FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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DEPENDENCY PRACTICE ON THE FDAP PANEL

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First District Appellate Project
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FDAP
FIRST DISTRICT APPELLATE PROJECT

Dependency Practice on the FDAP Panel

FDAP Seminar February 2018

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1. Communication with the Court of Appeal
    a. Beth Robbins, Assistant Clerk
    b. Garth King, Clerk Division Three

2. Brief writing guidelines
    a. Generally
        i. Tone/analogies/professionalism
        ii. Identifying minors with name/initials (Cal. Rules of Court, Rule 8.401)
    b. Statement of Facts
    c. No Issues Statements
        i. Send email to assisting attorney identifying issues considered
        ii. Send statement of facts
        iii. Format
            1. No tables required
            2. Statement
            3. Declaration
    d. Petitions for rehearing/review
        i. Encourage if good issue
        ii. Composition of Supreme Court has changed

3. Compensation claims
    a. Claim is provided to assisting attorney for review
    b. As part of claim, all filings and briefs are reviewed
    c. Billing for unbriefed issues – describe in complete sentences
        i. Unbriefed issue must involve legal research or the application of legal principles to the record if already familiar with the controlling legal principles. Not simply issues that were considered and rejected.
        ii. Helpful to include reference to the specific authority consulted prior to deciding to reject the issue.
        iii. Explain the relationship between the issue and the case to provide an understanding of the reasonableness of the consideration.

d. Billing to "Use of prior briefing"
e. Postage over $25 must be explained
f. Record review
    i. Guidelines
    ii. Relying on panel's representation of size of record
    iii. If record over 3,000 pages, compensated at higher rate
    iv. Multiple/subsequent appeals
    v. CT for each minor but virtually identical
g. Provide explanations in complete sentences

4. Feedback to and from FDAP
    a. The No Issues Statement is opportunity for assisting attorney to see work of independent attorney before filing
    b. When reviewing compensation claims, FDAP reviews briefs and filings
        i. Work reviewed by assisting attorney and by attorney doing second claim review
    c. For assisted attorneys, what is submitted to the assisting attorney should be in final form – not a draft
    d. Evaluations
    e. On particular case – ask assisting attorney
    f. Generally – ask Jonathan Soglin
    g. What would panel like from FDAP?

5. How cases assigned at FDAP
    a. General rotation
    b. Can let FDAP know of preferences
    c. Let FDAP know when unavailable
    d. Let FDAP know when available

6. Electronic submissions - RT'S only
    a. Effective 1/1/18, the default form of RT's will be electronic instead of paper (CCP 271 adopted in AB1450)
    b. Superior courts are moving slowly on this as some do not yet have the technology.
    c. In dependency appeals, an electronic copy is to be delivered to appellate counsel unless counsel requests a paper copy.
    d. What are the advantages of electronic transcripts?
        i. They are text-searchable, internally-hyperlinked from the table of contents (including ability to click directly to a particular witness

examination), easy to cut-and-paste from, more ergonomic for some users, much more portable, and easy to store and share (e.g. send to an investigator, the appellate project, etc.). Some users find it easier to review a transcript on the screen--- turning pages with a single click---rather than fighting to keep a large bound paper volume open.

e. Can attorney request a paper copy?
    i. Yes. Under subdivision (a)(1) of section 271, an exception applies with the party or person entitled to the transcript requests the reporter's transcript in paper form.
f. Can you get paper and electronic copy?
    i. Possibly. The statute expressly provides that a party receiving a paper transcript can request an unofficial electronic copy. (§ 271(b).) HOWEVER, there is reason to believe you will be charged for the second copy. An indigent party is only entitled to one free copy and court reporters might treat a paper copy and an electronic copy each as a separate copy. In addition, the new statute states that there is no intent to change the operation of the statutes governing fees for transcripts. (§ 271(c).) That charge, moreover, for a second copy of the transcript would not be reimbursable on your compensation claim.
g. If you get an electronic copy and need to provide it to the client, will you be reimbursed for printing?
    i. Generally, reasonable and necessary costs are reimbursable. FDAP would take the view that providing the transcript to the client at the end of the case is necessary if the client wants it. (The client does not need a reason; the file belongs to the client.) Printing the electronic transcript for a client is necessary when the client does not have the means to receive it electronically, e.g. is homeless, in custody, does not have a computer, etc. So, if you received an electronic transcript, your client wants the transcript and if your client cannot use an electronic transcript, FDAP would view the printing of the transcript as reasonable and necessary. However, this is a new cost that the Court Appointed Counsel program did not have to bear in the past and we cannot make any promises regarding reimbursement for this new type of expense. When we have more information from the Appellate Court Services unit of the Judicial Council we will update the panel.

DEPENDENCY COMPENSATION CLAIMS

INTRODUCTION

Based on feedback received from the JCC and AIDOAC, explanations on compensation claims provided by appointed counsel will generally satisfy the standards applied in JCC reviews and AIDOAC audits of claims where they are more detailed. Fewer questions and kickbacks from the JCC mean faster payment and fewer cuts for attorneys.

HOURS

LINE 1: CLIENT AND TRIAL COUNSEL COMMUNICATION

When requesting an over-guidelines recommendation for client and trial counsel communication, referencing the number and length of communications may be useful as part of a narrative explanation, but is not an adequate substitute for a qualitative approach. Explanations should focus on individual factors to justify more than 3.5 hours of client and trial counsel communication. Such factors may include:

- Type of appeal [more complicated appeals usually involve more communication]
- Duration of the appeal
- Out of custody client
- Client assumed an active interest in the appeal
- Pre-approved client visit
- Client unable to read/write
- Client suffers from cognitive deficits
- Client represented self in trial court
- Client moved for substitution of appellate counsel
- Need to resolve problems with appellate record
- Need to obtain trial counsel's file
- Possible direct appeal IAC issues
- Difficulty locating client
- Ongoing/concurrent developments in the juvenile court

Additional Comments:

Do not use adjectives to negatively describe the client, such as "demanding," "difficult," or "confrontational," etc. Instead, as noted above, point out that the client took an active interest in the appeal or moved for substitution of appellate counsel.

Remember, any habeas-related client and trial counsel communications should be claimed on line 11 and should not be claimed on line 1.

LINE 2: RECORD REVIEW

FDAP will rarely recommend payment above the guideline for record review (1.0 hour for every 50 pages). It is also true that FDAP does not automatically recommend full payment even where the panel attorney claims the guideline amount or less. For example, where it is apparent from the face of the claim or from the staff attorney's independent knowledge that portions of the record are duplicative (for example, in a consolidated appeal, a subsequent appeal and in appeals where the record is prepared separately for multiple minors), appointed counsel will not be compensated for reading the same record more than once. Although some time is reasonable to determine whether portions of the record are in fact duplicative, this time is evaluated differently and some adjustment to the hours claimed is expected. Similarly, where appointed counsel has previously represented the same client in a related appeal and was compensated for reading portions of the current record in the prior appeal, full payment for an amount claimed within the guideline may not be reasonable. Again, some time is reasonable to determine whether portions of the record in the current appeal are in fact duplicative of portions of the record from the prior appeal and to re-familiarize oneself with the prior record.

Case documents which are provided by trial counsel, received following a motion for judicial notice or obtained after reviewing the juvenile court file are not considered part of the record on appeal and should not be claimed on line 2. Reviewing these items is generally compensable on line 24. Line 2 is reserved for items deemed by the Court of Appeal (or certified by the trial court appeals clerk) to be part of the official record on appeal (the original record, items obtained by augment motion or record omission letter).

LINE 3: EXTENSIONS OF TIME

FDAP generally does not recommend payment above guidelines for EOTs. FDAP staff attorneys will review EOTs to determine whether the claimed amount is justified. It is not uncommon for subsequent EOTs to be brief or so substantially similar to the first EOT such that a below guideline recommendation is made.

LINE 4: AUGMENT MOTIONS

FDAP will recommend additional time for a motion to augment where it was necessary for appointed counsel to set forth aspects of the procedural or factual history of the case in more detail than usual, where the motion included an attorney declaration, or where time was spent obtaining documents attached to the augment motion as exhibits.

