How to Write an Introduction

By David J. Perlman*

We start cold. We’re strangers and must “break the ice.” Everything rides on this, the beginning. And you’re free to leave at any moment. But stay — we’re lawyers both; law’s our common ground. And let me go one step further. Let me tell you something about this — an introduction. Since we both write briefs, I’d like to share my thoughts on how to begin one — that is, how to write an introduction.

Keep Your Eye on the Goal.

The purpose of an introduction is nothing less than to proclaim immediately why you must win. Besides this, there are three additional objectives: to convey what the case is about, to create a meaningful context for the facts and argument that follow, and to engage the reader.

The last three are, in a sense, secondary because if you’ve achieved the first, you’ve gone a long way toward achieving the others. If you convey why you must win, you’ll convey

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Chairs’ Column

By Crystal G. Rowe, Publications Chair and David J. Perlman, Editor

This issue focuses on written advocacy. It begins with two articles exploring the relatively neglected topic of weaving a theme into a legal brief. Although the articles approach the subject from different angles, they intersect on three points: that a theme is a compelling statement of why you should win, that it transcends legal doctrine, and that the rules dictating the structure of an appellate brief can impede its expression. The issue then delves into the impact of technology, beginning with a groundbreaking article on the implications of judges reading not merely on computer screens but on tablets such as iPads. Next are two articles discussing hyperlink citations. The first touches on the practical considerations and persuasive advantages of hyperlinks. The second is a story of pragmatic and creative problem-solving, of how the demands of legal practice generated a new approach to briefing — in this case, hyperlinks to the video record of a trial judge’s rulings and comments from the bench. Technology is a factor in the next article, on using time-
what your case is about and create a context for the succeeding material. At the same time, you’ll plant in the reader an expectation — a desire to see a more complete exposition of why you must win — and thus you’ve hooked him on at least that intellectual level.

Still, being attentive to all four goals will aid in constructing a powerful introduction.

**Distill the Facts Down to Their Moral Essence.**

If there’s a single sentence that immediately states why you should win — that presents the theme — it ought to be the first. And if you get the first sentence right, you’ll likely get the introduction right, at least the difficult, first part of the introduction, before the summary of the argument.

But how do you write a single opening sentence that distills the entire case, explains why you should win, and inspires the reader to continue? The starting point is a deep understanding of the facts and how they implicate an underlying sense of fairness. Achieving this is similar to formulating a litigation or trial strategy. Usually, only by total immersion can you identify a compelling theme.

Beyond the preliminary work, three general rules apply to articulating the theme in the introduction. First, the opening sentence — and the rest of the first paragraph — should concern specific people, places, occurrences, or actions. These attract and hold attention. They are generally more compelling than abstractions.

Secondly, while focusing on concrete facts, you want to appeal to a fundamental sense of right and wrong — usually, the shared moral beliefs that form the foundation for legal rules and doctrine.

Thirdly, the first sentence should focus on the opponent’s wrongful conduct and not your client’s innocence. We’re impelled to justice by bad acts. The degree of your client’s victimhood will be clarified later.

**Start with Deep Conviction.**

Examples will demonstrate what makes an opening sentence, and by extension, an introduction, effective.

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lines, charts, and diagrams; for without computers, we couldn’t create such visual aids or insert them into a text, and these illustrations also hold the promise of hyperlinks and inter-active engagement. Then, within a thoughtful summary of CAL’s Midyear ABA presentation on brief-writing, there lies a fresh nugget on the issue of whether citations should appear in the body of a brief or be relegated to the notes. The penultimate article is a vibrant review of the latest book on legal writing, a work that values teaching by examples more than dictum. Finally, our brief-writing issue gazes ahead to the next step — preparation for oral argument. Yet, this final article also closes the circle, for it reminds us that the best way to steel yourself for a bulletproof oral presenta-

For this collection of notes from the field, we thank each of the authors as well as ABA Publications Specialist Jo Ann Saringer.

Also, we would remind readers that one of the most rewarding ways of participating in CAL is becoming a Publications Committee member or contributor. Anyone interested can contact Publications Chair Crystal G. Rowe ([crowe@k-glaw.com](mailto:crowe@k-glaw.com)), Appellate Issues Editor David J. Perlman ([djp@davidjperlmanlaw.com](mailto:djp@davidjperlmanlaw.com)), or website coordinator Kim Dimarchi ([kdemarchi@lrlaw.com](mailto:kdemarchi@lrlaw.com)).
Let’s start with a relatively dry case, which is probably more challenging than a dramatic one. Here’s a negative example from a fictional securities class action: *Plaintiff Smith represents a class of persons owning stock during the relevant time period, from year 1 until year 2, and he asserts a claim against Board Members X, Y, and Z for violation of Rule 10-b5.* This statement is incontestable but dull. Already, the brief is dead.

Better to focus on the defendants’ act: *Drug Company board members X, Y, and Z sold their stock when they learned at a board meeting, but before the public announcement, that Drug Company would be denied FDA approval for its prospective breakthrough drug.* Even this bland, matter-of-fact sentence sparks a bit of ire against the defendants. Without reference to legal norms, it communicates that they preferred themselves over the public for self-interested reasons.

A second example comes from an actual case and is more specific. It’s from an appellee’s brief, when the court already knew something about the facts. In this particular case, when a company’s insurance came up for renewal, it reduced its coverage limit. It then suffered a loss exceeding the new coverage amount. After the insurer denied a claim made under the predecessor policy with higher limits, the company sued. The company then lost on summary judgment. Here are the first two sentences from the insurer’s brief on appeal:

*Insured, seeking a bargain when premiums were on the rise, got exactly what it paid for — reduced coverage. Now that it has incurred a loss, Insured wants the coverage it opted not to buy.*

The opening is factual and concrete. There is no mention of policy provisions, policy periods, or reporting periods. There are no citations. Rather, the facts invoke, without directly stating, a fundamental principle, indeed, a cliché — you get what you pay for.

The first sentence describes a customer controlling cost by opting for less insurance. It implies that he was going cheap, “seeking a bargain” in response to rising premiums. These facts — buying less insurance and rising premiums — though completely irrelevant to the governing policy provision are critically significant to the theme. The second sentence communicates that the Insured is irrational for suing since it wants something it didn’t pay for. The second sentence also provides a motive for its invalid insurance claim and groundless lawsuit — a loss that exceeds the coverage amount.

Though the opening is factual, it doesn’t include a single fact that would distract from the theme. It doesn’t specify what the loss was. It doesn’t list dates when anything occurred. It’s simple and direct. Moreover, focusing on the opposing party’s bad acts, it encourages the reader to continue. He wants to learn how this could be — that a corporation could expect to get what it didn’t buy — and he wants to see justice done.

Another example comes from a case in which a company sued two former officers who, after their employment terminated, started a competing business. The officers hadn’t signed a non-compete covenant, and the complaint asserted claims for unfair competition and misappropriation of trade secrets. Yet the claims were strained — for example, the typical allegation that defendants stole customer lists was meaningless since it was obvious from the companies’ product that customers would be publicly known.

On a motion to dismiss on behalf of the two departing officers, the key fact favoring them was extralegal — that is, beyond what was necessary for application of legal doctrine. Specifically, the plaintiff company was controlled by the officers’ father. In other words, this was a family rift, driven not by business judgment and economic considerations but by an irrational impulse. Even readers in the professional roles of judge and law clerk would be wary of a father suing his sons, suspecting a perversion of the normal paternal instinct. Such a lawsuit would be difficult to justify unless the sons — both of them, no
less—had committed a very grave offense. Thus, the brief began: This is a lawsuit brought by a father against his two sons.

Of course, the brief went on to argue the law. But that first sentence goes deeper. It strikes an almost mythical chord: This is a lawsuit brought by a father against his two sons. It explains why the suit was meritless—because it was the product of warped fatherhood. Also, it recasts the defendants as the victims deserving empathy. Yet, it doesn’t go so far as to demonize the father or cast explicit judgment. It simply states a fact. Certainly, it would have been easy to begin the brief on the level of legal doctrine, which is what the court’s opinion properly turned on. But it would have been myopic to ignore that on a more elemental level the defendants should win simply because they were two sons sued by their father.

Here’s the first sentence from a brief in a similar case but where the departing officer had no familial relationship with the corporation’s owners: Having terminated its CEO Jones without cause, thereby signaling that Jones was of no value to its continuing business, Company now invokes a covenant not to compete to prevent him from earning a living.

Here the Defendant should win because the Company’s actions are inconsistent, as well as selfish, and Jones is entitled to a livelihood. The Company can’t have it both ways—fire him despite excellent job performance—and then ask the court to hold him in occupational handcuffs. Although this opening refers to legal concepts, it still functions mainly on the factual and common sense level. Specifically, it does not mention the governing legal rule: that a covenant not to compete, as an agreement in restraint of trade, is subject to the rule of reason.

Place The Introduction Up Front.

