GOVERNING APPELLATE PROCEDURE

Early in the process, obtain and review current copies of all applicable statutes and rules governing appellate procedure. Don't assume that you already know the rules because you handled an appeal in the same court last year. Rules change. If you are in federal court, review the Federal Rules of Appellate Procedure, the applicable local rules, and any internal operating procedures or other materials that tell you how the court operates. If you are in state court, review the corresponding state appellate court rules. The purposes of this step are (1) to avoid malpractice, and (2) to know what the court expects of you. Pay particular attention to any deadlines provided by the rules, any requirements for obtaining or foregoing oral argument, formal requirements for briefs, and generally, any rules governing practice before the court.

GET ORIENTED TO THE CASE

Also early in the process, if you did not serve as trial counsel, you will need to get oriented to the case. You can start before the record becomes available. Get copies of all the pleadings, all legal memoranda on file (including trial memoranda and memoranda filed to support or oppose motions), all court orders, jury charges, jury interrogatories, verdict form, the judgment of the trial court, and any written reasons given for the trial court's judgment. Read these materials. If you were not trial counsel, talk to trial counsel to get her or his impressions concerning possible issues for appeal.

As you begin to get a feel for the legal issues on appeal, consult the index of any brief bank that may be available to you. If you are a member of DRI, you can use the DRI brief bank. (See your Member

Services pamphlet or call DRI for details.) Also, your law firm may have its own brief bank. Talk to your librarian or other person responsible for maintaining the brief bank. Reading a brief that covers an issue in your case will help orient you on the law, and may save you some time on legal research.

GET THE RECORD

Borrow a copy of the record on appeal from the clerk of court as soon as it becomes available, including the trial exhibits. Make a copy for yourself; you cannot be sure that the record will still be available when you need it down the road.

STUDY THE RECORD

Studying the record is absolutely vital even if you were trial counsel. Do not depend on your memory of what happened at trial. Human memory is flawed. Often, there is a gap of several weeks to several months between the end of trial and the time to write the appellate brief. The appellate court will decide the case on the record, not on your adversary's or your memory of what happened at trial. You must be intimately familiar with the record evidence to do an adequate job as appellate counsel.

In studying the record, you may find that the court reporter made a critical mistake. One example from personal experience was the omission of the critical word "not" from a witness's testimony under cross-examination, "I would [not] disagree with that." When this happens, consult the applicable rules to determine the procedure for correcting the error. See, e.g., FRAP 10(e).

SUMMARIZE THE RECORD

Summarize the record, as you would summarize a deposition. Some appellate practitioners summarize the record while studying it; others review the record first and summarize afterward. For additional ideas on summarizing the record, see

Michael R. Fonham, WRITTEN AND ORAL ADVOCACY § 3.7 (1985), and LOUISIANA APPELLATE PRACTICE HANDBOOK § 10.8 (1994) (Roger A. Setter ed.). Use whichever method works best for you.

Summarizing the record serves two important purposes. First, it helps you to work efficiently and thus saves time over the long haul. Second, it helps you to learn and master the record.

Efficiency and time-saving come from being able to work with the summary, rather than the bulky record, throughout the remainder of the briefing process. This means that the summary must include all the pertinent information, together with citations to the record where the original information can be found. Since the summary is supposed to be just that (a summary), the goal is to include what is important and exclude what is unimportant. If you err, err on the side of over-inclusion; omit something only if you are sure you won't need to refer to it later. Unlike the summary of a deposition, which often includes only witness testimony and excludes all colloquies of counsel, the summary of the transcript should include some reference to objections and the court's ruling on objections. An evidentiary ruling may be an issue on appeal.

Since one purpose of the written summary is to be able to refer to it in lieu of the much more bulky record during the remainder of the briefing process, the summary should include all information that might have some bearing on the brief. The information should be detailed and accurate enough to enable you to rely on it without having to refer back to the record itself (except perhaps for direct quotes of testimony). Summarizing the record is a time-consuming chore, but it saves time later. As you go through the remaining steps of the briefing process described below, you will find it much easier to work with a summary than with the full record. When you need to locate some crucial bit of testimony to support your contention, you will find it fairly quickly in the summary without having to plow through the much more voluminous record. (If the summary is on a computer, the word-search feature of your word processing software can often locate the testimony instantly.) Thus, time invested in preparing the summary

pays dividends of efficiency throughout the remainder of the process.

