WRITING TO WIN: THE ART AND SCIENCE OF COMPELLING WRITTEN ADVOCACY

Lawrence D. Rosenberg
Partner, Jones Day
Washington, DC
INTRODUCTION

Writing a winning legal argument can often be the most important single element in a case. In this era of fewer and fewer jury trials, the prevalence of summary judgment, and endgame strategies more often focusing on appellate courts, a lawyer’s skill in writing a winning legal argument – whether before a trial judge or on appeal – may well dictate whether the client wins or loses. That is not to say that all of the other facets of litigation, including discovery, oral argument, trial presentation, etc., are unimportant, but in some cases writing a winning legal argument may be the most crucial.

Fortunately, writing an excellent legal argument is not extremely difficult. While it takes care, focus and a good amount of hard work, it is certainly possible to write a winning legal argument by following the key, straightforward principles of effective written advocacy. This article sets forth a number of approaches, strategies and tips for developing and writing winning legal arguments. It looks at several important steps in preparing to write a compelling legal argument and then examines the key “do”s and “don’t”s of brief writing. Along the way, it includes a number of examples of effective and ineffective written advocacy.

THE KEY STEPS IN PREPARING TO WRITE A WINNING ARGUMENT

Writing a winning argument takes a significant amount of preparation. While it is difficult to write anything very well without a lot of thought, it is particularly hard to write a focused, compelling legal argument without having first considered most of the likely content of the document. The following are the most important, critical steps in preparing to write an outstanding and persuasive legal argument.

Analyze the case. First, while this probably goes without saying, it is essential when considering any written legal argument
to begin by analyzing and thinking about the case. Even before reading documents and deposition transcripts or researching legal issues, it is important to spend some time (often several hours or perhaps even a day or two) reviewing the decision from the trial court, the complaint, any answer, any memoranda evaluating the claims in the case, and any other fundamental pleadings or analyses to understand what the important issues are in the case and what kinds of arguments have the potential to convince a judge or panel of judges regarding the issue(s) about which you are contemplating writing an argument. Certainly, if you are planning on writing a dispositive motion or an appeal brief, it is necessary to have carefully thought about the case before doing anything else. But even if you are writing a motion to exclude the testimony of an expert, or to compel discovery, it is very helpful to look at the case as a whole, determine the key issues in the case, and develop a sense for how the argument you are considering will fit into the rest of the case. At this point, it is also helpful to make a very preliminary list of the issues that you are beginning to consider for you argument.

**Examine the relevant parts of the record.** The next step in preparing to write a legal argument is to review thoroughly the parts of the record relevant to the argument that you are considering. In determining the content of your argument, it is very important to review all of the materials that contain factual information that may affect the argument. Therefore, if you are writing a motion to compel discovery, after having analyzed the case, you would need to examine all of the discovery requests and responses in the case, any relevant documents produced in the case, and any relevant deposition testimony. If you are writing a summary judgment brief, you would need to review all of the written discovery requests and responses in the case, all relevant produced documents and deposition testimony, and all of the prior pleadings and motions in the case; of course, you would also need to review any prior decisions by the court in your case. If you are writing an appeal brief, you would also need to examine the entire
trial transcript (if there is one) and all relevant exhibits admitted at trial as well as all pretrial and post trial briefs and rulings from the trial court. While such review can be time consuming, it really is essential to preparing a written argument that will persuade a judge or appellate panel that will either have first hand knowledge of the details of the record of the case or at least access to the entire record and law clerks who are likely to examine the parts of the record that they feel are relevant to your argument.

**Preliminarily identify your theme and the issue or issues that you will address in your argument.** Once you have analyzed the case and reviewed the relevant parts of the record, you should begin to get a pretty good idea of the issue or issues that you will address in your argument. To be sure, it may be easier to identify the issue if you are preparing a discovery or evidentiary motion. But you should attempt to identify the issues you will address even if you are preparing a summary judgment motion or an appeal brief. While you may abandon certain issues and adopt other issues as the writing process progresses, you want to have as good an idea as possible of the main issues before you undertake extensive research or spend a lot of time drafting. At this point, it is helpful to draft a one or two sentence statement of each issue that you are considering.

You should also begin to consider the theme of your brief and how it ties to the central issues in the case. You should tailor your theme to your audience and the stage of proceedings of your case. Thus, if your brief supports an evidentiary or a discovery motion, a straight-forward theme is ideal. If you are seeking to exclude the testimony of an expert witness, an effective theme could be “the expert’s methodology is fatally flawed.” Or if you are moving to compel privileged material, an effective theme could be “there is no valid privilege claim because the documents in question are neither relevant to nor provide attorney-client advice.”
If your brief supports a summary judgment motion, a broader theme could be appropriate. Thus, in a breach of contract case, an appropriate theme could be “as a matter of law, the contract authorized defendant’s conduct” or “because it is undisputed that defendant provided plaintiff with advance written notice that it would use parts from a new manufacturer, no reasonable jury could find that defendant failed to comply with the relevant contractual provisions on substitution of the manufacturer.” In an antitrust case, an effective theme could be “there could not be any conspiracy as a matter of law because defendants had a genuine agency relationship and were not independent economic actors.” In a patent case, an appropriate theme could be “no reasonable jury could find infringement in light of the parties’ stipulated construction that a ‘square peg’ as used in the relevant claims could not fit into a ‘round hole,’ such as the hole used in the accused products.”

You should bear in mind that when communicating to a judge or panel of judges, jury arguments or blatant appeals to emotion are less likely to be effective themes than those that specifically address the relevant law and facts. Thus a theme such as “this is a case about greed,” while potentially effective in a jury trial, is unlikely to be your most effective theme in a written argument.

Other considerations are relevant to appellate briefs. It is critical to realize that appellate courts do not sit as super juries and are not likely to reverse a jury verdict or even trial court findings on the ground that they are unsupported by the evidence or clearly erroneous. Thus, if you are appealing an adverse judgment, if possible, you want to identify legal errors made by the court below that you can argue infected the factual determinations, jury instructions, or evidentiary rulings made or given by the trial court. The old adage that you don’t want to retry on appeal the case you tried and lost is particularly apt. For example, in a criminal case, claims of evidentiary insufficiency, while occasionally successful,
are notoriously difficult to win on appeal. An argument that is much more likely to prevail is that critical evidence was mistakenly admitted or excluded or that the jury was given a seriously flawed jury instruction. Similarly, in a patent case, it is very difficult to prevail on an argument that the jury mistakenly credited the testimony of one party’s incredible expert. But it is much more promising to argue that the court improperly construed the patent claims in issue or misapplied the law of obviousness or contributory infringement. Likewise, in a contract case, the odds are poor that you will convince an appellate court that no reasonable jury could have construed the parol evidence to support the adverse judgment. But you have a much better chance to prevail on an argument that the contract was unambiguous and parole evidence should have been excluded.