Time spent writing a follow-up letter to the appeals clerk regarding the status of an augment motion should be claimed on line 23 (other communication).

LINE 5: OTHER MOTIONS

All motions other than EOTs and augments qualify as "other" motions that must be claimed on line 5 (with the exception of habeas-related motions, which must be claimed on line 11). Necessity and reasonableness are the guiding principles.

For common filings (judicial notice motions, motions to transmit exhibits, record omission letters, etc), no detailed explanations are necessary. However, for unusual filings (or for filings where a high number of hours is claimed), appointed counsel should provide an explanation as to why the work and the amount of time claimed were reasonable or necessary.

Although not appellate court motions, record omission letters should also be claimed on line 5. There is no formal guideline for record omission letters, but some comment should be included when claiming over 0.5 hour (e.g. "Omission letter requested eight items" or "Record omission letter sets forth an explanation as to why the requested items qualified as normal record items").

For standard oral argument requests and notices of abandonment FDAP generally recommends no more than 0.2 hour. Time spent deciding whether to request oral argument should be claimed on line 17. Time spent attempting to obtain the client's signature on an abandonment notice or advising the client as to whether or not to abandon the appeal should be claimed on line 1.

LINE 6: CLIENT'S FIRST BRIEF (AOB, RESPONDENT'S BRIEF, MINOR'S BRIEF)

STATEMENTS

Guideline for statements is 1.0 hour for every 100 pages of the appellate record (or one-half the amount allowed for record review on line 2), up to 10.0 hours. When reasonable, FDAP will recommend additional hours above the 10.0 hour guidelines in cases involving both substantive briefs and no-issue briefs. Particular scrutiny is applied (whether the amount claimed is above, at, or below guidelines) where statements include details not relevant to the issues raised on appeal or where the only issues raised are not fact-dependent.

ARGUMENTS

Where sample/prior briefing is used by appointed counsel, it must be acknowledged. It is always appropriate to acknowledge prior briefing and to explain that the briefing was revised, updated and adapted for the specific facts of the current appeal.

For the purposes of the claim, attorneys should provide the total amount claimed for the brief filed on line 6. It is not recommended that appointed counsel provide a specific breakdown of time spent on statements or individual arguments.

LINE 7: UNBRIEFED ISSUES

Appointed counsel may bill for an unbriefed issue where a reasonably experienced appellate attorney would need to perform research in order to determine if an issue were viable. If a settled rule of law is dispositive, compensation will not be recommended where a reasonably experienced attorney should have known of the settled rule.

Unbriefed issues are not possible questions that counsel considered and rejected as part of record review. To be compensable, an unbriefed issue must involve research or the application of legal principles to the appellate record.

An unbriefed issue is a question that raises sufficient concert to merit, either, (1) some legal research (checking of caselaw, statutes or other authorities); or, (2) the application of known legal principles by examining the record to determine if an issue is viable. The more an attorney helps the reviewer by articulating information regarding the work performed, the more likely the claim will be compensated fully. Accordingly, it is helpful to include reference to the specific authority or authorities consulted.

As of January 1, 2018, the appellate projects are required to transmit a panel attorney's description of unbriefed issues along with the final claim. To avoid your claim being held up or delayed, attorneys should specifically describe unbriefed issue. Any unbriefed issue which reads "ICWA," "sibling exception," or "notice," without more, will result in a claim being unsubmitted for further explanation or description of the issue considered and rejected.

LINE 8: REPLY BRIEF

The guideline for a reply brief is one-third the amount recommended (not claimed) for the opening brief on line 6.

Some common justifications for an over-guidelines reply brief recommendation include:

- Distinguishing new authorities cited by respondent
- Addressing new cases decided after the filing of the respondent's brief
- Rebutting respondent's mootness/waiver/forfeiture contentions
- Explaining why an issue was properly preserved
- Disputing respondent's characterization of the facts
- Disputing respondent's characterization of the arguments set forth in the AOB

LINE 9: SUPPLEMENTAL BRIEFS

Supplemental briefs are evaluated using the AOB guidelines. Attorneys should provide a short explanation that identifies the reason for filing a supplemental brief.

LINE 10: REVIEW OF OPPOSING BRIEF

Appointed counsel is not automatically entitled to compensation for the maximum guideline allowance of 2.5 hours for review of the opposing party's brief(s). FDAP staff will consider the length and complexity of the brief and make a recommendation based on the reasonableness of the claim. Keep in mind, time spent formulating how to counter any arguments advanced in the opposing brief should be billed to the reply brief on line 8 (or, in the case of a county or minor's appeal), to the respondent's brief on line 6).

Additional Comments:

Time spent reviewing filings submitted by the opposing party other than direct appeal briefs is not compensated on line 10. Reviewing motions (or oppositions to motions) filed by the opposing party should be claimed on line 24, and reviewing a petition (or opposition/answer to a petition) filed by the opposing party should be claimed on line 15.

LINE 11: HABEAS PETITIONS

HABEAS INVESTIGATION (NO PETITION FILED)

When claiming time for habeas investigation, include a brief explanation of the work performed as part of the investigation. If the claimed time is particularly high, a more detailed explanation will be required.

HABEAS PETITIONS

In all appeals where a habeas petition has been filed, attorneys should break down any time spent on related work, including, but not limited to, client communication, trial counsel communication, court communication, expert/investigator communication, motions/applications, travel time, reviewing non-record evidence, drafting declarations.

LINE 12: REHEARING PETITIONS

When claiming over guidelines (6.0 hours) for a rehearing petition, attorneys should indicate the reason for seeking rehearing and, if applicable, that the petition contains new analysis or original material.

LINE 13: PETITIONS FOR REVIEW

Both petitions for review and answers to a petition for review should be claimed on line 13. The guideline for both pleadings is 10.0 hours. As with petitions for rehearing, when claiming over guidelines for a petition for review (or answer), it is useful to mention that the petition (or answer) contains new analysis or original material.

LINE 14: OTHER PETITIONS

Line 14 is for "other" petitions (i.e., not habeas, rehearing, or review petitions), including petitions for extraordinary writ, mandate and supersedeas petitions. Because there is no formal guideline for these petitions, an explanation is always helpful.

LINE 15: REVIEW RESPONSE TO PETITION

Line 15 is for reviewing respondent's informal opposition to a habeas petition and is also the proper line for claiming time spent reviewing the opposing party's response to any petition as well as for time spent reviewing a petition filed by the opposing party.

LINE 16: REPLY TO RESPONSE TO PETITION

Line 16 is most commonly used for an informal reply to respondent's opposition to a habeas petition, but it is also the proper line for claiming time spent drafting a reply to the opposition to any petition filed in the Court of Appeal or Supreme Court. The guideline for the reply to a response to a petition is 1/3 the hours recommended for the petition.

LINE 17: ORAL ARGUMENT

The 7.5 hour guideline for oral argument does not prohibit the projects from making over-guideline recommendations for oral argument where justified. Factors that may justify a recommendation above 7.5 hours for oral argument include:

- Long delay between the filing of the reply brief and the calendaring of oral argument
- Size of appellate record
- Number of issues
- Complexity of issues
- Issuance of a focus letter in advance of oral argument
- New authorities decided after completion of briefing
- Waiting time in court
- Length of argument (especially where there were multiple co-appellants)

LINE 18: TRAVEL

Travel time is compensable only where the distance traveled exceeds 25 miles one-way from counsel's office and where counsel cannot reasonably work while traveling. If a type of travel requires pre-approval from the project (e.g., client visit in prison), the explanation should indicate such approval was given. Because counsel must generally select the most economic means of travel reasonably available, an explanation as to why the mode of travel adopted did (or did not) comply with that requirement is helpful.

LINE 19: OPINION REVIEW

The guideline for reviewing an opinion where a substantive brief has been filed is 1.5 hours and the guideline for reviewing an opinion after the filing of a no-issues brief is 0.2 hour. Time claimed on line 19 is only for reviewing the Court's opinion. Any time claimed for considering whether to file a rehearing petition or petition for review should be claimed on lines 12 and 13, respectively.