If the summary is to serve its purpose, it must include references to the page numbers of the record where the testimony or other information can be found. The Federal Rules of Appellate Procedure (and probably most state appellate court rules) require that factual statements be supported by "appropriate references to the record." FRAP 28(a)(4); *see also* FRAP 28(e). By including record references in the summary, you will later be able to rely on those record references during the outlining and drafting phases. I suggest a page-by-page format, with record page number in the left-hand margin next to the corresponding testimony or other information excerpted from the record.

The second purpose of preparing the summary is to help you learn and master the record. Thus, the lawyer who will actually write the brief should *personally* summarize the record. "Unless the person making the summary is completely familiar with the issues, he or she may omit important references. Moreover, by skipping this step, the lawyer loses an opportunity to gain the familiarity with the evidence that is necessary for good advocacy." Fonham, *supra*, at § 3.7.

In studying anything, whether cases in a law school textbook or a record on appeal, you can enhance your ability to remember the material by involving more parts of your brain in the process. Reading the record and writing a summary of it involve not only eyesight but also motor skills. Similarly, dictating the summary involves not only eyesight but also speech and hearing. Whether you write the summary yourself or dictate it, by summarizing the record you force yourself not only to read the material, but also to think about it, to decide whether it is important, to analyze it, to boil it down to its essence, and to write or speak a few sentences conveying the essential information. The result is that you learn the material better because you bring more of your mental resources to bear on the task. Being intimately familiar with the record evidence is essential for analyzing possible issues on appeal. Though this article is not about preparing to argue orally, intimate knowledge of the record is also essential for arguing extemporaneously and for responding to the judges' questions.

MAKE A WRITTEN CHRONOLOGY

In cases where the pertinent facts occurred over a period of time, it may help to make a written chronology. This involves going through the written summary, extracting the testimony concerning relevant events that occurred, and putting the testimony in chronological order. At trial, various parts of the story are usually told by a number of witnesses and are rarely presented in chronological order. Thus, it can be difficult to get a clear picture of how the events transpired and how they relate to each other just by reading the record, or even by reading the written summary. Rearranging the testimony into chronological order helps the lawyer see clearly exactly what happened and in what order it happened. The chronology should juxtapose all testimony pertaining to the same event, whether the testimony is from one witness or from several. The result: The lawyer can instantly spot inconsistencies in testimony. Also, when several witnesses describe the same event, the lawyer can see at a glance the points on which the witnesses agree and those on which their testimony diverges, without having to go back and forth through the record summary (or worse, back and forth through the record itself). Finally, the chronology is a useful tool for outlining the statement of facts. In most cases, the statement of the facts is simply the story as told from your client's perspective. Most of the time, you will want to tell the story in chronological order. Having a written chronology in hand makes it easy to extract the pertinent facts and present them in chronological order.

If you are computer-literate, making a chronology is simply a matter of using your word processor to cut and paste selected material from the summary and rearranging it into chronological order. If you prefer low-tech methods, index cards can serve the purpose. Write on an index card a short description of each relevant fact or event, the name of the witness describing the event, the time or approximate time of the event, the all-important record citation, and (if there is enough room) the testimony or other information itself. Rearrange the index cards into chronological order. Then, working with the stack of cards and the record summary, either dictate the chronology or

write it out longhand. Again, make sure to include in the chronology not only the testimony, but also the name of the witness giving the testimony and the page in the record where the particular testimony can be found.

SELECT THE ISSUES ON APPEAL

After you have studied and summarized the record, you are ready to begin selecting the issues on appeal. Write down your ideas on paper, making a list of all issues that appear at this stage to be potential winners. Keep in mind the standards of appellate review applicable to the respective potential issues. While appellate courts generally review legal questions *de novo*, they generally defer greatly to the trial court on its factual findings. On evidentiary questions, the trial court's ruling generally will not be overturned unless it constituted an abuse of discretion. Thus, if an issue is one where the appellate court will tend to defer to the trial court, and if your case is not compelling enough to overcome that deference, you had better find another issue or, failing that, consider recommending to your client that the appeal be voluntarily dismissed.