Accordingly, for the appellant, themes such as “the trial court misconstrued the applicable statute by ignoring its plain language, structure, legislative history and underlying purpose” or “the trial court’s pervasive and erroneous legal and evidentiary rulings prevented the defendant from presenting its defense” could be effective.

To be sure, the arguments that you raise on appeal must have been preserved. But that does not mean that they must have been the “main event” in the trial court. An argument that was one of several presented in support of an unsuccessful summary judgment motion may be much more persuasive on appeal than one based on the most important ruling made at trial. Moreover, you may choose to “spin” an argument differently on appeal than it was below. For example, an argument made before the trial court that a piece of hearsay evidence should be admitted because it is inherently reliable and it would be unfair to exclude it in light of other rulings admitting similar hearsay evidence offered by the other side could evolve on appeal into an argument that the trial court destroyed the fundamental fairness of the trial by excluding perhaps the most critical evidence to your side. You have to be
careful that your spin on an argument isn’t so far afield that it invites a response that the argument was not fairly presented to the trial court. But a properly preserved argument can really take on new and vibrant life on appeal.

When you are defending a favorable judgment, you will usually want to defend the judgment with vigor. Particularly if the standard of review is favorable, you will want to emphasize the reasonableness, clarity and persuasiveness of the ruling that you are defending. You may want to characterize your opponent’s arguments as retreads that were fully considered and rejected below, or else as mischaracterizations of the law and/or facts. Thus, effective themes for the appellee could include “The trial court made careful, evidence-specific admissibility rulings that should not be disturbed on appeal,” or “The record was replete with sufficient and detailed evidence supporting the jury’s verdict.”

Even when defending a favorable judgment, there is a need for skill and creativity. Thus, you shouldn’t merely parrot the ultimately winning briefs below. You may be able to better explain the rationale supporting an affirmance. You may find better authorities that support your position. And you may be able to better convey the broader consequences of a decision in your favor.

In very rare cases, an appellate advocate may determine that a favorable ruling cannot persuasively be defended based on the rationale of the trial court. In such instances, you would usually be well served to defend that decision below as best you can, but also to provide alternative rationales that support the ruling. So long as the arguments you make are fairly supported by the record, you can defend the judgment on any ground.

**Research the law pertaining to the issues you have identified.** Once you have preliminarily identified the issues that you think you are likely to raise and begun to craft your theme, the
next step is to comprehensively research the law pertaining to those issues. This part of the process may be undertaken by the lawyer ultimately responsible for the written argument under consideration or it may be undertaken by several lawyers working with or under the guidance of the responsible lawyer. In all events, it is critical that the key issues are very carefully examined. The most helpful authorities will be statutes or cases that directly govern the issues about which you are concerned. If there is not a statute or case that directly controls, the next best authority may be a controlling case that addresses a different but analogous issue or has pertinent and helpful language, a non-controlling factually similar case from a lower court or different jurisdiction, or an administrative regulation that speaks to the relevant issue. Other helpful authorities may be non-controlling cases that address different but analogous issues, legislative history, treatises, law review articles, dictionaries, and other sources that can help develop your argument. When undertaking your primary research, it is important to make sure that you plan to rely, not merely on helpful language in a case or the legal rule that a case sets forth, but also upon how that language or rule was specifically applied to the facts in the case. Ultimately, the most persuasive authorities are those that articulate or adopt the legal rule that you advocate and then apply it to similar facts and reach the result that you advocate should be reached in your case. To be sure, there may be instances, such as in interpretation of a statute, where sources like legislative history or dictionaries may be more prominent than most cases would be in supporting your argument. But for the most part, it is the similarity of the application and outcome of the rule you advocate that will persuade judges to rule in your favor.

It is important not to rely on a single research method, such as computer searches. While it is possible that you may find most of the key authorities regarding your issue by performing only a single search method, it is also quite possible that you may miss one or more of the most pertinent authorities. It is usually ideal to begin your research by examining a treatise or a law review or
similar article that addresses the issue that you are researching. Such an examination will likely lead you to many of the authorities that you need. It is also beneficial to examine the relevant practice digest(s) that include the issue you are researching. For statutory research, it is usually helpful to consult the annotated version of the statute at issue. After you have reviewed such sources, it usually makes sense to supplement your research with computer searches. Unfortunately, it is far too common for a lawyer to miss important authorities by relying solely on either book research or computer research.

**Complete your secondary research.** Once you have carefully researched the primary issues in the case or with which you are concerned, it is often helpful to complete research on secondary issues. These might include the applicable standard of review on appeal or for summary judgment, general statements about the desirability of resolving certain issues by way of legal motion, and analogous areas of the law upon which you may wish to rely. While it is possible to complete such research at a later stage of the writing process, I have found that completing as much of the research as possible before undertaking any extensive drafting usually makes the drafting process go more smoothly.

**Select the issues you that you will present.** After having completed your research, it is a good idea to revisit your preliminary list of issues and refine that list. You may abandon one or more issues that are unlikely to be the basis for a persuasive legal argument. You may add one or more issues that your research has led you to consider. Think very carefully about these issues because they will serve as the foundation for your legal argument. You should also revise your prior descriptions of each issue that you had previously considered and draft one or two sentences defining each new issue that you intend to present. You may very well edit or alter your definition or abandon an issue at a later stage of the drafting process, but it is beneficial to have a clear idea of the composition of your issues before you begin to
draft your outline. You should also be very careful about the
number of issues you select. As a general rule, presenting more
than three issues in any brief runs the risk of signaling to the court
that none of your issues has merit. While in an exceptional case, I
have seen four or even five issues persuasively presented on an
appeal, I have also seen many cases in which one or two legitimate
issues were lost in a sea of several other weak or frivolous issues.

**Draft a focused outline.** In my view, one of the most
critical steps in writing a winning legal argument is carefully
developing a focused outline of your brief or other document. I
typically recommend using the outlining process to develop the
theme or themes of your written argument, to highlight the most
important facts that you want to set forth in your document, the
issues that you want to address, and the primary components of the
arguments that you want to present. Therefore, it is usually helpful
to include in your outline a description of the introduction and
theme to your argument, the most important facts that you want to
include in your written presentation, the point headings and
subheadings for the argument section of your brief or document,
the key cases and other authorities upon which you plan to rely
(and ideally a one sentence description of each critical point from
each authority), and at least a brief description of how you plan to
apply the authorities to each issue that you plan to address. While
there is no magic formula for how long such an outline should be,
and it will vary depending on the length of your written
presentation, an outline of 1-2 pages will often suffice for a single
issue motion like a straightforward motion to compel, but an
outline of 3-4 pages may be more appropriate for a summary
judgment motion or an appellate brief. Occasionally, outlines of 5-
6 pages may be warranted in a particularly complicated matter.
Once you get much beyond that, however, your outline begins to
resemble a first draft more than a true outline. If there are more
than one lawyer working on the case, it is very helpful to circulate
your outline and get feedback on it before beginning to draft your
brief or document in earnest. Particularly, if there are more senior
lawyers working on the case, circulating an outline is an excellent opportunity to make sure that everyone is reasonably in agreement as to the approach to the brief before you have spent many hours drafting an argument that others may believe is unlikely to be persuasive.