LINE 20: REVIEW SUPERIOR COURT FILE

Time spent reviewing items at the Superior Court or reviewing exhibits actually admitted into evidence (from any location) should be billed on line 20. An explanation for time spent in excess of the guideline of 2.0 hours is helpful.

Time spent reviewing outside-the-record items – such as reports and recordings – that were not admitted into evidence at trial should be claimed on line 24 (or line 11, if habeas-related).

LINE 21: PROJECT CONSULTATION

The guideline for project consultation is dependent on whether the case is assisted (4.0 hours) or independent (2.0 hours). The projects rarely recommend payment above the guidelines in this category. To establish reasonableness in this context, an explanation for an above guidelines claim should be detailed and will be approved where appointed counsel was called upon to perform tasks rarely encountered by panel attorneys (motion for constructive filing of a late notice of appeal/motion to recall the remittitur/petition for writ of supersedeas/ex parte application for expert fees, etc).

LINE 22: ADMINISTRATIVE TASKS

The guideline for administrative tasks is a firm one. Time for administrative tasks may only be claimed at the time of the final claim. Brief processing, claim preparation, mailing/service, etc., is considered administrative.

LINE 23: OTHER COMMUNICATION

All communication other than that with the client and trial counsel should be claimed on line 23 (or line 11, if habeas-related). Common examples include:

- Opposing counsel (below and on appeal)
- Court clerks (trial and appellate)
- Custodial officials
- Client relatives[1]
- Co-appellate counsel

[1] When a panel attorney communicates with a client's relative solely for the purpose of facilitating communication with the client or where the relative serves as a surrogate for the client, such time should be claimed on line 1.

- ICWA representatives
- Amici
- Translators

There is no guideline other than reasonableness for "other" communication, but generally comments should be included for any individual item exceeding 1.0 hour.

LINE 24: OTHER SERVICES

All time spent on any other case-related activities should be claimed on line 24. There is no guideline aside from reasonableness, but generally explanations should be included for any individual item that exceeds 1.0 hour. Common examples include:

- Reviewing co-appellant's briefs
- Reviewing opposing party motions and oppositions to motions
- Reviewing trial counsel's file
- Appearing in trial court (e.g., at a hearing on an application to settle the record)
- Reviewing court orders
- Reviewing client court filings (e.g. supplemental *Sade C.*, letter)
- Reviewing record, opinion, and filings from prior related appeal
- Registering for online docket notifications and checking the docket
- Researching legal matters outside of the appeal when necessary
- Locating client
- Reviewing institutional records
- Filling out forms for custodial client visit
- Redacting record or briefs

Among the most commonly over-billed other services are registering for online docket notifications, checking the online docket, and reviewing court orders. The amount claimed (and recommended) for these brief tasks should be assessed in the aggregate, not on the assumption that each individual act automatically merits 0.1 hour.

EXPENSES

LINE 1: COPYING

Copying expenses are subject to a hard guideline: 10 cents per page, without exception. FDAP cannot make an over-guidelines recommendation to account for sales tax (nor can the sales tax be claimed on another line).

LINE 2: BINDING

Since the adoption of TrueFiling in the summer of 2014, FDAP is no longer able to recommend payment for binding expenses for Court of Appeal filings. Now that the California Supreme Court has made the use of TrueFiling mandatory (as of September 1,

2017) for petitions for review (and other pre-review-grant filings), FDAP can only recommend payment for binding one paper service copy of documents filed in the Supreme Court. If the attorney does not provide a receipt (which is not required), FDAP will recommend up to $6.00 for binding a single document (of any size). Where appointed counsel provides a receipt, FDAP will recommend actual costs, if reasonable.

There may be rare situations where binding expenses other than for Supreme Court pleadings will be compensable. The First District's local rule 16(I) allows for the filing of paper documents where the file size of scanned documents exceeds TrueFiling's data upload limit.

LINE 3: POSTAGE

Where the claim exceeds $25.00 for postage expenses, an explanation is necessary. If it is apparent from the file (or where the staff attorney has independent knowledge of the case), FDAP will recommend full payment for postage expenses for mailing client correspondence, service copies of pleadings, and return of the record to the client at the completion of the appeal. Otherwise, where it is not apparent and no explanation is provided, it will be necessary for the staff attorney to contact the panel attorney for an explanation and the processing of the claim will be delayed.

LINE 4: TELEPHONE

Telephone calls that come within the panel attorney's calling plan are considered overhead and are not compensable. However, long distance calls outside of a panel attorney's flat rate plan and collect calls from clients are considered compensable expenses. The guideline is actual costs, if reasonable. An explanation is always helpful.

LINE 5: TRAVEL EXPENSES

The travel guidelines are too long and complex to be summarized in this manual. However, a copy of the JCC's most recent travel guidelines (updated June 2017) can be found online at: http://www.adi-sandiego.com/news_alerts/pdfs/2010/TRAVEL-GUIDELINES-APPROVED-BY-AOCprojects.pdf.

LINE 6: COMPUTER RESEARCH

While panel attorneys may not seek reimbursement for regular monthly costs associated with online legal research (such as a Westlaw or Lexis subscription), computer research outside of a basic fee plan – research outside of a plan that covers California cases and statutes, the Ninth Circuit, and the United States Supreme Court – is compensable when necessary and where the attorney provides an explanation.

LINE 7: PARALEGAL/LAW CLERK

The guideline for paralegal and law clerk expenses is $25.00 per hour. Paralegal and law clerk work on a given task is expected to reduce the time an attorney must spend on the

same task. Where attorney time is over guidelines for a specific activity, no paralegal or law clerk expense for that activity will be recommend.

LINE 8: TRANSLATOR/INTERPRETER

The guideline for translator and interpreter expenses is $30.00 per hour. The cost of translating briefs or other pleadings is not compensable.

LINE 9: MISCELLANEOUS

Expenses that do not fall within the scope of lines 1 through 8 should be claimed on line 9. The most common expenses claimed on line 9 are TrueFiling fees. The guideline for each document filed and served through TrueFiling is $10.50 ($7.50 for electronic filing and $3.00 for electronic service). Other common miscellaneous expenses include expert or investigator fees, obtaining certified copies of court documents, and duplicating CDs.

Expert and investigator fees have their own guidelines. FDAP can approve up to $900.00 in expert and/or investigator services at a maximum hourly rate of $125.00 per hour for experts and $65.00 per hour for investigators. Any expenses for expert or investigator services in excess of $900.00 or at a rate above either of the aforementioned hourly rates must be pre-approved by the Court of Appeal

UNSUBMITTING CLAIMS

The most common reason for unsubmitting a claim is that appointed counsel neglected to include time or expenses. When appointed counsel fails to claim for a particular task (or claims less than they meant to or realized they could), FDAP can unsubmit the claim and notify the appointed counsel when the claim has been unsubmitted, at which point the attorney can log back into eClaims and make the necessary changes, revisions or additions.

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Persuading Quickly: Tips for Writing an Effective Appellate Brief

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PERSUADING QUICKLY: TIPS FOR WRITING AN EFFECTIVE APPELLATE BRIEF

Jane R. Roth* and Mani S. Walia**

We write this article to guide the brief-writing advocate on how to make her brief more effective. Because we are a judge and her former law clerk, we think that we know what we're talking about.

The main goal when writing a brief is to persuade the judge that the advocate's argument is the correct one to resolve the parties' dispute. This persuasion must be done *quickly* because judges read mountains of briefs every year. For instance, each year an appellate judge on the Third Circuit will participate in six court sittings. For each sitting, the Third Circuit judge will have, at most, two months to study all the briefs.[1] For the twelve-month period ending on September 30, 2009, almost 58,000 appeals were filed in the thirteen federal courts of appeals.[2] In the Third Circuit alone, 3750 appeals were filed,[3]

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* Judge Roth has served on the United States Court of Appeals for the Third Circuit since 1991. From 1985 until then, Judge Roth served on the United States District Court for the District of Delaware.