Although it goes without saying that an introduction comes first, the federal and Supreme Court appellate rules, to say nothing of state appellate rules, dictate the required sections of a brief without mentioning an introduction. Recognizing an introductions’ persuasive significance, the committed advocate won’t be defeated by the rules’ silence. There are two options for including an introduction: creating either a separate section labeled “introduction” or inserting an introduction as a subsection at the start of a required section such as the “statement of the case.” Especially in the former instance, you should ensure that the clerk won’t reject the brief for having a section beyond the mandated sections. If it is indeed a separate section, the introduction can appear before the “statement of the case.” This location can be effective even though it sacrifices absolute primacy since a court is unlikely to expect advocacy or theme-setting in any prior section, except perhaps the questions presented.

An interesting example is petitioner’s brief in the recent, widely reported Supreme Court case of Maples v. Thomas, concerning a missed habeas deadline when a law firm’s mailroom returned trial court correspondence unopened. The Supreme Court brief was by Gregory C. Garre and three Latham & Watkins colleagues. The introduction is a separate section, as you can see through this link:

http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-63_petitioner_brief.pdf

Transform the Question Presented into an Introduction

An advocate can work persuasive wonders with the question or issue presented. Lawyers have long used the question as an abbreviated introduction to communicate why they should win. Typically, they’ve weighted a question with a few favorable facts so that the answer seems self-evident. Bryan Garner suggests the alternative of re-formulating the question as a three-sentence syllogism; the first sentence would be the major premise or rule of law, the second, the minor premise or facts to which the law is applied, and the third, the conclusion couched as a question.
Yet still more can be done to transform the question into an introduction. An example, both masterful and creative, of rendering the question as a potent introduction comes from a brief filed by Council of Appellate Lawyers Board Member Kannon Shanmugam. Since it was a U.S. Supreme Court brief, the question appeared first, even before the requisite tables, and was perfectly positioned for an introduction. Shanmugam told me that his goal was to explain, through a presentation of the critical facts, why reversal was merited.

Here is the question presented in the Petitioner’s merits brief in *Smith v. Cain*, which the Court decided in Petitioner’s favor on January 10:

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the only person brought to trial. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney’s office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants. Petitioner was linked to the crime solely on the basis of an identification by one of the survivors. At trial, the witness testified he was certain about his identification. But materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other subsequently disclosed materials included statements by other witnesses casting doubt on the witness’s testimony; a statement by an apparent perpetrator seemingly denying petitioner’s involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual. The question presented is as follows:

**Whether the failure of the Orleans Parish district attorney’s office to produce the foregoing information before petitioner’s trial violated his right to due process under Brady v. Maryland, 373 U.S. 83 (1963), and related cases, because the information was material to the issue of guilt.**

Although the first sentence conveys that the murders were committed by a group, we learn in the stunningly short second sentence that only one person was arrested and tried: *Petitioner was the only person brought to trial.* This, in a jurisdiction, where the district attorney habitually withholds exculpatory evidence: *He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney’s office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants.* Thus, in three sentences, we sense where the story is headed. We understand the implicit argument.

The narrative continues for another paragraph, fleshing out the disturbing details — how the defendant was linked to the crime solely on a witness’ identification and how the prosecution withheld evidence of the witness’ and other’s doubts. By starting with the conjunction “but” — once considered an offense — the second paragraph’s third sentence delivers the factual punch, the essence of the moral argument embedded in the narrative: *But the materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators.*

Then, finally, only in the third paragraph, after this narrative prelude, is the reader ready for the question: *Whether the failure of the Orleans Parish District Attorney’s Office to produce the foregoing information before petitioner’s trial violated his right to due process … because the information was material to the issue of guilt.***

Yes, indeed, it’s a question presented, aptly in due context. And the right answer, though never stated, is perfectly clear. Though the question reads smoothly, such craftsmanship didn’t come effortlessly. Shanmugam said that he and his Williams & Connolly team spent many hours revising and editing the question presented so that every word counted.
“Talking questions” aren’t reserved for dramatic stories like Smith. Here is a question from a cert petition in a patent case, Association for Molecular Pathology, v. Myriad Genetics, Inc., which was filed on December 7, 2011 by Christopher A. Hansen and fellow ACLU attorneys:

Many patients seek genetic testing to see if they have mutations in their genes that are associated with a significantly increased risk of breast or ovarian cancer. Respondent Myriad Genetics obtained patents on two human genes that correlate to this risk, including any naturally occurring mutations of those genes, on the theory that simply by removing (“isolating”) the genes from the body, they have invented something patentable. Petitioners are primarily medical professionals who routinely use standard genetic testing methods to examine genes, but are prohibited from examining the human genes that Myriad claims to own. This case therefore presents the following questions:

1. Are human genes patentable?

Despite its neutral tone and incontestable character, the first sentence raises empathy for the women assessing their cancer risk. Focusing on a victim, this sentence doesn’t really violate the rule to lead with the bad actor. Rather, the opening sentence lays the groundwork for the second sentence, giving the second sentence the punch that portrays the opposing party, Myriad Genetics, as a bad actor. By the middle of the second sentence, we know that Myriad is wrong for trying to profit from the women’s misfortune: Respondent Myriad Genetics obtained patents on two human genes...

In making this point, the second sentence, like the first, begins as facially neutral, until the reader reaches the final clause: ... on the theory that simply by removing (“isolating”) the genes from the body, they have invented something patentable. (1) A contemptuous tone creeps in with on the theory. That tone is then reinforced with simply by removing (“isolating”), reaching a crescendo with they have invented something patentable.

The parenthetical quote — (“isolating”) — is especially shrewd. It’s the petitioner’s parroting of Myriad’s rationale for a patent, and, as you read on, the mockery extends to the word invented through aural association, that is, through alliteration (the initial “i”) and the repeated laminal sounds of “n” and “t.” It’s as if invented was also placed in quotes — “invented” — marking it as a mere pretense or fiction undeserving of serious recognition.

The sentence expresses growing but contained outrage as writer and reader contemplate Myriad’s claiming an inventor’s property interest in genetic material created through human biological processes. The third sentence begins by grounding us again in neutrality by merely identifying the party-victim, the medical professionals whose mission, of course, is to care for potential cancer victims mentioned at the outset.

Yet, despite the return to neutrality, the final clause strikes with an ironic sting in its reference to the human genes that Myriad claims to own. How can anyone, corporations especially, own human genes? The question presented: are we patentable?

Never Stop Experimenting

Shanmugam’s and Hansen’s questions are inspirational models, demonstrating that rules dictating a brief’s structure needn’t be limitations. Indeed, sometimes a writer can harness an extra measure of expressive force by pushing against convention. The lesson is, experiment. Test the limits. It may take hours or days to get a single passage right. But here, where we daily labor, in the cultural smithy of legal practice, new paradigms are forged.

Until Next Time

Thank you for staying with me. Now, between us, when we meet again, there’ll be no need for an introduction.

(1) Instead of “they,” “it” would have been grammatically preferable since the pronoun refers to Myriad Genetics.
“Why?” Wins: Theming the Appellate Brief

By Terry W. Posey, Jr.*

Introduction

Herman Melville once wrote, “to produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be that have tried it.” The same can be said about the mighty appellate brief.

The key to success on appeal can be derived from two separate questions: why, and how? The first question is why should your side win? This involves the intangible equities of whether the party is sympathetic, or has been wronged, or has merely been involved in an unfortunate good faith dispute and is being unfairly penalized. The “why” is an emotional response, derived from the innate understanding that courts of law are still oriented in an equitable fashion.

The second question is how should your side win? This involves the presentation (or lack of presentation) of evidence in the trial court, the application of that evidence to the law of the case, and the subsequent rulings as a result. Does this sound like your traditional appellate brief? The “how,” in addition to being mandated by the rules of appellate procedure, forms the logical basis for justifying the “why.”

However, lawyers (especially busy ones) can tend to ignore the “why.” This mistake is dangerous. As stated by a former president of the American Bar Association, “the way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination. You will almost always find plenty of cases to cite in your favor.” (1) While such “ends oriented” jurisprudence is hopefully rare, consideration of the “why” in an effort to persuade is certainly part of effective advocacy.

So how do you ensure that your brief is communicating the “why” in addition to the “how”? One way is to make sure your appellate brief follows a consistent theme. This article will discuss how theming can be unintentionally “designed out” of a brief and describe methods to ensure that this does not happen, so that practitioners can make the best case for the “why” and the “how” all at once.

Appellate Briefs are Repetitive

In the abstract, appellate briefs are a mechanical, routinized attempts at persuasion. Nearly all jurisdictions prescribe the required components of the brief: a statement of the case, a statement of the facts, presentation of assignments of error and a statement of issues, and legal arguments relating to the presentation of these asserted errors.