GENERAL CONVENTIONS FOR EXCELLENT LEGAL WRITING

Before suggesting specific approaches to the different sections of a brief or similar legal document, it is important to discuss certain general conventions for excellent legal writing.

1. **Always employ respectful and appropriate language.** While this point should be obvious, I have observed a significant amount of legal writing (including from experienced attorneys) that does not evidence the appropriate respect and decorum necessary for formal writing that is intended to persuade a judge or panel of judges. Of course, you should never submit something like the following document:
But overblown rhetoric, the use of *ad hominem* attacks on opposing counsel or the opposing party, excessive and unjustified indignation, or merely insulting or snippy comments are just as ineffective. A winning legal argument is virtually always
comprised of temperate, respectful language that has persuasive value based on its content rather than its tone.

2. **Use simple, clear language and relatively short sentences.** Almost all good writing uses straightforward and understandable language. Clear and direct language is even more important for excellent legal writing. While some lawyers feel that it is impressive or somehow more persuasive to use jargon, large uncommon words, or convoluted phrases, such devices are usually unhelpful and off-putting. One of my colleagues suggested long ago that it is most advantageous to use language that any high school graduate would readily understand and to avoid language that invites reference to a dictionary or thesaurus. Similarly, it is best to avoid long, complicated, and/or run-on sentences. A complex thought can usually best be expressed through a series of short, declarative sentences, rather than a run-on sentence with multiple clauses. Even though it may be tempting to demonstrate your broad vocabulary and ability to perform word gymnastics, such tactics are much less likely to be effective than they are to irritate or confuse the reader.

3. **Develop focused paragraphs with appropriate topic sentences.** Just as unclear language and run-on sentences may confuse a reader, unfocused paragraphs or those lacking a clear point or topic are unlikely to advance your argument. Whether you are writing a factual summary or describing controlling precedent, use a clear topic sentence and then develop each paragraph so that it logically flows from your topic sentence. If you wish to transition to another point or thought, it is generally best to begin a new paragraph. With that said, it can be effective to list a few supporting points within a single paragraph by using transitions such as “first,” and “second.” For example:

   The cases cited by plaintiff are unavailing for several reasons. First, none of those cases addresses the language of the controlling statute. Rather,
those cases all involve common-law doctrines that are inapplicable here. Second, those cases all predate the Supreme Court’s recent decisions interpreting the controlling statute, and are therefore unreliable.

But in all events, keep your writing focused and clear.

4. **Avoid footnotes in most circumstances.** Certain legal writing teachers claim that it is helpful to use footnotes for citations and less important factual or legal points. My experience and understanding is that that vast majority of judges, and likely the vast majority of the best practicing legal writers, disagree and find footnotes almost always more distracting than they are worth. It is virtually always easier to read a citation in the text of a document than to search the bottom of a page (or worse, in the case of endnotes, the last few pages of the document). And if a factual point or legal argument is not significant enough to be in the text of your brief, you should question whether it should be omitted entirely. To be sure, many excellent legal writers have different perspectives on this issue, and some regularly employ footnotes in certain circumstances. In my view, the only circumstances in which you should consider using a footnote are (i) when it would be distracting to state a necessary but substantively insignificant point – something such as “Intervenor incorporates and adopts the Statement of the Case set forth in Petitioner’s Brief” at the beginning of a Supplemental Statement of the Case; (ii) where you wish to include the citation of many cases from non-controlling jurisdictions, such as where you want to show that all or many of the federal appellate courts agree with your position and you want to cite them following an *Accord* or *See also* signal; or (iii) where you feel compelled to include a point that is particularly tangential and distracting, such as a case’s lengthy prior or subsequent history or the history of amendments to a statute. Accordingly, footnotes should virtually never be used to include facts relevant to your case or subsidiary legal arguments. Simply put, if the factual point or
5. **Do not under any circumstance misrepresent or overclaim any fact or legal authority.** A critical component of the persuasive value of a written argument is the credibility of the author. Any misrepresentation or inaccurate portrayal of a fact or authority in your document is likely to destroy that credibility. As one well-respected advocate put it:

> The four outstanding don’ts for brief-writers, in my judgment, are (a) inexcusable inaccuracy; (b) unsupported hyperbole; (c) unwarranted screaming; and (d) personalities and scandalous matter. They are don’ts, not only from the point of view of one’s own professional standards and self-respect, but also from the narrow aspect of intelligent self-interest; every one of these faults is bound to backfire – and most unpleasantly.

Frederick Bernays Wiener, *Effective Appellate Advocacy* 149 (ABA Publishing, Rev. ed. 2004). If you always fairly and accurately describe the facts of your case and the authorities you rely upon (and avoid intemperate rhetoric as previously suggested), you will not have to worry that you may lose as a result of your own missteps rather than the substance of your arguments.

6. **Consider using helpful demonstrative aids.** A picture can be worth a thousand words (and will sometimes save that many words). While many excellent legal writers would never think to use demonstrative aids in a brief (particularly an appellate brief), a timeline, chart, diagram, table or even a picture can sometimes add immeasurably to the persuasiveness and clarity of an argument. For example, intellectual property lawyers have used such devices to great effect in trial court briefs, and in appellate briefs in patent cases in the U.S. Court of Appeals for the Federal Circuit. But such demonstratives can be usefully employed in many other cases.
Under the ADEA, a judicial complaint must be dismissed for failure to exhaust administrative remedies if a supporting EEOC charge was not filed within 300 days of notification to the employee of the adverse employment action. See 29 U.S.C. § 626(d)(2) (grievant claiming violation of the ADEA must exhaust his administrative remedies with the EEOC before filing a judicial action); Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1392-93 (11th Cir. 1998) (en banc). Moreover, as amended by the Civil Rights Act of 1991, the ADEA requires that a judicial complaint be filed within 90 days of either “receipt of a notice that ‘a charge filed with the [EEOC] under [the ADEA] is dismissed or [that] the proceedings of the [EEOC] are terminated by the [EEOC],’” Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463, 464n.1 (3d Cir. 1994) (first, fourth, and fifth brackets in original), or, if a collective action has been filed, within no more than 90 days of the date that certification is denied or that any conditionally certified classes are decertified. See Armstrong, 138 F.3d at 1391-92.