** Mani Walia is an associate at Susman Godfrey L.L.P., and before that was an associate at Baker Botts, L.L.P. He previously served as a law clerk to the Honorable Jane R. Roth of the United States Court of Appeals for the Third Circuit and the Honorable Hayden Head of the United States District Court for the Southern District of Texas, and he has also taught legal research and writing at Widener School of Law. He is indebted to his wife, Sabina, for her sharp insight and for cheerfully being his first—and best—editor.

1. *See* United States Court of Appeals for the Third Circuit, *Internal Operating Procedures of the United States Court of Appeals for the Third Circuit* 1.1 (2010) (providing that "[b]riefs and appendices are distributed sufficiently in advance to afford at least four (4) full weeks' study in chambers prior to the panel sitting").

2. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial Caseload Profile—National Totals") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

3. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial

adding up to about 300,000 pages of briefs.[4] Indeed, Chief Judge Alex Kozinski of the Ninth Circuit estimates that he reads 3,500 pages of briefs per month.[5] Simply put, the appellate judge reads, writes, reads—and then repeats the cycle.

The furious pace of absorbing law in distinct areas for each sitting makes the life of an appellate judge similar to that of a law student, but with final exams *six* times a year. Advocates must therefore provide a concise, coherent brief that respects the judge's time constraints. They must appreciate the difference between their perspective and the judge's perspective: Advocates spend months researching and writing a brief, reading it multiple times during the editing process; the judge, by contrast, may read the brief only once. Because advocates usually view the process from their perspective, their briefs tend to be much longer than necessary. The Chief Justice himself has commented that almost every brief that he has encountered could have been shorter.[6] Chief Judge Kozinski made the point with asperity: "[W]hen judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief."[7] If advocates understand that the brief will persuade quickly only if it is written for the judge's perspective, they will more easily absorb our suggestions.

Caseload Profile—Third Circuit") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

4. *See* United States Court of Appeals for the Third Circuit, *Font and Page Length Requirements for Filing Briefs*, http://www.ca3.uscourts.gov/Rules/briefsamplefonts.pdf (listing page limits for each of the appellant's and appellee's briefs) (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

5. Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief* (1996), http://www.appellate.net/articles/gdaplbrf799.asp (appearing in section captioned "Organization above All") (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

6. LawProse, Interviews, Supreme Court, *Hon. John Roberts, Chief Justice of the United States*, Webcast (no individual date; general series date 2006–07), part 5 at 2:35–2:48 (available at http://www.lawprose.org/interviews/supreme_court.php) (recording the Chief Justice's comment that he has yet to put down a brief wishing that it had been longer and his further comment that most briefs would be better if they were shorter) (accessed Dec. 16, 2010; copy of main page on file with Journal of Appellate Practice and Process).

7. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 99 (Thomson/West 2008) (quoting Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 327) (alterations in original).

This article will, we hope, demonstrate how to write a brief that persuades *quickly*—and we hope that we can *quickly* persuade the reader of the merits of our point of view. In its first two sections, our article offers suggestions for achieving the goal. Section one gives tips on improving five parts of a brief: facts, standard of review, argument, summary of argument, and issues presented. Section two provides important brief-writing tips. Finally, section three presents legal principles that advocates should consider while preparing every brief. These principles do not relate to brief-writing, but they are, we submit, principles that may enhance a brief.

I. IMPROVING SPECIFIC SECTIONS

A. Facts

Many advocates dump facts haphazardly into the facts section, without a strategy. Those briefs are thus impotent from the start; they cannot persuade quickly because they have failed to even capture the judge's attention.

You, as an advocate, must provide only legally relevant facts and a strategic number of additional facts that add to the human interest of the story you tell in this section.[8] The legally relevant facts are those that are necessary for application later, in the argument section, to the governing law. For example, in an appeal concerning whether a party complied with the statute of limitations, you should provide the date of injury and the date the action was filed. The facts that add to the human interest are those that forcefully capture the judge's attention and remind her of the real lives affected by the parties' legal controversy.

You should provide those two types of facts while keeping in mind four specific goals: seize the story, summarize the story in the first paragraph, embrace the ugly, and be honest.

1. Seize the Story.

This is accomplished by skillfully presenting both types of

8. *See* Bryan A. Garner, *The Winning Brief* 180 (2d ed. Oxford U. Press 2004) (suggesting that advocates provide only facts that are "necessary to understanding the issues" and that "add human interest").

facts so that your client is perceived in a positive light; the client is the protagonist in the parties' dispute. Being the protagonist alone, of course, will not win the case on appeal, but it is important. We suspect that many judges are more inclined to go the advocate's way in a close case if her client is viewed as the "good guy." You should persuade the judge that, if the court endorses your argument, the right party wins and justice is achieved.

One way to seize the story is to start the facts section with a crisp one-liner that frames the entire dispute from the advocate's perspective. The one-liner can easily begin with "This is a case about . . ." or "This case involves . . ." [9]

Consider, for example, two hypothetical introductions from a case involving California's Sexually Violent Predator Act (SVPA), which allows the California State Department of Mental Health to take custody for an indeterminate term of an individual adjudicated as a sexually violent predator.[10] The confinement of a person detained under the SVPA must be reviewed at least once a year to determine whether further detention is warranted.[11] Under the SVPA, detainees awaiting adjudication are civil detainees who must be offered detention separate from inmates.[12] The case of John Doe arose after hospital officials transported him to the county jail to receive his bi-annual assessment. Doe contended that jail officials failed to offer separate housing and detained him with inmates. We suggest the following as examples of effective factual introductions for each side:

> For John Doe: This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication.

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9. If the appellate court allows for a section before the factual recitation (perhaps a statement of the case), the advocate should consider including the story-seizing one-liner there. In either section, though, its purpose is the same.

10. Cal. Welfare & Instns. Code § 6604 (West 2006).

11. *Id.* at §6605(a).

12. *See* Cal. Penal Code § 4002(b) (West 2002) (stating that detainees must be offered "separate and secure housing" that does not impinge upon any privileges other than those necessary to protect inmates and staff).

> For Pope, Head Jail Official: This appeal considers whether a convicted sexual predator, whose confinement was evaluated consonant with governing law, can make a claim of improper confinement based on unverified affidavits.

These introductions would shape the way in which the judge views the rest of the facts section, with each party's opening funneling the facts and arguments to the legal issue that it found dispositive.

Another way to seize the story is to tactfully include a vivid fact that will stick with the judge during the decisionmaking process. This tool works well in cases in which the advocate's opponent is the more sympathetic party and the advocate strives only to close the sympathy disparity between the parties. Take, for example, a medical-malpractice case in which the decedent's family claimed that the decedent's death resulted from improper monitoring by the physician after weight-reduction surgery. It is difficult to seize the story outright in such a case because the harm that befell the victim is tragic. The defense's theory was that the decedent willfully failed to follow medical advice—that he lacked will power and self-discipline—and so the tragic result flowed from the decedent's failures, not from the doctor's negligence.

To draw attention to the decedent's obesity, the defendant's brief included this vivid fact: Because of his extreme obesity, the decedent was not physically capable of wiping himself after using the toilet. That description created a palpable image of the decedent as lacking in personal discipline, which worked to narrow the sympathy gap between the doctor and the decedent.

2. Summarize the Story First.

Always recap the entire story quickly in the first paragraph and then move into a chronological presentation beginning in the second paragraph. This roadmap will provide the judge with context, signaling which facts will be legally relevant. Think of it as providing the same function as scanning the inside flap of a book jacket before beginning to read the book.

Returning to the sexual predator, John Doe, after the one-sentence opening, Doe's advocate should finish the paragraph

with a summary, so that the first part of the presentation reads something like this:

> This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication. In January 2002, Doe was transferred from a hospital to the county jail for a determination of his mental health under the SVPA. Both the hospital and jail officials acted properly during the transfer. But from February 2002 until December 2002, jail officials forced Doe to be housed and treated with criminal convicts, in violation of the express language of the SVPA. During that time, he was treated just like a criminal convict: He was denied access to showers, exercise, telephone calls, religious services, and the library. He was released back to the mental hospital in December 2002. His 42 U.S.C. § 1983 claim involves the legally improper treatment during those eleven months.