The form of the brief itself can cause a lawyer to start intellectually compartmentalizing the appeal into these sections. Instinctually, one understands that the statement of the case must describe the relevant developments leading to the appeal. One further knows that the facts section should include sufficient detail to allow the court to understand what the case is about, and what information may or may not be important for the appeal.

Once the factual and procedural exposition is complete, lawyers are already strong at identifying the dispositive errors made by the court below, reciting the dispositive standard of review and the binding legal precedent, and applying the facts of the case to this precedent, all of which is to result in a specific decision by the court.

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(1) Jerome Frank, Law and the Modern Mind 111 n.2 (1930; repr. 1963)
But once these sections are written, how often does the practitioner go back and make sure that a distinct narrative exists, tying the sections together in a manner so compelling that the sum is greater than the individual parts? How does a lawyer effectively communicate the “why,” when the court only asks him to expound on the “how”?

Again, the answer is in theming.

**What is a theme?**

Defining a theme can be as difficult as ensuring your brief uses one effectively. Ruggio J. Aldisert’s classic *Winning on Appeal* (2nd ed. 2003) describes the theme as language that “not only sets the flavor of your argument, but also sets the mood” and “is both the focus and the thesis.”

Judge Aldisert provides another example of how to describe a theme from Loyola Law professor Henry D. Gabriel. Gabriel states that a theme is “the opportunity to go beyond the technical, legal points of your case and give the court a common sense, simple reason why all the technical stuff in your brief makes sense.”(2) This is another way of stating that the theme provides the “why” so the court can agree with the “how.”

Another law professor, Jonathan K. Van Patten of the University of South Dakota School of Law, provides a more explicit description when he describes a theme as a “‘sound bite’ with a sense of urgency.”(3) Van Patten describes six categories of themes: the familiar, common sense, metaphors, irony, dramatic, and exotic.

At its core, a theme is a simple statement of why you should win the appeal.

**Finding Your Theme**

Sometimes it seems that there are nearly as many methods for finding a theme as there are themes themselves.

Judge Aldisert describes perhaps the most enjoyable method of determining your theme. He describes a social process: standing at a bar having a drink with another lawyer friend, simply and in plain language describing the reason you should win the appeal.

Ohio State Mortiz College of Law Professor Mary Beth Beazley analogizes finding your theme to finding your “Kevin Bacon.”(4) Professor Beazley asserts that the Six Degrees of Kevin Bacon game (whereby any actor can be connected to a Kevin Bacon movie in less than six movies) serves the appellate brief well. Finding the Kevin Bacon of your case, that is, the overriding theme that touches every necessary legal argument, keeps the “center of the universe” discussing the why in addition to the how.

Professor Van Patten has another name for it: finding the “moral center” of the case. He describes simple propositions: in a contract case “promises should be kept,” while in a tort case “wrongs should be righted.” Van Patten suggests that aligning your client’s themes with positive character traits while portraying the opposing side as having negative character traits effectively demonstrates the theme.

If one were to try to draw an overarching theme from the methods described, it is the ability to simply communicate the “why.” When you understand why you should win, are able to communicate this in an uncomplicated fashion, and make this the theme of your brief, you go a long way towards increasing your persuasive authority.

**Using Your Theme**

For readers making it this far in the article, it is possible to make three conclusive assumptions. The reader now inevitably and clearly understands that in drafting an appellate brief, the author must not only demonstrate how the client technically prevails on purely legal grounds, but must describe why the

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Writing Appellate Briefs for Tablet Readers

By Robert Dubose*

Introduction - why courts’ reading technology matters

Over the past two decades, technology has profoundly changed the way Americans read. Once we read entirely on paper. Now we read more on screens.

As researchers have discovered, screen reading has changed our reading habits. In response, web designers and electronic publishers changed the look of electronic documents. Most documents on the Internet look different from books, magazines, or newspapers. Texts are shorter. Paragraphs are shorter. Headings are frequent. Structure is more visible.

In my 2010 book, Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World, I argued that the switch from paper to PCs requires lawyers to re-think legal writing. Most law schools teach a legal writing style geared to paper readers – long text, long paragraphs, and complex, lengthy development of arguments. Yet, as countless web pages illustrate, PC readers prefer something different – a highly structured text that is easy to read rapidly. I argued that, to communicate with screen readers, legal writers need to make briefs look more like web pages.

Two years later, paper and the PC have new competition – the tablet computer. Led by the iPad2 (and now, the iPad3), the tablet has become a widely used reading technology. In 2011, tablet sales reached about 60 million units. Of those, about 38 million were iPads. Tablet sales are forecasted to outpace PC sales within three years. Because of their small size and portability, tablets make it easier to read news, books, and legal briefs when out of the office.

This paper will explore what tablet-reading means for appellate brief writers. It will (1) survey technolo-
gies judges currently use to read briefs, (2) explain how the experience of tablet reading affects reading habits, and (3) suggest tips to make briefs easier to read on a tablet.

I. How are appellate judges reading today?

I have been asking this question of appellate judges across the county for a few years. The answers vary, and they have been changing rapidly. Appellate judges fall within one or more of these categories:

- **Paper readers.** Two years ago, most appellate judges I asked were reading briefs exclusively on paper. Yet within the past year, judges who read briefs exclusively on paper have become the minority. Judges who do still read on paper give several reasons. Some have no choice; their court’s files are maintained on paper and briefs are only available on paper. Some resolutely prefer paper over screens, even though their courts manage files electronically. And some judges alternate between reading on paper and screens; they are more likely to read briefs on paper when they need to study a complex issue in depth.

- **PC readers.** In courts that use e-filing and electronic document management, a majority of judges are reading on PC screens. I practice in Houston, where only two years ago all appellate court files were maintained on paper, and all briefs were read on paper. Today, the courts have adopted e-filing and electronic document management and moved into a new courthouse where every justice has dual PC monitors. Most appellate justices in Houston now read briefs primarily on screens.

- **Tablet readers.** In 2011, I began hearing reports of appellate judges who read at least briefs on iPads. Judges are more likely to read on an iPad when their court uses electronic document management, when the individual judge reads briefs out of the office, and especially when the court has purchased iPads for the judges. But most iPad readers do not read on iPads all of the time. When judges with iPads are in the office, most report that they are more likely to read on paper or on a PC screen.

The reading media of judges, and court staff, is currently in flux. To find out what reading technology is used in the courts in which you practice, ask the judges and court clerks. Be prepared for their answers to change overnight whenever the court adopts a new technology.

II. Reading environment and habits for three reading technologies.

Whether a brief is read on paper or a screen, the words are the same. Why would the reading technology change the reading experience? The answer lies in each technology’s reading environment.

1 - Paper reading: studying text

Try a thought experiment. Visualize a person studying.

You probably pictured a student, professor, or maybe even a judge, deep in thought, pouring over a paper or a book. This is because paper is the reading technology synonymous with studying. A paper reader is typically immersed in a single text, slowly absorbing its meaning. Paper readers tend to do one task at a time. They tend to read more slowly, more carefully.

Before screen reading, slow and careful reading was the norm. Some people read rapidly, but they were unusual. I remember seeing books and courses in the 1980s that offered to teach readers how to speed read. Like most people, I could not speed read. I envied a college roommate who read books twice as fast as me.

For paper-reading lawyers, the equivalent of study was research. When I first worked in a law office, the only way to research was with “the books.” Research was slower. I might start with a treatise, which provided a map of the law. Then I would review the table of contents in the West Digest, looking for the right headnote. As I narrowed down to the specific
issue, I started reading cases. Book research required readers to start with the big picture before narrowing to the particular issue.

Most electronic researchers work differently. Electronic research allows the researcher to jump into the specific issue by entering a few search terms that lead to the specific parts of a case on that issue. Electronic research is faster. It does not require the researcher to understand the specific issue in the larger context. It does not require as much deep thought.

Study was slow, inefficient, and difficult. Yet it gave us a deeper understanding of books. For legal researchers, it gave us a deeper understanding of the law.

2 - PC reading: rapid information gathering and multitasking

The PC creates a different reading environment because so much more information is available and easier to access. In a paper environment, the amount of information is finite. In a paper-based office, we could read the papers in front of us, the books on the shelf, and perhaps the books in the library. The amount of information was finite.

In contrast, information on a PC is limitless. The Internet provides access to more information than we could read in many lifetimes. Also limitless are the opportunities for communication, entertainment, and distraction. Most of us read much more than we did 20 years ago simply because there is much more to read.

For instance, in the pre-Internet law office, written communication was by letter. Even with a fax machine, I sent far fewer text communications each day than I do today by e-mail. E-mail makes communication faster and easier. So we compose more text than we did in the age of paper. And we must read that much more text too.

The PC also gives us quicker access to information. Search engines such as Google allow us to type a few words and find the information we need within seconds. We do not have to think as much to find information.