As the following chart illustrates, Ruehl failed to satisfy both of these requirements:
Although Ruehl had notice that he would be separated from employment on August 31, 1998 by as early as December 10, 1997, he did not file an EEOC charge until October 14, 2003. Thus, Ruehl did not file his charge until more than 5 years after his employment was terminated, well after the 300-day charge filing period had expired. Indeed, given that Ruehl was notified as early as December 10, 1997 that he would be terminated, Ruehl’s 300-day charge-filing period expired even before Mueller and Bellas filed their EEOC charges on December 21, 1998; and given his August 31, 1998 effective-termination date, Ruehl’s 300-day charge-filing period had plainly run by no later than June 27, 1999—i.e., well before Mueller and Bellas filed their putative collective action on August 13, 1999. Therefore, Ruehl’s EEOC charge is plainly untimely.

Furthermore, Ruehl’s judicial complaint is also untimely. The untimely EEOC charge makes the judicial complaint untimely.
as well. Moreover, Mueller and Bellas filed their collective action 90 days after the EEOC completed processing their own charges; and the notice date of the district court’s decertification of the Mueller collective action was March 20, 2003. But Ruehl did not file his judicial complaint until January 20, 2004, more than 6 months later. That complaint was thus filed well beyond the 90-day deadline for any lawsuit based on the charges of Mueller and Bellas.

7. **Review the rules of the court in which your case is pending.** It is, of course, necessary that you know the basic federal or state rules of procedure that apply in your case. Those will contain many of the rules governing your brief or document and what may or may not be required or appropriate to include. But many state and federal courts themselves have their own nuances with respect to the rules of procedure. It is therefore critical that you also know those “local” and/or “chambers” rules and tailor your written argument to conform to them. It is difficult to prevail on your brilliant legal argument if your brief gets “bounced” by the Clerk’s Office.

8. **Edit carefully.** Always carefully edit your drafts. While theoretically possible, it is unlikely that you will get it exactly right the first time. Some writers go through a dozen or more drafts in the course of writing a legal argument; others may only work through a few. But virtually all good legal writers go through each draft in a focused effort to improve, tighten and polish their arguments. The editing process should include a rigorous assessment of your brief’s structure, persuasiveness, language and syntax. As part of this process, you should also proofread very carefully. Always run a computer spell check, but also examine grammar, syntax and spelling yourself. You should also always check and double-check to make sure that you have included all portions of your document that are required by the rules of the court in which your case is pending (e.g., statement of facts or jurisdiction, summary of argument, statement of related cases, etc.).
It is also helpful during the editing process to have other lawyers read a draft of your brief, particularly those who have not worked closely with you on the case. In a large law firm or government office, it may be fairly easy to have a colleague review your draft. In other settings, it may be more difficult. But your argument will almost always improve when others with a fresh perspective have considered it. I recall an instance many years ago when I was working on a Supreme Court brief with several colleagues. One of our colleagues who had not worked on the brief reviewed a draft and convinced the rest of us entirely to restructure the brief in a way that ultimately made it much more readable and persuasive.

PUTTING TOGETHER A WINNING LEGAL ARGUMENT

Bearing in mind the general conventions of excellent legal writing and having completed your research, analysis, outline, and other preparations, it is time to start drafting your brief or legal document. Let’s examine each of the components of a winning brief, motion or similar persuasive legal document.

Statement of the Issues Presented

In an appellate brief, you will usually be required to include a formal statement of the issues or questions presented and it will normally be the first substantive portion of your brief. Most trial court rules do not require a formal statement of the issues for either motions or briefs. While I don’t think that you need to include a formal statement of the issues in a trial court brief, I do think it is essential to include a clear description of the issues in the introduction or preliminary statement to a trial court brief. It is critical within the first one or two paragraphs to clearly set forth for a trial court what the issue(s) are and what relief you seek. Your statement should incorporate the following principles:
• **Clearly and accurately state each issue.** It is essential both for your credibility and for the persuasive value of your argument to rigorously define the issue(s) that you will present.

• **Use language that is likely to elicit a favorable response.** Your advocacy begins with the definition of the issue(s) that you are presenting to the court. You should define each issue such that the court may be persuaded in some fashion by the definition alone. For example, it is more effective to frame an issue as: “Whether the agency reasonably denied relief where the requested relief would have been inconsistent with decades of agency precedent and would have resulted in an unwarranted windfall for the petitioner,” than merely as “Whether the agency erred in denying relief.”

• **Frame the issue(s) with whatever background material is necessary.** In a trial court brief, it is often most effective to provide a paragraph or so of context before defining the issue for the court. While the practice has not always been followed in appellate courts, it is now becoming more common to do the same thing in appellate and U.S. Supreme Court briefs. A good recent example of this is as follows:

  A divided panel of the Court of Appeals for the Third Circuit held that a district court **must** first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of forum non conveniens. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an already-existing 4-2 split among the circuits, and invited this Court’s review.

  The question presented is:
Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of forum non conveniens?

Unfortunately, the opposing brief neither provided any context nor accurately stated the question. That brief stated:

The question presented is:

Whether a district court should establish jurisdiction before dismissing a suit on grounds of forum non conveniens?

A hypothetical case. To illustrate some of the principles of excellent brief writing, consider the following hypothetical case. Your client, Pharma, a major U.S. pharmaceutical company, makes Happynol, a “nextgen” anti-depressant. A well-known pharmaceutical “entrepreneur,” Dr. Evil, has been importing and selling a very similar drug, Euphorizem, that is made outside the U.S. and allegedly uses a different, but remarkably effective, active ingredient. Both drugs are patented – Happynol in the U.S., Euphorizem in the EU. Both drugs are sold at high prices. Consumer plaintiffs have brought suit alleging that Pharma and Dr. Evil have conspired to fix prices in violation of the Sherman Act and have suffered cognizable damages under the Clayton Act.

The issue presented. Suppose that the district court had granted summary judgment on the ground that no reasonable jury could find that there had been direct dealings between Pharma and Dr. Evil sufficient to establish a price-fixing conspiracy and emphasized that there was no evidence in the record that Pharma and Dr. Evil had directly communicated with each other. On appeal, you could phrase the issue presented as: “Are plaintiffs correct that there is sufficient evidence in the record such that a reasonable jury could find that there existed a conspiracy by defendants to fix prices?” Such a statement, however, fails to mention the district court’s ruling in your client’s favor or the lack
of evidence in the record that the defendants had directly communicated with each other and casts the issue in the best light for plaintiffs. A more effective statement would be: “Whether the district court erroneously determined that plaintiffs had failed to proffer sufficient evidence that a reasonable jury could have found that Pharma and Dr. Evil, who never directly communicated with each other, nevertheless conspired to fix prices.” Some advocates strenuously oppose beginning a statement of the issue or question presented with the word “whether”; a good alternative to consider here would be to start with “Did the district court erroneously determine . . . .”

Statement of the Case and Facts

The statement of the case and facts is not merely a necessary part of your brief, it is an excellent opportunity for advocacy.