MAKE A SEPARATE MINI-OUTLINE FOR EACH IMPORTANT FACTUAL POINT

Once you have figured out potential issues for appeal, you should know which factual points relate to those issues. You may wish to consider making a separate mini-outline for each important factual point, with each outline containing all testimony on that particular point (including names of witnesses and record cites). This serves two purposes. First, by seeing all testimony on an important point in one place, it becomes easier to analyze the evidence and evaluate just how strong or weak the evidence on that point is. Second, when you outline the brief before writing, you can save time and effort by incorporating all or parts of these mini-outlines into the big outline. By doing this, you can assure yourself of including in the big outline (and eventually in the brief) all evidence on a particular point that helps your cause. The result will be a stronger, more compelling brief.

RESEARCH AND ANALYZE THE POTENTIAL ISSUES

Next, research and analyze the potential issues. There is not enough room in this article to tell you step-by-step how to conduct legal research. Two works I recommend highly are Clyde Emery, *A STREAMLINED BRIEFING TECHNIQUE* (1973), and John Alan Appleman, *SUCCESSFUL APPELLATE TECHNIQUES* 554-57 (1953). I do wish to pass on a few tips to put on your research checklist.

Don't forget to research the standards of appellate review applicable to the particular issues in the case. The Federal Rules of Appellate Procedure require that the argument in the appellant's brief "include for each issue a concise statement of the applicable standard of review...." FRAP 28(a)(6). Some state appellate courts may have similar requirements. Aside from that requirement, you must understand the standard of review applicable to each issue in order to evaluate competently your chances of winning on that issue and to advocate your position credibly.

Be efficient. Look for the controlling authorities first. On questions of federal law, try to find a United States Supreme Court case first or, failing that, a case from the controlling circuit. Look for merely persuasive authorities only if you can't find any controlling authorities. (The exception to this rule is the case where you are trying to have the controlling authorities overruled or modified.)

For each proposition of law you put forward, try to find (a) the oldest supporting authority, and (b) the newest. Being able to cite both ancient and modern authorities "emphasizes the continued validity of that point of law without drowning the inference in a sea of citations." 2 George K. Rahdert and Larry M. Roth, *APPEALS TO THE FIFTH CIRCUIT MANUAL*, ch. 21, p. 14 (1997).

Don't wait until after you write the brief to Shepardize or otherwise update your authorities. If you think you're going to use a case, update it while you're still in the research and analysis phase, or at the latest, before you outline the brief. You don't want to draft, edit, and polish an entire argument, and *then* find out that the pivotal case on which the entire argument rests was overruled five years ago. (You should also update your authorities

again immediately before sending the final version of the brief to be photocopied.)

MAKE A SEPARATE RESEARCH OUTLINE FOR EACH LEGAL ISSUE

I have found it helpful to make a separate research outline for each legal issue. The purpose is to collect in one place all of the legal authorities on a particular point. What you include in the outline in addition to the citations depends on the purpose for which you are considering citing or distinguishing the particular authority. If you are using a case as authority for a rule of law, you should quote the rule of law from the case verbatim. If you are using the case to compare its facts to the facts of your case, you should include a succinct analysis of the facts of the cited case with a notation as to what the court did in light of those facts. The authorities should be arranged in order of importance or strength, with the strongest or most authoritative coming first.

The mini-outline of law serves two purposes. First, just as the mini-outline of evidence on a factual point helps you evaluate the strength or weakness of evidence on that point, the mini-outline of legal authorities helps you instantly see how strong the law is on a particular legal point. Second, when the time comes to outline and actually write the brief, you will have a ready, efficient means of relocating the legal authorities. The mini-outlines of law can save you lots of time later by avoiding having repeatedly to plow through a pile of books or photocopied cases to find some snippet of law during the outlining or drafting phases.

ANALYZE THE ISSUES

As you research (in fact, throughout the entire briefing process), analyze the issues. In other words, make a conscious effort to think about them. Set aside time to devote to analysis of the issues. Don't just read the legal authorities; absorb them and understand them. Try to learn not only the rule of law, but the underlying principle or the reason for the rule of law. Think about how the underlying principles apply to your case and whether they support your position. If you do this, and if you later base your argument on the underlying principles, you will convey the impression of having fairness and jus-

tice on your side, not just technicalities of law.