By the late 1990s, web designers had learned that the Internet’s information explosion had changed the very mechanics of reading. Paper readers had generally read left-to-right, line-by-line. Yet when web designers tracked the eye movements of screen readers, they found that readers were more likely to skim text, focus only on a few portions of the page. This heat map demonstrates what web designers refer to as the “F-Pattern”:

Screen readers most frequently look at the red areas – the first few lines of the text, the headings, the first sentences of paragraphs, and a line running down the left side of the text. The surrounding yellow areas are read by only some readers. And words located in grey areas at the end of the paragraph, or toward the end of the text, are not likely to be read by anyone.

There are two lessons of the F-pattern:
There have been few published studies about how tablet reading may differ from PC reading. In 2011, as more and more judges reported that they liked reading briefs on iPads, I did some first-hand research. I began using an iPad for reading news, books, and briefs. I found a different reading environment from a PC, and I noticed my reading habits changing yet again.

I expected that reading on an iPad would resemble reading on a computer. In theory, the volume of information should be the same. Both a PC and an iPad are typically connected to the Internet, and therefore to the same world of information. But I found that the iPad makes rapid information gathering easier, more fun, and even faster.

Portability. The iPad makes screen reading portable. Studies have found that people who read books on computers tend to read them during the day. Yet people who read books on iPads tend to read from 7 pm to 11 pm. This is because the iPad is easier to read at dinner, on a sofa, or in bed. It also makes reading much easier when traveling.

Compared to a PC or laptop, the iPad makes it easier to open up the device and start reading immediately. For instance, when I take a laptop to a hotel, I need to turn it on, secure a Wi-Fi connection, and then go to the Internet. The process can take 5 to 10 minutes. With an iPad it takes me less than 5 seconds to turn it on by simply opening the cover and pressing an icon to take me to content. The iPad is the perfect device when a user has 60 spare seconds to read.

Most judges who have reported using iPads extensively are judges who read briefs while traveling or out of the office. iPads are particularly useful for circuit court judges who travel to a different city for oral argument.

Apps. iPad applications, or apps, make the user’s favorite information sources available more quickly. For instance, to use Westlaw on a PC, the user must
go through several steps: (1) opening the Internet browser, (2) opening the favorites bar, clicking the link to Westlaw, and then (3) entering a password. The Westlaw app for iPad allows the user to skip the first two steps. Although the difference only saves a few seconds, the app makes information sources seem much more accessible.

Apps on tablets are also creating a new way of reading media. Aggregation apps, such as Flipboard, make it easier to process a large quantity of media and information more rapidly. On Flipboard, each of the user’s favorite media sources has its own tile:

When a user touches a tile for a media source, the source opens with four or five short article summaries. Users are able to touch any summary to see the full text article.

In my experience, iPad apps encourage rapid review of summaries to gather information as quickly as possible. Apps have changed my reading habits by making more sources of information more accessible. As a result, I have been gathering information on an iPad much faster than on a PC.

No windows. Compared to a PC, an iPad discourages multitasking within the device itself. It does not allow users to open separate windows running different programs. Although two programs can run at once, a user cannot “see” both programs in the same way as with windows.

In my experience the absence of windows makes a difference. The iPad discourages multitasking, and is better for focused reading than a PC – even if the focused reading is at a rapid pace.

Smaller screen. Tablet screens are smaller than PC screens. For many texts, such as Internet pages, not as much content fits on a single iPad screen. The iPad does make it easy for users to adjust text size and orient text horizontally or vertically. This makes it possible, using an iPad app such as iAnnotate to view an entire brief page on a single screen. But the reader must orient the iPad vertically and size the text fairly small.

When I read a brief on an iPad, I typically size the text so that less than half of an ordinary paper page is visible on the screen at one time. This makes it harder to see where a particular sentence or argument fits within the larger body of text. As a result, visible structure is very important for tablet readers.

III. Advice for writing to tablet readers

The tablet environment encourages focused, rapid information gathering. Tablet users read quickly, often for short durations. Like PC screen readers, they need visible structure in order to convey the overall context of the particular argument they are reading.

These are a few tips for making the brief easier to read for tablet users. Although these tips are focused on the needs of tablet users, they will not detract from the reading experience for PC or paper readers.

1. Visible structure.

The F-pattern shows that screen readers need structure to process information rapidly. This explains why web designers provide extensive structural cues on Internet pages for the benefit of screen readers.

In a tablet environment, the need for structure is even greater. Tablets encourage rapid information gathering and speed reading. Yet with a smaller
screen, it is easier for readers to lose their “place” – that is, to fail to see the relationship of a particular paragraph or sentence with the overall argument.

Useful structural tools include:

- **Frequent headings.** Particularly in an argument, headings are very useful to give the reader the overall logical structure. Because a tablet screen is smaller, tablet readers need frequent headings to remind them of their place in the argument.

- **Outlines.** Outlines help show the overall structure of the argument.

- **Topic sentences.** The F-pattern shows that screen readers are more likely to read the first sentence of paragraphs. This lesson is also true of iPad users, who tend to be rapid information gatherers. A useful topic sentence is one that persuasively summarizes the argument of the paragraph.

- **Lists.** Lists are useful to delineate separate arguments or support. Lists show structure-oriented readers how many points support an argument and where each new point begins.

- **Bullets.** Bullets points are useful to delineate examples or support where the number of points is not important.

2. **Short bookmarks.**

When I ask judges who read briefs on tablets for advice, the one suggestion they almost always give is: “use bookmarks.” A bookmark is a feature in Adobe Acrobat that allows a user to jump from a heading in a table of contents to the corresponding heading in the brief. Different programs, including Acrobat, iAnnotate, and other reading apps, make it easy for readers to see the overall document structure in a bookmark pane, which shows an outline much like a table of contents. For instance, this image of iAnnotate includes a bookmark pane that outlines the argument.

Tablets require an extra step in bookmarking. When Microsoft Word or Word Perfect converts an outline-structured brief to Acrobat, they convert the full text of marked headings to bookmarks. This is not a problem for PC readers because an ordinary-length sentence will fit in the bookmark pane. But it is a problem for tablet readers. On the smaller screen of a tablet, only the first five or six words of a heading will appear in the bookmark pane.

The solution is to edit bookmarks for tablet readers. Even if the brief heading is sentence-length, it is possible to truncate the bookmark. For instance, this entire argument heading may be bookmarked:

The statute of limitations bars Sharpwell’s claim of minority shareholder oppression.

On a PC, the entire bookmark would be available in the outline navigation pane. But on a tablet, it is too long. The solution is for the brief writer to truncate the bookmark to:

Limitations – oppression.

Headings are a good idea whether the brief is read on paper or on a screen. On a tablet, careful attention to bookmarks will make an e-brief easier to use.

3. **No footnotes/some hyperlinks.**

A number of judges have reported that footnotes are
very difficult to read on a tablet. Because of the smaller screen, footnotes often do not appear on the same screen as the footnoted text. Judges report that it is difficult to scroll back and forth between the footnotes and the text. In the tablet era, the best advice is to avoid footnotes.

In contrast, most tablet readers report that they prefer some hyperlinks, especially links to important contracts, statutes, and cases. Since tablets have limited memory, judges are unlikely to have the entire record on a tablet. If a tablet-reading judge wishes to see a cited document, a hyperlink is the only feasible way to make it available.

There are some technical hurdles for hyperlinking documents for e-filing and ultimate use on a tablet:

- Hyperlinks to supporting documents are not likely to survive e-filing unless the supporting documents are incorporated in the same .pdf file as the brief.

- Briefs with too many attachments are too big to be stored on most tablets, which have far less memory than the average PC. As a result, it may be necessary to select only your best support for hyperlinking.

For tablet-using courts, it is important to communicate with court clerks about how to prepare, and file, hyperlinked documents in a way that makes it possible for tablet-using judges to use the hyperlinked briefs.

Conclusion

There is room for debate about whether technology’s effect on reading is beneficial or harmful to the law. On one hand, lawyers have long valued the act of studying law. That is why most American bar associations require several years of legal study before an attorney may be licensed. Technology is discouraging study and deep thinking at the same time that it encourages rapid information gathering. Because we are observing this transition as it happens, the effect of technologies on reading may appear disturbing.

On the other hand, rapid information gathering is a necessary adaptation to this new rapid, information-rich environment. Lawyers and judges are knowledge professionals. By using electronic research, communication, and document management, lawyers and courts can gather more information in less time. For instance, although I had a much deeper understanding of the law when I researched from “the books,” I cannot imagine giving up the speed, and breadth of information available through electronic research. I rarely go back to the books to do research, just as most lawyers rarely go back to letters mailed on paper.

Whether these changes are beneficial or harmful, the reality for brief writers is that the reading habits of our audience are changing. To communicate and persuade, we must be able to understand how judges and law clerks are reading and adapt to make our writing usable for all styles of reading.