_The statement of facts is as important as any portion of the brief._ The statement should be written, rewritten, and then rewritten again before being placed in final form. The statement is designed to inform. But a good statement does more; it engages the reader’s interest, making the judge look forward to working on the case. The statement of facts tells the story of your case. This does not give you a license to embellish or to throw in irrelevant but juicy facts to liven up the plot. Stick to the essentials. But remember, it is not unconstitutional to be interesting.

Ruggiero J. Aldisert, _Winning on Appeal: Better Briefs and Oral Argument_ 163 (National Institute for Trial Advocacy 2d ed., 2003); _see also_ Justice Robert H. Jackson, _Advocacy Before the Supreme Court_, 37 A.B.A. J. 801, 803 (1951) (“It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other.”).
There are several specific things that you can do to make a statement of the facts compelling and persuasive:

- **Follow chronological order.** Many poor statements of facts result from the common mistake of structuring the statement by topic or witness. While such a structure can seem logical and may even shorten the statement a bit, it does not result in a compelling story. You should start from the beginning and craft the statement as a narrative, building each new fact upon those already described. Typically, you can break up the statement into the background facts and the procedural history of the case. If you do so, you can create a compelling chronological description of everything relevant that has happened both before and after the case was filed.

- **Adhere to a chronological structure even if you have to include a separate Statement of the Case.** In many appellate courts, you are required to have a separate “Statement of the Case” that must precede the Statement of Facts.” If so, my recommendation is not to abandon a chronological structure. Rather, you can draft a pointed one to two paragraph statement that relays the critical procedural events of the case, but does not attempt to address them in detail. Leave the detail for the procedural history section of your Statement of the Facts. Thus, an effective Statement of the Case could read like this:

  Pharma makes many drugs that have improved the lives of millions of consumers. Pharma’s research into new and improved drugs costs hundreds of millions of dollars per year. Prices for drugs with significantly improved efficacy necessarily reflect those costs. Pharma’s new anti-depressant, Happynol, along with Dr. Evil’s new anti-depressant, Euphorizem, are more effective than prior-generation drugs. Both are patented and reflect years and millions of dollars of research.
Accordingly, they are more expensive than older, less-expensive drugs.

In March 2005, plaintiffs, a class of consumers of Happynol and Euphorizem filed suit claiming that Pharma and Dr. Evil conspired to fix the prices of these drugs. After expedited discovery, in February 2006, Pharma and Dr. Evil moved for summary judgment on grounds that (1) there is no evidence of any communications between Pharma and Dr. Evil that could have given rise to a conspiracy to fix prices, and (2) Pharma and Dr. Evil lack market power because of the availability alternative products. On September 15, 2006, the district court granted summary judgment on the ground that plaintiffs have not proffered any evidence of communications between Pharma and Dr. Evil that could have given rise to a conspiracy to fix prices; the court did not reach the market power issue. On December 10, 2006, plaintiffs filed a timely notice of appeal.

Tell a compelling story. A corollary to structuring your statement chronologically is that you should tell a complete and compelling story in your statement of facts.

A lawyer engaged in stating facts is telling a story, a story the court should accept and understand as it reads along, without having to supplement your narrative by its own independent efforts. Or, to use a different metaphor, the lawyer stating the facts is painting a picture – and those who look at that picture should not be troubled by the details of how the artist mixed his colors. To the extent that the reader may want to check the facts of the story, or the art-lover those of the picture, the record
references supply the necessary assurance that what has been depicted is real and not imaginary.

Weiner at 35.

The idea is to relate the facts in such a way as to tell a coherent story that casts your client’s actions in a positive light and will lead the court to adopt your client’s perspective on the salient details. You should select the facts that advance the story in a meaningful way and avoid facts that are unimportant, distracting or, unless central to the case, would not reflect well on your client’s actions. You should also be sure that no important details or events are omitted. Your statement should give the reader all of the key details needed to understand what happened and to conclude that your client acted in a reasonable manner. It is critical that, on the whole, your story makes sense and depicts the actions of your client as fair and sensible.

Lawyers often question whether they should reveal “bad facts” in their statement of the facts and attempt to address them, even where the opposing party has not yet relied on them. That is a difficult issue and entire books have been written on the subject. My advice is that if a bad fact is so central to a case that it is sure to be relied on by the opposition and it is sure to get the attention of the court, it probably does make sense to address it as part of the story you are telling. But it is not beneficial to pay too much attention to that fact unless and until your opponent does. Thus, in our hypothetical, if there is evidence in the record that Pharma and Dr. Evil both attended the same pharmaceutical convention a month before their new anti-depressants came on the market, it could be addressed as follows:

None of Pharma’s employees ever discussed Happynol or Euphorizem with Dr. Evil. Dr. Evil has never been seen in the presence of any of Pharma’s employees, and his business, personal and cell phone records show that he has never called
any of Pharma’s employees. Two of Parma’s executives, Dr. Strange and Dr. Love did attend Medcon 2004 in Las Vegas, but they left the same day that Dr. Evil arrived, did not attend any of the same meetings or events, and were not seen together by anyone; neither their hotel nor cell phones were used to communicate with Dr. Evil.

If the “bad fact” is not central to the case, I would recommend not addressing it at all until and unless your opponent has raised it. Otherwise, it will appear as if you believe that it is important and are “sponsoring” that fact. See generally, Robert H. Klonoff & Paul L. Colby, Winning Jury Trials: Trial Tactics and Sponsorship Strategy (National Institute for Trial Advocacy, 3d ed. 2007).

- Be rigorously accurate. It bears repeating that it is critical to be completely accurate in your description of the facts. To be sure, you want to emphasize and highlight the facts that support your story and reflect well on your client’s actions. But you cannot in any sense play “fast and loose” with the facts. It is also important to cite the record to support each fact that you introduce. When you are writing an appellate brief, you should try to cite to the trial court’s decision if you can for most facts because your panel and their law clerks will certainly read the trial court’s decision and will assume that the trial court’s description of the facts is accurate. You should try to keep citations relatively unobtrusive by abbreviating where possible. And, as previously discussed, you should not place your citations in footnotes, which are quite distracting.

- Avoid any argument or editorializing. You will have plenty of opportunity to argue the case. The statement of facts is not the place to do it. Rather, the statement should not include any argument or editorializing about the facts. Your credibility as an advocate and the seriousness with which a court regards your
Carefully and completely set forth the procedural history. Finally, be sure to include all elements of the procedural history that are pertinent and helpful. Even if an event seems tangential to your argument, such as transfer of the case or removal to federal court in the distant past, it is usually helpful to give the court all of the background that the court may wish to know. The last thing you want to do is to confuse the court by omitting a detail that you know about and think is insignificant, but which a judge or law clerk wants to learn. If there has been a prior decision in the case, seriously consider quoting helpful statements from such a decision. Trial judges rarely are offended if you quote their earlier decisions or those of their colleagues. Appellate judges are more likely to rely on statements expressly made by trial judges than on your paraphrasing. You should rely as much as you can on the language of any prior decisions.