Then, in the next paragraph, Doe's advocate would start at the chronological beginning of the story.

3. Embrace the Ugly.

You, as an advocate, should not let your opponent expose a weak fact. Instead, you should acknowledge and explain the weak facts of your case. If you do not, your credibility (and that of your arguments) will suffer. If possible, you should explain why the unpleasant fact is not legally relevant. Acknowledgement is better than the alternative: letting the opponent exploit the mistake by describing it in the worst possible way and branding the advocate as deceptive to boot.

The case of John Doe is again instructive. The advocate representing Doe must address the ugly: Doe was, after all, a sexually violent predator. After presenting this fact, however, the advocate should focus on the facts establishing the jail officials' improper confinement of a civil detainee. By embracing the unpleasant fact, the advocate has explained it on her terms and obviated her opponent's opportunity to vilify Doe.

4. Be Honest.

This mandate is a truism, yet lawyers (sadly) do not always follow it. Never—we repeat, never—make inaccurate

representations to a court. Your task in the brief is to persuade and you cannot do that if the judge does not believe you. The judge (or her crack law clerk) will discover the statement's falsity in the record and then view your entire brief under a cloud of suspicion.

B. Standard of Review

This is the section that can most often be improved because the standard of review may constrain the judge to the point that the standard dictates the decision. For instance, under an abuse-of-discretion standard, it does not matter if the judge believes that an advocate's argument is ultimately right. The advocate's argument, instead, is a legal winner (or a loser) if the lower court simply did not get it wrong enough. By contrast, a judge is unconstrained under a de novo standard, under which the appellate judge does not have to defer to the lower court's decision.[13]

To improve the standard-of-review section, then, you must first understand that the standard of review controls the argument. If there is any room for leeway, you must argue for the standard that best supports your argument. Too many advocates set out a standard of review without thinking critically about what they are doing. Even worse, an advocate may uncritically accept her opponent's characterization of it. Either course of action will undermine the advocate's chances of success in the appeal.

Next, you must develop your arguments, in the argument section, within that standard. A favorable standard of review is like the home stadium in a football game: It does not mean that the advocate is going to win, but that she is advantaged. The advocate must argue within the review standard's framework, be it abuse of discretion or de novo review.

For example in *In re W.R. Grace & Co.*,[14] the appellants contended that the bankruptcy court abused its discretion by not

13. *See e.g. Cybor Corp. v. FAS Techs.*, 138 F.3d 1448, 1464 (Fed. Cir. 1998) (en banc) (Mayer, C.J., & Newman, J., concurring in the judgment) (stating that "[w]e review the denial of a motion for judgment as a matter of law de novo by reapplying the same standard").

14. 316 Fed. Appx. 134 (3d Cir. 2009).

allowing them to conduct discovery and present evidence on their status as "known creditors."[15] But in the Third Circuit, an abuse of discretion occurs only if "there has been an interference with a substantial right" or the ruling "result[s] in fundamental unfairness in the trial of the case."[16] That standard is almost insurmountable; an advocate who asserts an argument prescribed by an abuse-of-discretion review must persuade the judge that the lower court was not merely wrong, but egregiously wrong, and that its result caused fundamental unfairness. The appellants in *W.R. Grace* failed to show such an egregiously wrong ruling and fundamentally unfair result in the trial court, instead pressing the court to enter what they perceived to be the right decision as if it were free to do so even in the absence of the required showing. And they lost.[17]

But the advocate representing the appellants in *W.R. Grace* could have introduced the argument in the following way:

> The bankruptcy court abused its discretion by limiting discovery. That is, its decision resulted in fundamental unfairness in the trial of the case. Admittedly, most discovery rulings do not constitute abuses of discretion, but the decision here violated that standard in three ways.

This might have given the court an opening, a chance to decide the case using a standard that favored the appellants' position.

C. Argument—Legal Science

Although the argument section of a brief comes after the issues presented and the summary of argument, the latter two sections cannot be written until the advocate is thoroughly familiar with the arguments she is making. The advocate must understand the issues that she will argue and the manner in which she will present them before she can competently describe the issues raised or summarize the argument. We therefore put this section before the sections on summary of

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15. *Id.* at 136–37.

16. *Public Loan Co. v. Fed. Deposit Ins. Corp.*, 803 F.2d 82, 86 (3d Cir. 1986) (internal quotation marks omitted).

17. *See W.R. Grace*, 316 Fed. Appx. at 137 (holding that "[t]he Bankruptcy Court did not err in disallowing claimants' claims as untimely, and the District Court did not err in affirming the Bankruptcy Court's decision").

argument and issues presented. You should do the same in writing your brief—block out your arguments before you attempt to summarize them or to finalize the issues presented.

A good argument section is a manual for the judge on how to decide the issue. The advocate should lay it out following the form that a judicial opinion will take; that is, the legal rule, an explanation of it, and then application. We will explain.

Each argument heading should represent the holding you want from the court in order to resolve that issue. For example, the heading for an argument in which an advocate contends that the lower court did not have subject-matter jurisdiction might read: "The District Court erred in resolving the merits because it did not have subject-matter jurisdiction." The advocate hopes that the judge will find this statement opportune and adopt it as the holding. This may seem straightforward, but many advocates fail to see it.

After developing the argument heading, you should provide a brief one-paragraph roadmap of that argument before turning to the subarguments. The roadmap outlines how the judge can reason to reach the proposed holding. For example:

> I. The District Court erred in resolving the merits because it did not have subject-matter jurisdiction.
>
> The District Court relied on 28 U.S.C. § 1332 as its basis for subject-matter jurisdiction. That section confers jurisdiction if two requirements are met. First, the parties must be completely diverse. *E.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990). Second, the plaintiff must seek, as the amount in controversy, at least $75,000. *E.g.*, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 n. 10 (2006). Here, neither requirement was satisfied. Accordingly, this Court should reverse; indeed, it can end its analysis after finding the first requirement unsatisfied.

Next, each sub-argument should explain and apply the steps of reasoning necessary to reach the proposed holding. Back to our example, here is an effective introduction for the sub-argument: "The first requirement—complete diversity between the parties—does not exist." Then, in the body of this

subsection, you must state the governing rule to measure complete diversity, provide an explanation of why that is the rule, and then apply it to the facts.

This process is legal science—a direct linear progression from rule to explanation to application. So for each argument you should (1) clearly identify the argument, *viz.*, the proposed holding, (2) state the steps of the argument in a roadmap, (3) clearly identify the sub-arguments, and (4) scientifically apply the rule to the relevant facts. Those are the elements of a legal-science argument; we will now explain the steps needed to produce it.

First, you must spend as much time as possible researching and understanding the case law. No matter how time-consuming and challenging, this step is indispensible. You should analyze the cases with the intent to distill a rule, not to present a case-by-case rehash. An advocate who gives research short shrift should not proceed to step two.

Second, distill the rule from the body of cases and state it clearly. If a rule is not evident from the cases, you should present an honest, clear extrapolation of what the rule seems to be and then an explanation of why the cases suggest that rule. Take, for example, the following issue: When does the stock-price test apply in securities cases involving § 10(b) of the 1933 Securities Act? You may find that the courts in your state or circuit have not explicitly stated a rule. You must then synthesize the cases and offer your view of when the court applies the test. Naturally, the less clear the court has been with stating a rule, the more explanation the advocate must present. For example:

> The stock-price test applies only when a plaintiff alleges an efficient market. Though the Court has not explicitly stated a rule triggering the stock-price test, it has applied the stock-price test only when a plaintiff alleges an efficient market. There are three relevant cases. [Provide brief explanations of those cases.] The rule that those cases establishes is this: A plaintiff can plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test.

Third, apply that rule to your set of facts. Signpost your application section with "here" or "in this case" or something similar. For our example:

> Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market. [Cite Record.] They are thus entitled to the stock-price test. The District Court erred in holding otherwise.

You can only scientifically apply the rule to the relevant facts if you have presented as clear a rule as possible along with its attendant explanation. If the three steps are done properly, you have taken the busy judge through the argument linearly, as if you were progressing through a scientific or mathematical formula.