As the recent explosion of tablet computing demonstrates, reading technology is changing rapidly. For brief writers, it is important keep up with the changes. We must learn which technologies appellate courts are using. And we should ask judges about how to make briefs more useful in their new reading environment.
Hyperlinking in the Appellate Arena

By L. Steven Emmert*

Back in the Medieval Period of appellate advocacy (late 20th Century), lawyers drew appellate jurists’ attention to record or appendix materials, caselaw, statutes, treatises, and the like by inserting citations into the texts of their briefs. In order to consult the referenced material, the jurist was often required to get up out of a chair, go over to a shelf of books, pull down the appropriate volume, search for the cited page (presumably a pinpoint cite, assuming the lawyer wasn’t lazy), and then scan the page for the cited passage and surrounding contextual materials and discussion.

For most of us, those days are past. Many appellate courts require electronic versions of paper briefs, and some courts have done away with the paper copies entirely. A 21st Century jurist is as likely to read briefs on a computer screen as on the printed page.

This phenomenon requires appellate lawyers to adapt to a degree, though in reality, it isn’t much of a change to submit a PDF in addition to or in lieu of paper originals. The most important effect of this shift toward digital filing is the opportunity it gives lawyers to cite authority and record material much more efficiently and effectively. Most appellate courts permit the use of hyperlinks in digital briefs, and if you aren’t hyperlinking, you’ve already fallen behind.

The Basics

First, here’s a primer on hyperlinks. You’ve seen hyperlinks if you’ve spent any time at all on the Internet. When you click on one, a new window opens to a different website or a different page on the current website. Another common link retains the same web page but quickly scrolls down to a lower portion of the existing page. The link enables the reader to jump from place to place, or from website to website, with a minimum of effort and essentially zero delay.

But hyperlinks aren’t unique to web pages; they can be used to great effect in PDF documents – the medium now favored in many appellate courts. They can be inserted using an Adobe program called InDesign, and Adobe’s Acrobat X Pro also performs this function. The user can link not only to web pages but also to other PDFs. That feature brings record materials (including transcripts) and caselaw into the calculus. (Keep in mind that the text of your brief still must contain a standard citation; the hyperlink is simply embedded within that citation.)

Using Hyperlinks Effectively

Every capable appellate attorney understands the value of making things easy for our briefs’ ultimate consumers. That’s especially true when the reader is particularly busy (as appellate jurists uniformly are) and there are hundreds of other briefs competing for the reader’s time and attention.

Hyperlinking electronic briefs reduces the reader’s time investment, when confirming a record or case citation, to a single mouse click. The link can be programmed to take the reader not merely to the cited case but directly to the pinpointed page of that case. You can even highlight the relevant text, so the reader’s attention is drawn instantly to the proper passage.

The utility of this feature isn’t limited to caselaw. Confirming transcript citations becomes a snap, as the reader can instantly ascertain the accuracy of a quotation and scroll backward and forward to check the context. Important exhibits can be included on the disk, and unlike paper copies, the reader can zoom in on a key portion.

*CAL member L. Steven Emmert is a partner with the Virginia Beach law firm of Sykes, Bourdon, Ahern & Levy, where he limits his practice to appellate advocacy. Steve filed his first hyperlinked brief in 2007, and will never go back to doing it the old-fashioned way.
As discussed below, many appellate courts provide for the electronic filing of briefs. Even in those that don’t require e-filing, it may still be permissible to file a CD-ROM as a companion to your paper filings. This disk can contain all of the transcripts, exhibits, pleadings, statutes, and caselaw that you cite in your brief. You can also attach video clips, a capability that’s impossible with traditional paper briefs. The storage capacity of a CD is large enough that you should be able to fit all of the briefs and the entire appendix on a single disk, making it simple for your reader—whether jurist or law clerk—to review everything without ever leaving his or her chair.

The most important benefit of filing effectively hyperlinked briefs may be much subtler. Every experienced attorney appreciates the value of an advocate’s personal credibility. A reputation, good or bad, sets a ceiling on any advocate’s effectiveness, especially in an appellate courtroom.

A hyperlinked brief enables the reader to confirm the accuracy of your citations quickly and easily. After several such confirmations in rapid succession, the jurist reading your brief will develop confidence in your word; by the end of the brief, he or she will believe that what you say is likely to be the truth. Where one advocate enjoys this degree of judicial confidence and the other does not, the scales are already significantly tilted.

Rules Relating to Hyperlinking

Many appellate courts provide for the filing of electronic versions of briefs, and some of those rules refer to hyperlinks within the electronic copies. In the Supreme Court of the United States, Rule 25(9) requires the filing of an electronic version of each brief, but mentions nothing about hyperlinking. The federal courts of appeals have promulgated a variety of local rules relating to hyperlinking, as outlined in the accompanying table. Practitioners in state appellate courts should consult the rules in their jurisdictions to determine whether hyperlinked briefs are permitted, and if so, what may be included with this powerful tool of modern advocacy.

Summary of Federal Circuit Court Rules on Hyperlinking

<table>
<thead>
<tr>
<th>CIRCUIT</th>
<th>PROVISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Fed. Cir. R. 32(e) – corresponding brief on CD-ROM may be filed by motion – denied only for substantial prejudice. Hyperlinks permitted to trial record, cases, statutes, treatises, etc. The court plans to implement ECF by May 17, 2012; the new rules may address hyperlinking.</td>
</tr>
<tr>
<td>D.C.</td>
<td>D.C. Cir. R. 25 covers ECF filing, but does not mention hyperlinking.</td>
</tr>
<tr>
<td>First</td>
<td>Loc. R. 32.0 – mandatory e-filing; hyperlinking is permitted under Rule 13 of the court’s September 2009 administrative order implementing electronic case filing.</td>
</tr>
<tr>
<td>Second</td>
<td>LR 25.1(i) – e-filed briefs may contain hyperlinks to other documents filed on appeal, documents in trial record, statutes, rules, regulations, and opinions.</td>
</tr>
<tr>
<td>Third</td>
<td>LAR Misc. 113.13(a) permits but does not require hyperlinks within a document or “to a location on the internet or PACER, e.g. the appendix.” Part (b) implicitly authorizes citations to authority.</td>
</tr>
<tr>
<td>Fourth</td>
<td>Admin. Order 08-01, Rule 13 permits links within a document, to portions of district court record, or to statutes, rules, regulations, opinions. New Local R. 25(a)(12) effective April 2012, permits hyperlinks within a document, to portions of the trial record, or to statutes, rules, regulations, and opinions.</td>
</tr>
</tbody>
</table>
Fifth Cir. R. 25.2.14 permits links within a document, to PACER or CM/ECFR, between simultaneously filed documents, and those “that the clerk may approve in the future as technology advances.” It also implicitly authorizes links to cited authority. Note: Fifth Cir. R. 31.1 states that an electronic copy must “contain nothing other than the brief.” – links must be to internet documents.

Sixth Cir. R. 25 requires e-filing, but no provision for hyperlinking.

Seventh Cir. R. 31(e) requires filing of a digital version of each brief, but no mention of hyperlinking.

Eight L. R. 25A mandates e-filing, but no provision for hyperlinking.

Ninth Electronic Filing R. 11 authorizes hyperlinks and refers to the appendix, record, and legal authority. E-filing mandatory per Cir. R. 25-5. Chapter 12 of the court’s ECF guide specifies how to link between documents already filed and between documents filed simultaneously.

Tenth E-filing mandatory per 10th Cir. R. 25.3, but no provision for hyperlinking.

Eleventh Cir. R. 31-5 requires filing 1 e-copy of brief, and authorizes links to “cases, statutes and other reference materials available on the internet.” If e-copy is filed on disk (floppy or CD), you may also link to documents appended to the brief. The court started voluntary ECF as of January 1, 2012. The rules will likely be updated once ECF becomes mandatory.

**Video Hyperlinks: An Effective Tool in Appellate Advocacy**

By Mark T. Boonstra*

A picture may be worth a thousand words, but a video may be priceless. A textual document, or even a photograph, presents only a snapshot in time. But video can be timeless – conveying attitude, intonation, inflection, modulation, atmosphere and ambiance. Where it is available, video can communicate the full climate and milieu in which a trial court made its decision, including unspoken nuances of tone and timbre that otherwise are not easily expressed – and that may not otherwise be readily appreciated by an appellate panel or fully absorbable from the written word alone. Video hyperlinks can be an effective weapon in your appellate arsenal.

In forming a company (Plaintiff), your client hires a president (Defendant) who helps to build that new company from the ground up. Soon after, Defendant leaves for a competitor. You believe that he has taken and deleted electronic files from Plaintiff’s computer network. Defendant denies it. You sue.