Talk about the issues with others. "Explaining the arguments should deepen the lawyer's understanding of his or her position. Moreover, objective parties may provide a perspective on the persuasive power of the arguments." Fontham, *supra*, at § 3.10. Encourage those to whom you talk to play the devil's advocate. It's good practice for oral argument, and will help you anticipate and preempt your adversary's arguments.

As you analyze the issues, keep in mind the "harmless error" rule. An error by the trial court is not grounds for reversal unless the error made a difference or could have made a difference in the outcome of the trial. For example, an erroneous evidentiary ruling is generally not a ground for reversal if there is other evidence proving the same fact for which the erroneously included or excluded evidence was offered. As you analyze an issue, ask yourself whether the error in question truly affected your client's rights. If you can answer that question "yes" with conviction, you just might have a winnable issue on appeal. If you cannot, consider discarding the issue.

NARROW THE ISSUES

After you've researched and analyzed the potential issues, you should narrow the issues. This involves more than weeding out the frivolous issues. You need to eliminate issues and arguments that are weak or shaky. Also, as suggested above, you should eliminate issues and arguments concerning errors that did not make a difference in the ultimate outcome at trial. You need to select just a few strong issues on which you can make compelling arguments and with which you can win the case. How few issues? Experienced appellate judges and advocates agree that a good rule of thumb is a *maximum of three or perhaps four issues on appeal*.

There are a number of solid reasons for this rule of thumb. First, if you can't convince the appellate judges with your three or four strongest arguments, you're

not likely to convince them with your weaker arguments. Second, if you mix weak arguments with strong arguments, you run the risk of burying your good arguments in excess verbiage. Third, offering up numerous arguments will make the court think that you don't have confidence in any one. Fourth, since most appellate courts impose page limits on briefs (not to mention time limits on oral argument), you probably don't have the space or the time necessary to adequately brief a dozen issues. See *Jones v. Barnes*, 463 U.S. 745, 752-73, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983) (citing several experienced appellate judges and advocates who unanimously agree that only a few issues should be argued on appeal).

MAKE AN OUTLINE OF THE BRIEF

Before actually writing the brief, you must make an outline of the brief. "The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan." Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 1957 Wts. L. REV. 59, 60. At this point in the process, having exhaustively studied the record and thoroughly analyzed the issues, you need to organize your thoughts and ideas. Making an outline forces you to organize. If you have followed the steps recommended above, the outline is already halfway done. For each issue you have selected, you should already have in hand mini-outlines of all evidence on important facts pertaining to the issue, as well as mini-outlines of pertinent legal authorities. Outlining will consist mainly of selecting from the mini-outlines the material to be included in the brief and organizing it into a coherent presentation. Include in the outline appropriate record citations for facts and appropriate legal citations for law.

Experts agree that in organizing the argument, you should start with the strongest issues and arguments first. First impressions count before an appellate panel, just as they count before a jury. A

strong opening salvo lends strength to the balance of the brief. Aside from that, the "strongest argument first" rule is so well recognized that the appellate judges will expect that your first argument will be your best. If you give them a weak argument first, they will assume that the remaining arguments are even weaker. Finally, remember that the judge may not read your entire brief. If you save your best for last, the judge may never read it. If you put your best argument first, you enhance the chances that the judge will actually read it.

Once your outline is ready, you are finally ready to begin writing the first draft of your brief. If you have prepared thoroughly by using the methods suggested above (or by using other methods that work for you), the actual writing of the brief should flow smoothly. You should be able to draft or dictate the entire brief in one sitting. You shouldn't have to stop to think about what to say next or to find some bit of testimony or snippet of law. Your first draft will be much better than it would have been if you had not prepared. As a consequence, the final version will likewise be a much better work product than you could have produced by writing first and then doing the research and record review while editing the draft. Ultimately, you will have improved your chances of winning the appeal.

CONCLUSION

There is no one right way to prepare to write a brief. However, I believe that hard work and preparation *before writing* are essential, and that the preparation must include studying and mastering the record and thorough analysis of the issues. Beyond that, preparation is simply a matter of getting organized. Any method is good if it helps the brief writer master the record, analyze the issues effectively, work efficiently, and (most important) ultimately write a winning brief. The method suggested above has helped at least this appellate practitioner accomplish those goals. 🌟