The Chief Justice believes, in fact, that a brief is likely to be effective only if a layperson—or a lawyer with no expertise in the area of law at issue in the case—can understand it after reading it only once.[18] Sticking to the scientific approach allows the advocate to satisfy the Chief Justice's advice because the advocate's presentation starts with a clear rule distilled from cases, not a sprawling discussion of cases, and then moves to a brief explanation of the rule and culminates in a clear application of the rule to the facts. Furthermore, presenting the argument in this way allows the judge to evaluate the argument on the merits during her first read without wasting time figuring out what the argument is.

We finish this section with a few tips that, though bedrock tenets, deserve comment because some briefs are lacking. First, never misstate the law. This is a cardinal sin. You will lose credibility. Second, lead with the best argument; this will get the judge believing in your theory of the case quickly. Finally, limit the number of arguments. The advocate should eschew quantity in favor of presenting only the arguments that are viable.

D. Summary of Argument

Once the argument section is completed, the advocate can turn to the summary. The summary should be presented succinctly. If the judge can understand what the advocate is arguing from the summary of argument, the points presented in it will be reinforced when she reads the argument itself. The advocate cannot include every nuance of the argument in the

18. Chief Justice Interview, *supra* n. 6 (part 3 at 9:54–10:30).

summary, but it is important to include all important points and to acknowledge weaknesses if there are any.

The summary aids the judge because, when she knows where the argument is going, she can follow its development. The summary section should furnish a sharp exposition of rule and application. It is a taut presentation of legal science and is similar to the roadmap within the argument section. For example, consider this summary of argument for the appeal involving the stock-price test:

> The District Court erred in precluding plaintiffs from using the stock-price test to measure materiality for their §10(b) claim. The Third Circuit has only applied the stock-price test when plaintiffs allege an efficient market. A plaintiff can thus plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test. Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market.

E. Issues Presented

The advocate should limit the number of issues. We do not suggest a magic number, but we believe that a limited set of issues presenting only viable arguments is best. Our suggestion here corresponds directly to our suggestion about limiting the number of arguments. To do so, you should, during your research, narrow the possible list of arguments in light of their viability and the relative favorability of their concomitant standards of review.

Occasionally, an advocate will present ten or fifteen issues in her brief. This is an automatic warning flag that the advocate does not understand what the case is about or that she hopes to hide the weakness of the appeal under a flurry of words.

II. IMPORTANT WRITING TIPS

A. Remember that Judges Are Generalists.

Appellate judges are busy and are, for the most part, generalists. So if the advocate is a specialist, she should be

cognizant of that and explain the overall function of the doctrines or the statutory scheme at issue before diving into the details. She should avoid forcing the judge to trudge through hefty treatises to understand basic background principles and jargon.

For example, Judge Roth sat on a panel that analyzed an appellant's claim under the Individuals with Disabilities Education Act.[19] The Act prescribes a complicated statutory scheme, offering substantive and procedural protections to individuals who qualify. The Act, moreover, and the cases interpreting it, use acronyms for several terms—e.g., Individualized Education Plan (IEP); Free Appropriate Public Education (FAPE); and Evaluation Report (ER). Counsel for the parties were experts in this area of law and jumped straight into the specific provision in dispute without explaining the Act's overall function. They also littered their briefs with those acronyms. This was understandable given that they are experts in the field. Because the judge (and her clerk) were not as familiar with this area of law, though, they had to spend considerable time familiarizing themselves with the relevant statutory provisions and the acronyms commonly used in the field. Counsel could thus have improved their briefs' persuasiveness simply by explaining the relevant provisions of this statute and giving the court a guide to the acronyms.

B. Keep it Short.

We hope, by now, it is clear: Judges read lots of briefs every month, so you should keep your sentences and paragraphs short. You should measure every sentence of your brief to determine whether it advances your goal of persuading quickly. If the sentence does not, excise it. Whatever does not help, hurts.

C. Avoid Lengthy Quotes.

The advocate should avoid the electronic-database crutch of copying and pasting clunky quote after quote into the brief to provide background law. Presenting analysis that way hinders

19. 20 U.S.C. § 1400 *et seq.* (2007) (available at http://uscode.house.gov).

clarity and adds bulk, which slows reading. This relates to what we have said about researching and then synthesizing; the advocate should do the heavy lifting and provide the rule in a cogent way so that the judge can follow quickly.

You should also avoid string citations with quotations. Although this tactic appears to be employed more and more frequently, a more persuasive argument will set out the legal precepts in a discussion of the relevant law and then apply them to the case at hand. To promote the flow of the argument, the citations, supporting the points being made, can very effectively be put in footnotes.

D. Avoid Personal-Attack Arguments.

Do not personally attack opposing counsel; attack only their arguments. Stay above the fray. Attacking opposing counsel will result in the judge questioning the advocate's judgment and character, which distracts her focus from the brief. Moreover, if you are arguing that previous panel made an incorrect decision, you should refrain from labeling it as a "conservative" or "liberal" decision.

E. Be Readable.

Use understandable, clear language: Eschew legalese and Latin. Because you are aiming to make your argument persuasive after only one read by the judge, you should keep the language as readable as possible.

F. Humanize the Client.

If the client is a person, you should call him by name. If the client is a corporation, a city, or some other impersonal organization, you should not just call it X Company or the City of Y; you should, as much as possible, refer by name to the persons, managers, officers, or policemen involved in the action. Don't let the judge consider a party to be an impersonal institution. A lawsuit is about *people*. If your client is considered to be a *person*—or a group of people—you should be able to generate more sympathy for him or for them.

G. Choose Your Language Carefully.

Remember that the words you use to describe your client and the actions that brought about the lawsuit can influence the outcome. You should use the vocabulary that will portray your client in the best light and your opponent in the worst. Returning to John Doe, his attorney described his situation as that of a civil detainee confined like a criminal convict. The Head Jail Official described him as a sexual predator whose confinement was evaluated consonant with governing law. This choice of language leads the reader in the direction that each advocate wishes.

H. Use Timelines and Charts.

Particularly when an appeal involves complicated facts or complex legal issues, charts and diagrams clarify the picture for the judge. A timeline is helpful to establish a sequence of events when that is important. A chart can summarize vital points when the material is voluminous. A diagram of relevant parts of two documents can demonstrate the difference (or similarity) of language that the advocate deems crucial to the case. Helping the judge understand intricate or convoluted facts or legal points will give the advocate a better chance of convincing the judge that the advocate's position is the meritorious one. Indeed, judges are apt to think that the advocate is trying to hide something if the facts are difficult to understand.

I. Do Not Let Your Opponent Lead You Astray.

You should ask yourself the following questions as you review your opponent's brief: Are the issues really as stated by the other side? Is my opponent hiding a weak point in a haystack or directing the court's attention to a red herring?

You can determine the answers to these questions only by reviewing the case so thoroughly that you will know when the other side is misrepresenting facts or misstating a precedent. The advocate who skips detailed preparation may regrettably be led astray. If your opponent is attempting to obfuscate, you must

refrain from personal attacks but proceed patiently to present the law accurately.

For example, Judge Roth was recently on the panel in a case in which appellants' counsel attempted to persuade the court that the elements required in one type of securities case were also required in an entirely different area, even though binding case law explicitly acknowledged the difference between the two types of claims. Specifically, appellants' counsel argued that appellees had failed to adduce any evidence of reliance or causation and thus had failed to present a prima facie claim under section 11 of the Securities Act of 1933.[20] Appellants' briefs were well written and facially persuasive. Only upon careful review did it become evident that case law—both from the Supreme Court and from the Third Circuit—unambiguously impugned appellants' argument.[21] Section 11 claims do not require those elements. Appellees' response exemplified the proper reaction. They were not led astray by appellants' slick mischaracterization. Instead, they persuasively explained what the law actually was and how the court should apply it. Had they not carefully studied the claim at issue, they might have adopted appellants' characterization. Furthermore, appellees refrained from personal attacks; they stuck to attacking appellants' arguments. Appellants, of course, lost their appeal. At the same time, the lawyers who represented them lost credibility with the court.