Only then does Defendant fess up that he has “innocently” retained copies of Plaintiff’s files on his home computers. Plaintiff and Defendant enter into a Stipulated Preliminary Injunction. A series of Orders are entered to facilitate a forensic analysis of Defendant’s home computers and assess Defendant’s pos-

*Before being appointed on March 16 to fill a judicial vacancy on the Michigan Court of Appeals, Mark T. Boonstra was a Senior Principal in the Ann Arbor Michigan office of Miller, Canfield, Paddock & Stone, PLC, and served as the Co-Chair of its Appellate Section (along with former Michigan Supreme Court Chief Justice Clifford W. Taylor), and as a Deputy Leader of its Litigation and Dispute Resolution Practice Group.
session of Plaintiff’s files and the extent of any use or disclosure of those files. While professing cooperation, Defendant throws up every roadblock that he can.


By now, a new trial judge is assigned the case. Another company (Intervenor) – Defendant’s former employer (before he was hired by Plaintiff) – has independently learned of your case, and has moved to intervene (believing that Defendant may have also taken some of its files). The new trial judge is none too happy – and seems to have accepted as true Defendant’s incorrect suggestion that it was Plaintiff who had “riled up” Intervenor, creating a “feeding frenzy for attorneys,” and describing that supposed fact as “what really bothers [her] about this case.”

The trial judge denies Intervenor’s motion, asserts that “this whole case is a fishing expedition,” belittles the import of Defendant’s deletion of Plaintiff’s “infamous 419 documents” as “nothing … out of the ordinary,” describes the transfer of confidential files to home computers as “standard operating business, [that] even little old computer fairly illiterate me does,” grants summary judgment to Defendant, and dismisses all of Plaintiff’s claims.

The outcome seems incomprehensible, given Defendant’s admissions, the Stipulated Preliminary Injunction, the circumstances of Defendant having left for a competitor, the undisputed evidence of Defendant’s possession of Plaintiff’s files, the file name descriptions suggesting that those files include Plaintiff’s highly confidential and proprietary information, and the continuing unfinished nature of the forensic analysis.

Even worse, Defendant argues that your case was frivolous from the outset, and demands sanctions. Shockingly, the trial judge seems receptive: “there’s been nothing that has happened in the last six months that I have been following the course of this case that gives me any different opinion than I did the first time I met with you guys. There’s nothing to this case, there simply is nothing to this case.”

She even threatens to “sanction the heck out of” Plaintiff’s counsel, and forces him to promise, as “an officer of this court that [he] will appropriately filter the actions that [he] bring[s] in this court.”

So you appeal.

But the protections of the stipulated preliminary injunction would seem to no longer be in effect. And all of the forensic evidence (which is now in the hands of a third party forensic expert) seems at risk of being lost. What do you do?

Normally, you might ask the trial court to implement protections during the pendency of the appeal. But this trial judge has already opined that there was “nothing to this case,” has threatened sanctions, and has coerced trial counsel to promise to be a “filter” in the future. You dare not risk going back before her.

If your court rules permit, you might seek protections directly from the appellate court. But that may be seen as unusual, as side-stepping the normal processes in the trial court. And the appellate court knows nothing about your case – the appeal briefs have not yet even been filed.

How do you interest the appeals court at this early stage? How do you overcome the perception that you may be circumventing the usual processes of the trial court? How do you convince the appellate panel to step in now, to preserve your evidence, and to continue the previously stipulated preliminary injunction, pending the outcome of your appeal?

Well, you might do what the Plaintiff did in the case described, which was to lay out before the appellate court, honestly and forthrightly, why Plaintiff dared not go back before this particular trial judge.
In doing so, video hyperlinks proved an effective way to bring the case alive – and to demonstrate, as the written word alone could not – what likely would be faced in the court below and why the appeals court should step in to grant the relief requested.

Plaintiff’s Brief in Support of Plaintiffs/Appellants’ Motion to Continue Preliminary Injunction, and to Preserve Evidence, Pending Appeal (as well as Plaintiff’s later-filed appeal brief) utilized video hyperlinks – each of which opened an immediate gateway to a videotaped excerpt of the trial court’s motion hearings. Those video hyperlinks (which worked in conjunction with a simultaneously-filed CD ROM containing the video excerpts) provided the appeals panel with click-of-the-mouse access to video clips of those lower court hearings(1), and served to bring the lower court proceedings to life with a flavor that could not otherwise have been conveyed.

The appeals panel granted the motion. The protections of the Stipulated Preliminary Injunction were continued. The evidence below was preserved pending appeal. Might the appeals court have granted the motion even without the video hyperlinks? Impossible to know. Were the video hyperlinks compelling? Absolutely and unequivocally. Did they increase the likelihood of success? Almost certainly.

Equip your appellate toolbox with the technology of video hyperlinks and consider using them when the appropriate situation arises.

1. Timelines.

A timeline is useful in a case that hinges on the chronology of events. For example, in the 2006 Duke University lacrosse rape case, an exotic dancer hired to perform at an off-campus party accused several team members of rape. In response to the public outcry for blood, the students’ defense lawyers prepared a timeline of the evidence in the case, brought it into the courtroom, and argued that no crime occurred. The timeline was reprinted in the article entitled “Sex, Lies and Duke” in the May 1, 2006 issue of Newsweek. The various news organizations covering the case produced timelines of their own and updated them as more information became available. For a particularly good example, see an interactive timeline prepared by a Raleigh, N.C. television station: http://www.wral.com/news/local/flash/1106323/.

Bloggers then went to work, creating their own time-
lines of the events of the case to persuade readers as to the truth or falsity of the accusations. Ultimately, the timelines won the day, and several students who might otherwise have ended up in registries of violent sex offenders were able to finish their educations. Only the county prosecutor, who suppressed evidence, went to jail.

In the not-so-distant future, more than a few judges will read briefs on portable electronic devices with hyperlinks to videotaped trial testimony and other evidence. For now, however, truly interactive timelines of the variety created by the Raleigh, N.C. television station cannot fit into a “paperbook” brief of the variety that attorneys typically submit. However, an informal timeline can turn a meandering recitation of facts into a coherent narrative that is accessible to an appellate court judge, a law clerk and a legal staff member.

For example, let us assume that you are preparing a brief on appeal from a workers’ compensation board determination, and you wish to highlight the fact that the claimant had several injuries and conditions prior to the accident or injury that is the subject of the appeal. You could prepare a witness-by-witness summary, but that approach is strictly passé and, in fact, has been condemned by the appellate rules in several states. See, e.g., N.J. Court Rules, R. 2:6-2; Pa. R.A.P. 2117. Rather, you should describe the accidents and injuries in chronological order. To emphasize the point, you could prepare a timeline, either preceded or followed by the text.

The timeline emphasizes one fact: the claimant had an extensive history of ailments that precede the injury for which she sought and received compensation. The narrative following the timeline is interspersed with headings, thus heeding the admonition of the Seventh Circuit manual and, in fact, taking it to the next level by providing the reader with a visual roadmap:

**STATEMENT OF FACTS**

Claimant/appellee, Dorothy Parker, is a 50-year-old visiting nurse with a significant history of back and shoulder injuries pre-dating the accident for which she made a claim. The various events of this case are summarized in the following timeline:
Preexisting Back Ailments

In 1998, John Smith, M.D. diagnosed claimant as suffering from a lumbar herniated disc. She underwent epidural steroid injections with no pain relief.

On September 22, 2000, Dr. Kelly again evaluated claimant and diagnosed her as suffering from lumbar facet syndrome.

Preexisting Shoulder Ailments

Sometime in the summer of 2000, claimant began to experience pain in her right shoulder.

Blackmarsh School District

On November 30, 2000, while working as a playground assistant with the Blackmarsh School District, a student grabbed claimant’s right arm and spun her around. Claimant reported back and shoulder pain from this incident.

Employment with Ames

On March 13, 2001, claimant began working for Employer, Ames Visiting Nurse Association, as a visiting nurse.

Subject Incident

On July 10, 2001, claimant reported right shoulder and back pain precipitated by an attempt to stop a patient from falling.

Post-accident Work History

At the panel physician’s recommendation, claimant left work on October 3, 2001. Employer issued a Notice of Temporary Compensation Payable for a “right shoulder strain” and paid temporary total disability benefits from 10/3/01 through 10/15/01 and partial temporary total disability benefits from 10/16/01 through 11/11/01. On December 5, 2001, employer issued a Notice Stopping Temporary Compensation Payable. R. 185a...

Post-accident Back Treatment

On August 1, 2001 claimant underwent another MRI of the lumbar spine, which showed “[m]ultilevel degenerative disc desiccation and extensive diffuse facet arthrosis” but no herniation...

Post-accident Shoulder Treatment

On August 21, 2001, claimant underwent a repeat shoulder MRI, the results of which were identical to the August 2000 study. On September 4, 2001, she first saw Harold Baker, M.D., an orthopedic surgeon, who released her to light duty, with a 25-pound lifting restriction. On October 31, 2001, Dr. Baker performed surgery to repair claimant’s rotator cuff. He treated her post-operatively and discharged her on April 3, 2003.
The placement of the words makes the point in a simple but effective manner.