Introduction/Summary of the Argument

The introduction and/or summary of the argument are also quite important components of your brief. For most trial court motions and briefs, a formal summary of the argument is not required. But an Introduction or Preliminary Statement section can and should be used to accomplish the same things as a more formal summary: introducing the theme of your argument, clearly identifying the issue(s) presented, and summarizing your argument as to each issue that you have raised. Thus, in trial court briefs and motions, it is important to carefully write your Introduction or
Preliminary Statement to accomplish all of those objectives. Again, there is no magic formula for length or detail. A good general rule of thumb is that your Introduction should rarely, if ever, be longer than 10% of the total length of your brief – 2 pages maximum for a 20 page brief, 5 pages for a 50 page brief. A good model is to include one or two paragraphs setting forth the theme and defining the issue(s) that you are addressing and then one paragraph summarizing your argument for each issue that you raise.

In appellate briefs, the summary of argument will also state your theme, make clear the issues you are raising, and summarize your argument as to each issue. But there is one nuance to consider. It has become more acceptable in appellate briefs to include a short introduction prior to or in lieu of a statement of the case that sets forth the theme of your argument and very briefly describes the background of the case. An example based on our hypothetical could be:

Anti-depressants have improved the quality of life for millions of people. Pharma has spent millions of dollars and years of research developing its “nextgen” anti-depressant Happynol, which is more effective for more people than most prior drugs. Naturally, Pharma’s substantial costs are reflected in Happynol’s price. Dr. Evil markets a similar nextgen anti-depressant, Euphorizem. None of Pharma’s employees have ever discussed the price or marketing of Happynol or Euphorizem with Dr. Evil, and there is no evidence in the record that suggests otherwise. Furthermore, even though these new drugs are innovative, there are numerous other drugs available that can provide effective relief for most people suffering from depression.

Plaintiffs urge that they have paid artificially high prices for Happynol and Euphorizem and allege a
conspiracy to fix prices for those drugs. The district court rejected plaintiffs’ unjustified assertions because there is no evidence in the record from which a reasonable jury could conclude that Pharma and Dr. Evil ever communicated about, let alone conspired about, the prices or marketing of Happynol or Euphorizem. In addition, although the district court did not reach the issue, Pharma is also entitled to judgment as a matter of law that defendants do not possess sufficient market power to restrain trade. For both of these reasons, the district court’s grant of summary judgment should be affirmed and plaintiffs’ attempt to obtain an unwarranted windfall should be rejected.

There are several important guideposts for writing an excellent introduction or summary of argument:

- **It is important to draft a powerful opening paragraph or paragraphs.** As the example above demonstrates, it is essential to orient the court very quickly as to the theme of your argument, the key issues, and the outcome you seek.

  The introduction of your summary – the exordium in the schema of the rhetoricians – must let the reader know, in a few sentences, the scope, theme content, and outcome of the brief. It sets the stage for the discussion to follow. It dispatches your argument to the reader at once in succinct, concise, and minimal terms. It describes the equitable heart of the appeal.

  Aldisert at 184. The beginning of your introduction or summary has to grab the court and concisely articulate why you should win.

- **You should summarize all of your key arguments.** Many ineffective summaries or introductions are either too spartan or
The summary is critical because it gives the reader a concise preview of the argument. The summary should be crafted so as to allow the judge to construct a practical outline of a memorandum. Alas, this often does not occur, because the brief writer either has not prepared a summary or has slapped one together without the thought necessary to create a statement that is both comprehensive and concise.

Aldisert at 183. As will be discussed in the argument section, your summary paragraph for an issue should include a topic sentence that defines the issue, a sentence or two that describes the governing legal rule, a sentence or two that shows how that rule applies to your case, and at least a sentence that describes the outcome you seek with respect to that issue.

- **You may include citations, but keep them concise.** While an introduction or summary is not the place for a lengthy discussion of the law, it may be appropriate to include a small number of particularly important citations. For example, you may wish to refer to a controlling case that is directly on point or to a controlling case that has adopted the precise legal rule that you advocate. But don’t overdo it. It is rarely effective to cite more than a few cases in an introduction or summary and it can get unwieldy very easily.

An example of a summary paragraph based on our hypothetical is:

The district court’s ruling should also be affirmed on the alternative ground that plaintiffs have failed to prove that Pharma and Dr. Evil had market power
sufficient to restrain trade. A showing of market power must include a definition of the relevant market and proof that the market lacks sufficient substitutes to offset any attempt to artificially raise prices; in other words a plaintiff must analyze and offer proof regarding the “cross-elasticity of demand” for the products at issue. *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001). Plaintiffs here have failed to provide a coherent definition of the relevant market, referring only in general terms to “nextgen” anti-depressants. They have failed to proffer any evidence that other anti-depressants are not economic and therapeutic substitutes for Happynol and Euphorizem. Indeed, plaintiffs’ experts have not even attempted to account for Happynol’s recent loss of market share or for studies indicating that a majority of consumers are not willing to pay significantly higher prices for somewhat more potent anti-depressants. Defendants lack market power, and thus could not possibly have restrained trade.

**The Argument**

The argument is the heart of your brief or motion. It is obviously critical and it is likely to be the portion of your document on which you will spend the most time drafting and redrafting. While constructing an excellent argument section of a brief may appear daunting, there are several fundamental principles to follow.

- **Use argumentative point headings.** The point headings in your argument present an opportunity to persuade and focus the court. They should always be argumentative.
Headings should always be argumentative rather than topical or even assertive. For instance, say “This suit is barred by laches because brought twenty-five years after the issuance of the original certificate” rather than “This suit is barred by laches.” The first gives the argument in a nutshell, the second does not – though certainly the second assertive heading is infinitely more effective than the merely topical “The question of laches.”

Weiner at 54. This rule applies even to subheadings describing the governing legal rule. It is remarkable to me when I see an otherwise excellent brief with a subheading that says “The law regarding laches” or “The standard for summary judgment.” It is much more effective to say “Laches bars a suit when the plaintiff has unjustifiably delayed in asserting a claim” or “Summary judgment is appropriate when no reasonable jury could find that the defendants conspired to fix prices.”

In our hypothetical, it would be much better to say:

II. The District Court Correctly Concluded That Pharma And Dr. Evil Possess No Market Power Because There Are Many Economic Substitutes For Happynol and Euphorizem That Relieve Depression

than to say “II. Defendants Have No Market Power.” Moreover, as these examples show, it is important to have point headings that, while concise, actually state your argument in a persuasive manner.