III. LEGAL PRINCIPLES THAT THE ADVOCATE SHOULD CONSIDER

Taking advantage of every opportunity to include any of the following three principles will improve the substance of any brief.

A. Waiver

Many advocates would benefit from wielding this weapon

20. 15 U.S.C. § 77k (available at http://uscode.house.gov).

21. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *In re Supreme Specialties, Inc. Secs. Litig.*, 438 F.3d 257, 269 (3d Cir. 2006).

in appropriate situations, which occur more often than you may believe. A party can waive its argument on appeal in either of two ways. First, a party can waive an argument if it has not been raised in the court below.[22] Second, a party can waive an argument by not arguing it in its opening brief.[23] To raise an issue, a party must "present it with sufficient specificity to allow the court to pass on it."[24] A party typically raises an issue before the district court in its pleadings or papers, so be on the lookout as you review the other side's papers for opportunities to argue waiver.

B. Harmless Error

This tool allows the advocate to concede error in the court below but argue that it was harmless. An error is harmless if it is "highly probable that [it] did not affect the outcome of the case."[25] If correcting the flaw in the lower court's proceeding would not change the decision, the appellate court will affirm. Remember that this doctrine applies in both criminal and civil appeals.[26]

C. Judicial Estoppel

This is the tool to use against a party arguing a different position on appeal. You can assert that your opponent is estopped from arguing that issue because a party cannot adopt

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22. *See e.g. DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007) ("It is well established that arguments not raised before the District Court are waived on appeal."); *see also e.g. London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("It has long been the rule in this circuit that a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint.").

23. *See e.g. U.S. v. Hoffecker*, 530 F.3d 137, 159 (3d Cir. 2008) (citing *U.S. v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (noting that "It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal")); *U.S. v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006) (quoting *Laborers' Intl. Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994): "An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court.").

24. *See e.g. In re Teleglobe Commun. Corp.*, 493 F.3d 345, 376 (3d Cir. 2007).

25. *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 180, 205 (3d Cir. 2000).

26. *See McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 927 (3d Cir. 1985) (listing "three compelling reasons that the standards should be the same").

conflicting positions during different stages of the same proceeding.[27] Similarly, you can argue, if relevant, that the other party is estopped from presenting an argument because it argued the converse in a different proceeding. For example, Roe cannot sue Wade, the Attorney General of Texas, seeking a declaratory judgment that the Texas criminal abortion statues are unconstitutional and then sue Smith, the attorney general of another state, asking for a ruling that will uphold the criminal abortion statues of that state.

IV. CONCLUSION

Writing an appellate brief can be a daunting experience. If you follow our suggestions, however, you will have a formula for persuading the judges quickly and thus increasing your chances of winning on appeal.

27. *See e.g. In re Teleglobe*, 493 F.3d 345, 377 ("Judicial estoppel prevents a party from 'playing fast and loose with the courts' by adopting conflicting positions in different legal proceedings (or different stages of the same proceeding)." (parenthesis in original) (citation omitted)).

The Ten Commandments of Writing
An Effective Appellate Brief

Sylvia H. Walbolt and D. Matthew Allen[1]

The First Commandment: Know Why Your Client Should Prevail

It is basic, but critical, to persuade the court that the result you seek is the right result.

The court has to feel good about ruling in favor of your client. Judge Gurfein (2nd Cir.): "It is still the mystery of the appellate process that a result is reached in an opinion on thoroughly logical and precedential grounds while it was first approached as the right and fair thing to do."

The Statement of Case and Facts is critical in this regard. You are most likely to prevail if your properly presented statement of the facts -- without argument -- makes the reader believe that your client should prevail. In order to do this, you should not set out the facts in the same way in every brief; sometimes you may need a chronology of facts, other times you may not.

This does not mean ignoring bad facts, or slanting facts your way even though you were the losing party below. It means marshaling your facts, within the standard of review the court will be applying, in a manner that inexorably leads the reader to conclude that your client should win.

Even, for example, if your argument is that error wasn't preserved, you should remind the court why the preservation rule is a good rule of judicial efficiency and fairness.

Consider the broader ramifications of a legal ruling in your client's favor: Is the ruling good or bad as a general, jurisprudential principle?

Remember – the first thing the court reads should be what the issue is and why you prevail on that issue.

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[1] Sylvia Walbolt is the chair of the Carlton Fields Appellate Practice Group. She is a past President of the American Academy of Appellate Lawyers, as well as a Fellow of the American College of Trial Lawyers. Matt Allen is a shareholder of Carlton Fields and chairs its Associate Training Committee. They have "borrowed" generously from writings of other members of the firm, as well as from Judge John Minor Wisdom, Judge John Godbold, and others. "To quote from one source is plagiarism, to quote from several is scholarship." Martin Edwards, The Coffin Trail, Poisoned Pen Press (2004) at p. 19.

The Second Commandment: Know Your Standard of Review

This is what separates appellate lawyers from trial lawyers.

If you won below, you can take great advantage of the standard of review. If you lost, you must evaluate your appeal in the light of the standard of review that will be applied by the appellate court.

No matter how mad you [and your client] are about what the trial judge did, you have to focus on the standard of review.

Start by objectively and coldly deciding what issues are likely to be dispositive in order to prevail on appeal. Then select your best chance on appeal, bearing in mind the standard of review for the issues you are evaluating.

When you write your brief, force yourself to write within the standard of review. Do not ignore it. There is a reason why courts often affirm, asserting harmless error.

The Third Commandment: Prepare an Outline to Organize the Structure of Your Brief

Do not just start writing or cutting and pasting from the trial brief.

Prepare an outline.

This forces you to be disciplined and stay on track when you begin to write.

We often hear people say, "I can't outline." That tells us that they cannot think logically because thinking logically is what outlining forces you to do. Your ability to organize your writing is a reflection of your ability to think logically.

Analytical writing is a lot like a flow chart. Each thought should logically flow from the last.

The outline becomes your table of contents, which may be the first thing read by the appellate court.

The outline should present your case in logical, persuasive fashion.

Break your analysis into parts. Readability is enhanced by headings and sub-headings that tell a logical story. Use your outline to make topic headings for each major point in your brief.

Headings should be "argumentative" and explanatory. For example, do not say, "The Court correctly granted summary judgment." Instead, say: "There is no private right of action under the Food & Drug Act."

Use your outline to narrow your points on appeal. Eliminate the weak points. Try to order your points, from strongest to weakest. If this order does not work, re-think whether you really want to raise the weak point. Consider whether you can work it in as a fall-back argument at end of your stronger point.

The Fourth Commandment: Use a Mapping Technique

By this we mean tell your reader at the beginning of the brief where you are going and how you will get there. Provide a roadmap to the reader in advance, through an introduction or opening paragraphs. Don't bury your lead point.

Remember: you are steeped in your record and your research. You know your case. To the reader, it is a mystery, and you don't want the reader to only realize the answer to the mystery on the last page.

Educate the reader from the start. Mapping gives an overview of where you and your reader are going.

Your map should be a framework that will help the court solve the problem in your case and others like it. After you have laid out this framework, then you can address the arguments made by the other side. In doing so, you can refer back to the framework you have already developed, using the other side's arguments as a test of the soundness of the arguments you have advanced.

Remember – appellate judges are the last generalists in the practice of law. They know something about almost everything, but few are experts in any area. Do not expect your judges to know your subject. Some education is inevitably necessary, and you need to start doing so at the start of your brief.

Also remember – the judges may not read the briefs in order. Some start with the reply brief to get a feel for what the case is about.

The Fifth Commandment: Know Your Order of Authority

Here I am not referring to who is chief justice of the court. I'm referring to what governs your analysis.

If your point on appeal rests on a statute, quote the statute first, and put a copy of the statute in your appendix or attached to your brief. That is what

governs. Case law merely provides construction of the language of the statute.

If your point on appeal rests on Florida common law, start with Florida cases. If there are no Florida cases on point, acknowledge this before discussing cases from other jurisdictions.

When discussing case law, analyze it. Don't just string cite cases or regurgitate what an opinion says. Explain why the cases you rely on should control the case rather than the cases your opponent (or the lower court) cites.