As one can see, a timeline is useful in cases involving complicated medical testimony, particularly when one wishes to emphasize key aspects of the chronology that might otherwise be lost. Obviously, if you represented the claimant in the first example or the defendant physician in the second, you would avoid using one. But the possible uses are many. As technology expands, the truly interactive timeline may soon become available.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/1/1999</td>
<td>Sharp upper chest pain complaints</td>
</tr>
<tr>
<td>1/15/2000</td>
<td>&quot;chest pain - chest wall, reflux&quot;</td>
</tr>
<tr>
<td>1/20/2000</td>
<td>Complaint of chest discomfort</td>
</tr>
<tr>
<td>2/4/2000</td>
<td>Pt. reported doing better</td>
</tr>
<tr>
<td>2/25/2000</td>
<td>Test</td>
</tr>
<tr>
<td>3/20/2000</td>
<td>During this period, Dr. Smith never again suggested a stress test</td>
</tr>
<tr>
<td>4/11/2000</td>
<td>Test</td>
</tr>
<tr>
<td>5/24/2000</td>
<td>Test</td>
</tr>
<tr>
<td>8/25/2000</td>
<td>Test</td>
</tr>
<tr>
<td>9/28/2000</td>
<td>Test</td>
</tr>
<tr>
<td>11/5/2000</td>
<td>Test</td>
</tr>
<tr>
<td>11/10/2000</td>
<td>Test</td>
</tr>
<tr>
<td>1/4/2001</td>
<td>Test</td>
</tr>
<tr>
<td>5/5/2001</td>
<td>Test</td>
</tr>
<tr>
<td>10/15/2001</td>
<td>Complaints of chest pain, angina, EKG performed, diagnosis - acute gastroenteritis</td>
</tr>
<tr>
<td>11/30/2001</td>
<td>Spinal fusion</td>
</tr>
<tr>
<td>12/4/2001</td>
<td>Appeared at ER with right leg swelling</td>
</tr>
<tr>
<td>12/5/2001</td>
<td>Treatment for mild hypokalemia</td>
</tr>
<tr>
<td>2/5/2002</td>
<td>Test</td>
</tr>
<tr>
<td>3/18/2002</td>
<td>Test</td>
</tr>
<tr>
<td>4/4/2002</td>
<td>Test</td>
</tr>
<tr>
<td>4/9/2002</td>
<td>Test</td>
</tr>
<tr>
<td>5/1/2002</td>
<td>Fainted at home, taken to ER, no cardiac workup, referred for neuro workup</td>
</tr>
<tr>
<td>5/4-7/2002</td>
<td>Pt. taken to ER, admitted under service of Dr. Jones</td>
</tr>
<tr>
<td>5/15/2002</td>
<td>Found unconscious at home, taken to ER where he was pronounced dead.</td>
</tr>
</tbody>
</table>
2. Dispute Charts.

Even a good chronological development of the facts may be inadequate to educate the reader about the disputes in the case. This is particularly true in cases involving dueling experts who have divergent opinions about the issues before them. Courts can easily become confused by long summaries of testimony that do not pinpoint the conflicts. One easy way to summarize testimony and isolate the divergences is through the use of the dispute chart.

Suppose, for example, two physicians have given different opinions about injuries or the lack thereof to different body parts. The following chart gives the reader a ready reference point, to which he can repeatedly turn as he reads the balance of the brief:

<table>
<thead>
<tr>
<th>Dr. Baker’s diagnoses:</th>
<th>Dr. Ables’s position</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Elbows</td>
<td></td>
</tr>
<tr>
<td>Tendinitis of both elbows (R. 57a)</td>
<td>Agreed that claimant suffered left lateral epicondylitis and that she continued to have symptoms as of the IME date. (R. 98a)</td>
</tr>
<tr>
<td>(2) Hands</td>
<td></td>
</tr>
<tr>
<td>Neuritis of both hands (R. 57a)</td>
<td>Did not find any clinical evidence of it (R. 100a)</td>
</tr>
<tr>
<td>Left radial tunnel syndrome (R. 57a)</td>
<td>Agreed that she had it and that it was related, but it has resolved (R. 103a)</td>
</tr>
<tr>
<td>(3) Shoulders</td>
<td></td>
</tr>
<tr>
<td>Right full thickness tear of rotator cuff (R. 58a)</td>
<td>Agreed that claimant suffered from it, but unrelated (R. 104a)</td>
</tr>
<tr>
<td>Right supraspinatus tendinosis and effusion (R. 58a)</td>
<td>Agreed that claimant suffered from it, but unrelated (R. 106a)</td>
</tr>
<tr>
<td>Post-traumatic bursitis of both shoulders (R. 59a)</td>
<td>Agreed that there was effusion in right bursitis, but unrelated (R. 107a)</td>
</tr>
<tr>
<td>(4) Cervical</td>
<td></td>
</tr>
<tr>
<td>Strain/sprain, myositis (R. 60a)</td>
<td>No injury (R. 109a)</td>
</tr>
</tbody>
</table>

For another example, let us assume that in a workers’ compensation case you wish to show that the claimant made inconsistent statements to various treating physicians and in her in-court testimony. If the medical records and testimony are in the record, you can summarize them in the following manner:

<table>
<thead>
<tr>
<th>Back Ailments as Shown in records</th>
<th>History Given to Treating Physicians</th>
<th>Testimony at Hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td>11/2/06 family dr. record—Cl. reported lumbar pain, 10/10, for last year, radiation up and down back [R. __a]</td>
<td>Dr. Smith—Cl. told him that she had prior intermittent back pain that never amounted to much [R. __a]</td>
<td>Cl. reported only minor pregnancy-related back pain prior to subject accident. Denied injuries from MVA. [R. _a]</td>
</tr>
<tr>
<td>11/7/06 family dr. record—Cl. phoned doctor’s office and asked for medication stronger than Motrin [R. __a]</td>
<td>Dr. Jones—Cl. reported some back pain after child birth, but she did not treat for it [R. __a]</td>
<td></td>
</tr>
<tr>
<td>6/17/08 records of City Imaging—Cl. reported motor vehicle accident followed by back pain [R. __a]</td>
<td>Dr. Welby—On 10/11/07, Cl. reported “I’ve had back pain for 2 yrs.” [R. __a]</td>
<td></td>
</tr>
</tbody>
</table>
The distal radius is the portion nearest the wrist. The lunate bone is one of eight carpal bones:

![Carpal bones diagram](image)

Although I routinely employ diagrams, I anticipate that someone will object on the ground that they were not in the record. It is true that an appellate court can properly consider only the facts and evidence before the trial court and thus only those papers and exhibits filed in the trial court can constitute the record on appeal. However, medical diagrams are not "facts" or "evidence;" one uses them for demonstrative purposes to assist the court’s understanding. To obviate an objection, one should choose them carefully and cite them with appropriate disclaimers.

**Conclusion**

Although they are not appropriate in every case, timelines, dispute charts and pictures can, if used judiciously, enhance the comprehensibility of a complicated set of facts. One may use them to emphasize key aspects of the case and turn a great expanse of print or an inscrutable sea of words into a lucid explanation of the facts.
Preparation an Effective Appellate Brief – The Expert View

By Robert H. Thomas*

Last month, at the ABA Midyear Meeting in New Orleans, I had the opportunity to sit in on one of the best CLE programs I have attended in recent memory, “Preparing an Effective Appellate Brief,” sponsored by the Council of Appellate Lawyers. The session was a discussion with tips and insights from a panel comprised of Ninth Circuit Judge N. Randy Smith, Louisiana Supreme Court Justice Bernette Johnson, and seasoned appellate lawyer Roger Townsend (Alexander, Dubose & Townsend, Houston, Texas). Mitchell Tilner (Horvitz & Levy, Encino, California) moderated the discussion and audience questions. What follows is a summary of the session, interspersed with my own commentary.(1)

Briefs Should be Brief

Judge Smith started off with advice that the brief may be your only chance to convince the court since many busy courts like the Ninth Circuit cannot afford to allow oral argument in all cases. Even in those courts where argument is the norm, it may be severely truncated, ten to fifteen minutes for example. That being so, to Judge Smith, the hallmark of an effective brief is that it is “brief, brief, brief.” He noted that advocates should resist the temptation to seek additional briefing space, except in the most extraordinary circumstances because, “if we think you need more briefing, we’ll ask for it.” He emphasized that, understanding judges appreciate concise briefs, writers should take every opportunity to seize the reader’s attention quickly, and accordingly, that advocates should pay special attention to the Introduction or the Summary of Argument sections. Judge Smith stressed short: short sentences, paragraphs, quotes, and citations.

The same advice applies to block quotes, either from the record (trial transcripts, documents), or from cited cases. Short, dispositive quotes are fine, but keep them to one-half page. It’s preferable to weave quotes into the brief’s text, and if you really must block quote something, use an introductory phrase summarizing it before the block quote. Judge Smith suggested placing yourself into the reader’s position, realizing that block quotes are hard to read.