- **Make your best argument first in most circumstances.** If you have carefully selected your issues, you will likely have three or fewer issues to present to the court. In the event that you have more than one issue, it usually is most effective to present your strongest argument first. You want to lead with the argument that is most likely to grab the attention of and persuade the court. Certainly, if you feel like you have a slam dunk winner, lead with
• **Use the “IRAC” structure for each issue.** We are not talking about the war in the Middle East here. It is generally very effective to use the Issue-Rule-Analysis-Conclusion structure for each issue that you address in your argument. Under this convention, include at least one sentence that states and defines the issue you are addressing, a paragraph or more setting forth the governing legal rule, a paragraph or more applying the legal rule to the particular issue, and at least a sentence concluding with the outcome that you seek with respect to that issue. It will often make sense to divide a main section of the argument into a subpoint that sets forth and describes the legal rule and a subpoint that applies that rule to the issue involved.

The reason that this structure is usually the most effective to employ is that it is the most logical way to construct a legal argument. Identifying the issue at the outset orients the reader and sets the stage for your analysis. Defining and explaining the legal rule gives the court the criteria for decision and in many ways limits the possible analytical outcomes with respect to a given issue. Applying the rule to the issue provides the logical impetus for the court to rule in your favor. And explaining the outcome that you contend the law compels makes plain the result that you urge the court to order. Many legal writers discuss the key facts regarding an issue and then set forth the legal rule. While in very unusual circumstances such an approach can be effective, it usually
is not. It is much more analytically compelling to establish the rule of decision first and then to apply that rule to the case and its key facts than to list a number of facts and expect the court to draw the proper conclusions from the legal rule that you subsequently set forth. And it is unnecessarily repetitive to describe the salient facts, set forth the legal rule and then apply that legal rule to the facts that you will have to redescribe, at least in part.

When establishing the legal rule, it is also helpful to start with general statements of the legal rule from cases and then demonstrate how that stated rule has been applied to the facts of the most relevant cases. While statements of the law are important, it is how those statements have been applied in analogous circumstances that will most effectively persuade a court.

Particularly if the relevant legal rule is not well established, it is also important to explain why the legal rule is logical and compelling. Such an explanation may reside in helpful quotations from cases, treatises, or even law review articles. Or, you may have to craft such an explanation by using analogies, logic and policy arguments. An example of such development of a legal rule is the following:

As a corollary to the exception to the work-product privilege and attorney-client privilege for materials that shed light on a “crime” or “fraud,” there is also an exception to those privileges for materials that themselves constitute or evidence “other type[s] of misconduct fundamentally inconsistent with the basic premises of the adversary system.” In re Sealed Case, 676 F.2d at 812 (citing, inter alia, Moody v. IRS, 654 F.2d 795, 799-800 (D.C. Cir. 1981)); see also In re Sealed Case, 754 F.2d at 399. Just as the exception for an actual crime or fraud serves the salutary purpose of requiring disclosure of materials that shed light on the elements of
necarious conspiracies or enterprises, so does the closely related exception for other types of gross misconduct. It is plainly inconsistent with the basic premises of our adversary system to protect work product or attorney-client communications that are themselves violations of rules established by law or principles of ethics, or that evidence such violations. It simply makes no sense to protect such materials merely because those materials involve an attorney. Such materials indicate “abuse” of the attorney-client relationship sufficient to deny the protection of privilege.


Thus, in *Moody v. IRS*, the D.C. Circuit held that the work-product privilege would likely not apply to a document detailing an allegedly improper ex parte meeting between an attorney and a judge that had previously taken place. The Court noted that the purpose of the privilege is “to protect the
adversary trial process itself,” and explained that “a lawyer’s unprofessional behavior may vitiate the work product privilege,” as it would be “perverse” “to exploit the privilege for ends [such as covering up improper ex parte communications] outside of and antithetical to the adversary system.” 654 F.2d at 800. Accordingly, the court remanded to the district court to determine whether the ex parte communication described in the document was in fact improper and whether the document should be disclosed. See id. at 801.

Similarly, in Jinks-Umstead v. England, the court recognized that the “crime-fraud exception to the work product doctrine” would apply where there exists a prima facie case of government misconduct. 233 F.R.D. at 51-52. The plaintiff there alleged that government attorneys had conspired with the Navy to cover up instances of intentional discrimination. See id. at 51-52. The court upheld the government’s claims of work product and attorney-client privilege only after examining the disputed documents in camera and determining that “[e]ven if plaintiff had established a prima facie case of a cover-up, which I found she did not, the documents would have negated such a finding.” Id. at 52.

- Make your best affirmative case before responding to your opponent’s actual or anticipated argument. While employing the IRAC methodology, it is important to state your affirmative case first.

Always write your brief in such a way as to set out and make the most of your affirmative case. This admonition is perhaps most to be borne in mind when you are appellee or respondent; don’t content
yourself, in that situation, with a point-by-point reply to appellant or petitioner. Accentuate the affirmative features of your case don’t let the other side write your brief or even shape it.

Wiener at 98.

There are several ways to implement this precept. If your opponent disagrees with your statement of the governing rule, it is most effective to set forth and describe the legal rule you advocate (including showing how that rule has been applied in the most relevant cases), and then to respond to your opponent’s argument. It is more persuasive to establish the legal rule as the point of comparison before attempting to demonstrate the flaws in your opponent’s proposed rule. Similarly, if your opponent disagrees with your application of the governing rule, it is most effective to fully set forth your application and then to critique your opponent’s attempted application.

There are also likely to be many circumstances where your opponent makes an argument that neither directly conflicts with your statement of the governing rule nor your application, but nonetheless counsels for a different outcome. In such circumstances, it may be effective to subdivide your argument on the issue with a subpoint as to the governing law, as subpoint as to its application, and a third subpoint that directly responds to your opponent’s arguments that are not in direct conflict with your statement of the law or you application of it. You could use a point heading such as: “C. Plaintiffs’ Contrary Arguments About Market Power Are Unsupported and Erroneous”

- Rely most heavily on cases that apply the rule you advocate in circumstances analogous to those in your case. As has been noted previously, the most persuasive cases are usually those that set forth or adopt the legal rule that you advocate and then applies that rule in analogous circumstances in the same way
• **Address controlling or significant contrary authority.** In most circumstances, you opponent will cite (or will be likely to cite) one or more cases that are troublesome for you. If a case is controlling and clearly undermines your argument, you have an ethical obligation to address it. Often such a case can be distinguished or can be shown to no longer be effective, or at least can be plausibly argued to have been wrongly decided. If a case is not controlling, but undermines your argument and has been or is certain to be cited by your opponent, it likely will make sense to address it, particularly if you have a good answer. If a case is not controlling, only arguably undermines your argument, and has not been or may not be cited by your opponent, it is usually best to avoid it unless your opponent cites it (in which case you can address it in reply, or at oral argument or in a letter to the court if you have no right of reply and there will be no argument).