Explain what the issue in the case was, what the trial court ruled, what the appellate court held – and then draw out what is important to your point. Group common themes together. Think carefully about the persuasive force of the decisions as a whole.

The best type of case to rely on is a case with the result you seek. Failing that, use a case with good language that is distinguishable as to result. The worst type of case to cite is dicta – although if it is all you have, you must use it and demonstrate why reasoned, principled dicta should be followed by the court to reach the right result – i.e., your client wins!

Do not use long string cites – use your best three cases. If you cannot prevail on your best three cases having other cases won't do you any good.

The Sixth Commandment: Focus on Transition

Use transition to let the reader know you are moving to a new point.

The brief should march across the page. It won't unless your transitions are clear.

Topic sentence at the start of each paragraph should provide both transition and mapping. (A topic sentence is a sentence that sets out the meaning or main idea of the paragraph). Headings and sub-headings do so as well.

Each step should flow naturally and should not stop the reader. One exercise for determining if you have proper transition is to jumble the pages/paragraphs of your argument without any page numbers and give them to someone to try to put them back together. If your transition is good, they will be able to do so quickly.

The Seventh Commandment: Edit

Even experienced writers cannot produce a polished product on the first draft. Editing is essential!

We cannot emphasize this enough. You must plan your time to leave ample time to edit.

When you are editing, don't fall in love with your own prose. You are not preparing a literary masterpiece – you are preparing a tool to help someone figure out an answer to a dispute as concisely and quickly as possible. Be brutally objective about your own work.

How do you go about editing? <u>This is something that should be done on paper, not on a computer</u>. Print the brief out and read it, with a sharp red pencil, in the following way:

1) First focus on the organization, the flow of the brief as a whole. Have you developed your arguments first -- that is, demonstrated why you should win as opposed to what's wrong with the other side's argument. Do the paragraphs, themes, and thoughts flow from one to next?

   Are your thoughts in sequence? Is the transition clear?

   Does your central point emerge clearly and quickly? Is your logic explicit and sound? Have you considered and anticipated to the extent necessary possible counter arguments or alternatives to your arguments and framed your arguments in the light of them? Is your tone appropriate? Could you be bolder in your thesis? Or have you overstated it?

2) Look at the paragraphs next. Are they too long? Never keep a paragraph that takes up a whole page (this is one of many reasons why you cannot edit on the computer). Paragraphs should never, well hardly ever, be more than 3-4 (short) sentences. Small bites are more clearly understood and followed.

   The general rule is one thought or theme to a single paragraph.

   Does each paragraph have a topic sentence?

   Do all paragraphs fit within the heading? Do you need more or different sub-headings?

3) Then focus on each sentence. One thought to a sentence.

   Use short sentences. Break long sentences in half.

Eliminate rhetoric, hyperbole, and overstatement. Avoid metaphors and hypotheticals. Be careful that any quotations are correct – it is a "little learning," not a "little knowledge."

Eliminate any negative references to counsel or the lower court. Don't say that "counsel falsely told" the court something. Just show why the statement is correct. The court will know whether it was a blatant lie or not.

Eliminate alphabetical short forms.

Eliminate repetition and redundancy. If you have a sentence starting "in other words" - that is a signal of (1) redundancy and (2) lack of clarity in the prior sentence. Make the prior sentence clear.

Eliminate indented quotes if at all possible. If the quote is really essential to make the point, explain the substance of the quote in the sentence leading into the quote, so the court will know the point you are trying to make by using the quote.

Beware of the placement of dependent clauses within, or particularly at the end of, a sentence where it is unclear what words the clause modifies, and as a result the sentence can be read more than one way. Do not say: "The court granted summary judgment because the causal link was not established." That suggests you are agreeing the causal link was not established, when you really mean the court erred in finding no causal link was established. Better is: "Ruling as a matter of law that the causal link was not established, the court granted summary judgment." The problem can sometimes be eliminated by eliminating the "because" or by moving the dependent clause within the sentence.

Eliminate all footnotes that are extraneous. Move them into text, if the thought is really needed, unless it is a true footnote.

Turn any passive tense to active tense.

4) Now focus on every word. Get rid of adjectives and adverbs. Get rid of legal jargon. Get rid of redundant words. Get rid of any overstatement. Do not overwrite. Use the simplest word, not the fanciest word. Get rid of tired clichés ("red herring").

Is the word the right word? Judge Wisdom reminds us not to use "claims" when you mean "contends." "While" does not mean "although."

Is the word the strongest word to make your point? There is a big difference, for example, between whether a case "illustrates" or "establishes" a point.

If you have more than three prepositions in a sentence, you probably have too many words in the sentence and need to some words.

5) Eliminate emphasis that has been added as you wrote. There may be a particular point in the brief you wish to bold or underline, and it will be noticed if there is not a lot of other emphasis throughout the brief. Overuse of emphasis dilutes and irritates. Do not "shout" at the court.

6) Test the cadence – read aloud. That will help you detect awkward phrases and lack of flow.

The Eighth Commandment: Keep It Simple And as Short as Possible.

This commandment is easy to say but hard to do. But it is essential.

You are trying to persuade, not show how smart you are. Make it simple enough that a lay person would understand.

Give it to someone who (like your judge) knows nothing about the case. Use that person's comments as a reality check. Do so early enough to have time to reorganize or otherwise revise the brief if need be.

If an intelligent person tell you he doesn't understand something, don't think he is stupid -- fix it. It is not a debate if someone says something is not clear to him. If he doesn't understand, the judge reading quickly, without the benefit of your knowledge, may not understand either. If a reader only understands the point with an oral explanation/background that you give, you need to add that into the brief.

Could the court take the arguments laid out in your brief and make them the court's opinion? After all, that is the goal: to have the court agree with your arguments and accept them as its decision.

The Ninth Commandment: Edit Again

Be self-disciplined enough to finish your draft several days before it is due.

Set the brief aside for a while. Then edit again. That way the writing will seem more fresh in your mind and not as familiar. You will catch things you missed as you were reading the brief over before.

Look at the brief as a whole. Does it communicate your arguments and themes in a concise, understandable way?

Is the tone proper? Is it courteous and in appropriate moderation?

Have you cut away every nonessential word, sentence, paragraph? Can you shorten? You do not have to use all the pages you are allowed. No judge ever complained that the brief was too short.

Are there any typos or grammatical errors? Check your use of "which" and "that." Unsplit your infinitives. Spell–check.

Have someone cold to the case proof read the brief.

The Tenth Commandment: Be honest With Your Court

This is the only true commandment. The others are all suggestions.

Don't let the court be surprised and believe it was misled by you after it reads the lower court's order or the other side's brief.

Confess error below if you have to. Then explain why the error doesn't change the result you urge (that is, it was harmless error, the issue was not preserved, the law should be changed, etc.).

Disclose your bad facts (preferably in the middle). Never let the other side bring them up first.

Make sure all the facts you cite are in the record.

Disclose bad precedents. Do not let the other side bring them up first. If you cannot effectively distinguish or otherwise address bad case law, it is better to re-think whether you want to raise the issue.

It goes without saying, but we will say it anyway: Never, never, never misrepresent the record or the law.

Selected Bibliography

John Minor Wisdom, Wisdom's Idiosyncrasies, 109 Yale Law Journal 1273 (April 2000).

John C. Godbold, Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal, 30 SW LJ 801 (1976).

Mark Herrmann, How to Write: A Memorandum From A Curmudgeon, ABA Litigation Magazine, 24 No. 1 Litigation 3 (1997).

Appellate Practice Manual, ABA Section of Litigation (1992).

Stephen V. Armstrong and Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing. (Clark Boardman Callaghan 1992).

Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well, (University of California Press 1989).

Philip V. Padovano, Florida Appellate Practice (West 1988).

Judge Ruggero "Rick" J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument, (Clark Boardman Callaghan 1993).

The Bluebook: A Uniform System of Citation – 15th Ed.

William Strunk, Jr., and E.B. White, The Elements of Style (Macmillan, 3d rev. ed., 1981).