• **Avoid string cites, unnecessary citations, and long block quotes.** It is very important to use legal authority to its best effect. If you are stating an obvious or well-settled proposition, cite only to one or at most two cases; the court will realize that the proposition is well supported and will only be irritated and/or distracted by numerous citations. If you are citing several cases for a single, less well-established point, you should include either a sentence or more discussion of each case in the text, or at least a parenthetical containing a helpful quote and/or showing why the
String cites of numerous cases for a proposition should virtually never be used. The only exception to this rule is where you want to show that several other jurisdictions agree with the novel or less well-established point that you are making. Such a string cite should either come at the end of a paragraph or placed in a footnote. Long block quotes should never be used. While I don’t agree with some practitioners that block quotes should never be used, they should only be employed when they are used infrequently, are very helpful, and are limited to about 5-10 lines in length. I have seen several awful briefs that contained block quotes several pages in length. That is a recipe for argument suicide.

An example of a poor argument section. Using our hypothetical, one could conceive of an argument such as this:

Plaintiffs’ assertion that defendants possess market power does not take into account the realities of competition and interchangeable or substitute products. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); accord *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994). Just because Happynol is more expensive, does not necessarily mean that it so unique that has its own distinct market or that it truly possesses a significant market share. *See Global*, 960 F. Supp. at 705; *Shaw v. Rolex Watch, USA, Inc.*, 673 F. Supp. 674, 679 (S.D.N.Y. 1987). Plaintiffs do not account for the public recognition of older drugs similar to Happynol as well as evidence that most consumers are unwilling to pay substantially more for a somewhat more effective anti-depressant. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325
(1962). Just like other federal courts have granted summary judgment to plaintiffs under similar circumstances, so was it appropriate here. See, e.g., Bogan v. Hodgkins, 166 F.3d 509, 516 (2d Cir. 1999).

This example conflates the legal rule and the application of that rule, does not discuss the application of the legal rule in analogous circumstances, and only superficially applies the legal rule.

**An example of a much better argument section.** The following is greatly improved:

Plaintiffs have failed to show that defendants have sufficient market power to restrain trade. The alleged product market “must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes – analysis of the interchangeability of use or the cross-elasticity of demand.” Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001). Thus, plaintiffs must include all reasonably interchangeable or substitutable products, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), taking into account “the realities of competition.” Grinnell Corp., 384 U.S. at 572-73. Accordingly, a relevant market is determined not only by the prices of its products but also by their use and other qualities. See AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999). A relevant market definition must account for industry or public recognition; the products’ peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. See Brown Shoe Co. v. United States, 370 U.S. 294,
325 (1962). A product that is unique in some ways does not necessarily fall into a market by itself. See Global, 960 F. Supp. at 705. Rather, “it is the use or uses to which the commodity is put that control.” E. I. du Pont de Nemours & Co., 351 U.S. at 396.

Thus, an antitrust plaintiff’s failure to account for interchangeable substitutes requires dismissal of or summary judgment against the plaintiff’s claim. For example, in Bogan v. Hodgkins, 166 F.3d 509, 516 (2d Cir. 1999), the court affirmed a grant of summary judgment to defendant where plaintiffs confined their definition of the relevant market to experienced National Mutual Life insurance agents without considering the cross-elasticity of demand with regard to other sales agents in New York, and failed to produce factual evidence distinguishing potential substitutes in the insurance companies market.

Plaintiffs here have plainly failed to properly define the relevant product market. Their expert, Dr. Know-It-All, never provided any specific evidence as to why joynols, which are widely-accepted therapeutic substitutes for Happynol, are not reasonably interchangeable on the bases of price, use and other therapeutic qualities. Although he recognized that many therapeutic alternatives overlap one another with respect to efficacy, tolerance, range, as well as price, Expert Rep. at p.6, he failed to make any mention of the potential clinical interchangeability of therapeutic substitutes for Happynol and Euphorizem. That is directly contrary to the expert testimony below of psychiatrists and managed care organizations, which consider them to be essentially fungible.
Instead, Dr. Know-It-All looked only at price competition, even though “significant price differences do not always indicate distinct markets.” AD/SAT, 181 F.3d at 228. Dr. Know-It-All also could not explain why many studies documented the robust competition between Happynol and other joynols and Happynol’s recent decline in market share. Thus, Dr. Know-It-All failed to take into account the “realities of competition” as he was required to do. See Brown Shoe Co., 370 U.S. at 325-26 (emphasizing that it is “unrealistic” to divide markets on price alone). In this case, as did the plaintiffs in Bogan, plaintiffs have made the critical mistake of proffering flawed market-definition analysis that fails to account for reasonably interchangeable substitutes for Happynol and Euphorizem. See Bogan, 166 F.3d at 516. Therefore, plaintiffs’ proposed market definition is incorrect and insufficient as a matter of law, and this Court should affirm the grant of summary judgment for that reason.

- Do not construct reply briefs that are overly defensive.

The subject of writing compelling reply briefs could justify a book of its own. My limited advice is to write reply briefs that generally comply with the principles for opening briefs. The structure I recommend is to use your introduction/summary of argument to summarize the key arguments that you made in your opening brief and either briefly address the most important of your opponent’s arguments (if you have the room and it’s justified) or simply state that your opponent’s contrary arguments are unpersuasive.

In the substantive sections of the reply, briefly restate your specific argument from the opening brief and then address your opponent’s responses one by one. Follow the general structure of your opening brief, not your opponent’s brief, and use responsive,
but argumentative headings. For example: “Defendant’s definition of market power is wrong because it entirely relies on far-fetched substitutes and ignores more important economic considerations such as product features and price maintenance.” Be sure to address the primary authorities cited by your opponent and explain why your authorities are more persuasive. You may also be able to fold in affirmative points that you made in your opening brief as responses to your opponent’s arguments. For example: “Defendant’s argument ignores the principal component of market power: ‘the ability to maintain prices higher than those charged for potential substitutes.’ Brown Shoe, 370 U.S. at 324.”

Finally, do not feel compelled to address every point raised by your opponent, however minor. You must address all of the significant arguments and authorities and correct any material misstatements of fact or mischaracterizations of the record. But you need not address points that are trivial, clearly inappropriate, or facially implausible.

The Conclusion

Your conclusion should be succinct and should state clearly the relief you seek. For example: “For the foregoing reasons, this Court should reverse the district court’s grant of summary judgment and remand for a trial on the merits.”

CONCLUSION

Writing a winning legal argument just takes applying the principles we have discussed, focus, hard work, and a bit of experience. With significant effort, you can write excellent briefs and motions that have a great chance to persuade any judge or panel. Good luck and go get ‘em!

(I would like to thank my ABA colleagues Victoria Dorfman, Thomas Donlon, Todd Holleman, and Paul Watford, for their significant contributions to this article. I would also like to
thank my colleagues at Jones Day, most notably Donald Ayer, Glen Nager, Robert Klonoff, and Gregory Castanias, for influencing my approaches to these subjects.)