Justice Johnson agreed about the importance of brief-writing, even though oral argument in every appeal is the default option in her court. She noted that advocates should pay special attention to the briefs and to the court’s procedures: perfect the appeal by complying with all procedural steps, adhere strictly to details such as deadlines, typeface, word or page count, and pay attention to the brief’s indexes. She also suggested that arguments not start with “this case is complicated,” because judges already understand that by virtue of it being on appeal.

Stating the Issues

The number of issues presented in a brief influences the court’s perception of the merits of an appeal, said Judge Smith. Judges are “reading and writing machines,” so choose your issues narrowly and try to limit the number of points raised. He suggested using one of the two most common approaches: state the issue either as simply as possible or with a “deep issue” prefatory statement of relevant facts or law if necessary.(2) He suggested using the simple issue statement in an intermediate appellate courts and the deep issue method for courts of last resort.

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(1) Any errors in this summary of the speakers’ presentation are mine. The audio recording of the session is available at http://www.americanbar.org/content/dam/aba/multimedia/appellate_lawyers/cal_12my_prgm_recording.mp3.

Hammer the Standard of Review

Judge Smith provided a tip that I have heard from literally every appellate judge whom I have heard speak on the subject of appellate advocacy but have rarely seen in an appellate brief: focus on the standard of review. And by this he meant not just the section of the brief where you set forth the applicable standard, but to “weave it throughout your brief.” For example, in the Argument section of a brief, explain why the trial court was “clearly erroneous” when it found such-and-such fact, or why a conclusion of law was “wrong” under the de novo standard. Judge Smith noted that on ideologically diverse courts, such as the Ninth Circuit, the one area on which all judges might agree is the standard of review. (3)

Scrupulous Accuracy

Judge Smith stressed that appellate advocates should make sure that the facts they think are in the record really are there. He said this was especially true for trial counsel, whom he found tend to believe that the facts that they know are actually in the record, even when they are not. He humorously noted that his law clerks – fresh from law school and some of the best young minds (but still lacking in experience) – like nothing more than finding unfair or overreaching points in a Statement of Facts. Justice Johnson concurred, and revealed that she employs her clerks to verify record citations in briefs. (4)

Typefaces

A member of the audience asked the judges about their views on italics, underlining, and boldfacing in briefs and whether it helps to highlight words and phrases in a brief. Both replied that it was not very important and not effective. What is important, however, is for a brief to de-emphasize “bad” facts by acknowledging and addressing them in a straightfor-ward way, not by ignoring them. By putting these facts in context and helping the court understand why they do not matter, the brief writer aids the court in reaching its decision, which must confront all the facts. However, the writer must keep in mind local conventions and rules. For example, the New Jersey courts have a style guide for opinions – including underlining and other formatting – and it would be wise for advocates to adhere to these in briefs as well. (4)

Justice Johnson recognized that many appellate court have moved to an electronic filing system (even as her court, the Louisiana Supreme Court has not yet transitioned), and for those courts, lawyers should ensure that briefs read well both on screen and on paper. Mr. Townsend recommended a recent book on the subject by Robert Dubose, a partner in his firm, which notes that more than 50% of legal readers are reading from screens rather than paper, and that if lawyers do not adapt their writing style to the e-viewer, “persuasion is lost.” (5) (See Robert Dubose’s article “Writing Briefs for Tablet Readers” in this issue of Appellate Issues and “Re-Imagining the Appellate Brief” by Timothy J. Vrana of the Winter 2012 issue of Appellate Issues, covering Mr. Dubose’s presentation at the AJEI Summit in Washington.)

To Footnote or Not to Footnote

Both judges expressed their dislike for “talking footnotes,” adhering to the maxim that if something is important, it should be in the body of the brief. Putting something in a footnote other than a citation signals to the reader that it is not important. The panelists noted that some opinion writers are even putting all citations into footnotes, as suggested by writing teachers such as Bryan Garner. (6) For an interesting experiment in the Garner style of opinion footnoting, Justice Brent E. Dickson of the Indiana Supreme Court once tried it out in a series of opinions, and asked for input:

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As an experiment, this opinion departs from the author’s usual style of citation and footnote use. Cf. Indiana Appellate Rule 22. Generally adhering to the footnote recommendations of Bryan Garner, *The Winning Brief*, 139-47 (2d ed. 2004), all citations unessential to the text are placed in footnotes, and substantive matter that otherwise might appear in footnotes is included in the text. This revised format does not meet with universal approval. See Richard A. Posner, *Against Footnotes*, 38 Court. Rev. 24 (Summer 2001). The public, the bench, and the bar are invited to comment to the Supreme Court Administrator, 315 State House, Indianapolis, IN 46204. (7)

Justice Dickson recently informed me that there was little reaction to the court’s invitation, and only a handful of responses were received, none of them in favor of placing the citations in footnotes. As a result, he abandoned the experiment and resumed his former practice of footnote use. (8) He also noted that the frequency of footnote use still varies among the five justices of his court. For example, former Chief Justice Richard M. Givan authored 1,571 majority opinions from 1968 until his retirement in 1994, which included a total of only fourteen footnotes, an average of one footnote approximately every 112 opinions, or one footnote every 1.9 years. During an eight year period from December 14, 1977 until January 24, 1986, he authored 500 consecutive majority opinions without using a single footnote. (9)

There is no one rule for footnotes in briefs (except if Judge Posner is on your panel, you should probably eliminate them), except that if you must use them, keep them short.

On a related topic, an audience member asked how judges view the citation to multiple authorities to support a legal proposition – how many are enough? The panel responded that an effective method is to start with the case most relevant to the point, or if more, then the most recent case, then follow up with the oldest in order to demonstrate that it is a “well-established” rule. If you are in a court of last resort and there is a relevant case from that court on point, don’t bother with intermediate court opinions; they are viewed as redundant and unpersuasive.

**The Reply Brief**

Reply briefs are essential, but keep them short, focused, and condensed. Mr. Townsend said he uses the Introduction in reply briefs to summarize, “here’s why we should win, despite their arguments.”

The panelists also weighed in on whether an appelee’s brief should track the structure of the top side brief. Generally, yes, it makes it easier on the judges if the answering brief follows the organization of the opening brief. But there are times where an advocate should not, and in those situations, the brief should explain why it does not in the Introduction.

**Courtesy**

Justice Johnson pointed out her court’s rule that lawyers who file briefs containing discourteous language may suffer “the humiliation” of having the clerk return their brief. (10) Both Justice Johnson and Judge Smith affirmed that they did not appreciate briefs that were too strident. For a recent example of an appellate court calling out an advocate for uncivil language, the U.S. Court of Appeals for the Fourth Circuit wrote:


(8) Email from Justice Brent E. Dickson (Mar. 1, 2012).


(10) LA. S. CT. R. VII, § 7 (“The language used in any brief or document filed in this court must be courteous, and free from insulting criticism of any person, individually or officially, or of any class or association of persons, or of any court of justice, or other institution. Any violation of this rule shall subject the author or authors of the brief or document to the humiliation of having the brief or document returned, and to punishment for contempt of the authority of the court.”).
Finally, we feel compelled to note that advocates, including government lawyers, do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses.(11)

Judge Smith finished the session by emphasizing a related point: tone is important. Bad tone about the other lawyer or the lower court judge, for example, will usually result in a bad tone from the appellate court. (12)

Book Review: Ross Guberman’s Point Made: How to Write Like the Nation’s Top Advocates

By Wendy McGuire Coats*

An accepted axiom in writers’ circles admonishes: To be a great writer, read great writing. It’s obvious, almost trite, but in writing workshops and retreats, it’s the acknowledged starting point. If you’re not reading great writing, you simply will not know how to do it yourself. Is this true for legal writing? And if yes, where does a writer find great legal writing? And practically speaking, who has the time to run down that rabbit hole? I don’t. But, thankfully, Ross Guberman did. The result: Point Made: How to Write Like the Nation’s Top Advocates.

Ross Guberman is the president of Legal Writing Pro. A graduate of Yale, the Sorbonne, and The University of Chicago Law School, he has conducted thousands of writing workshops for judges, law firms, corporations, governmental agencies, and bar associations. Point Made is not a personal philosophy or self-help system that if adopted will transform you into a great legal writer. Instead, Guberman employed an empirical approach that first set out to identify the fifty most renowned, influential and prominent living advocates. The final roster includes familiar names such as Associate Justice Elena Kagan, Laurence Tribe, Maureen Mahoney, Carter Phillips, David Boies, Joe Jamail, Harvey Miller, President Barack Obama, Lawrence Lessig, Alan Dershowitz. In order to identify common patterns and themes, Guberman assembled, reviewed, and dissected hundreds of motions and briefs written by the top 50. The lengthy process resulted in fifty concrete techniques and the book, Point Made.

For legal writers striving to transform their functional drafting into artfully crafted documents, Point Made’s stated goal is to “reveal the craft” behind the art of great legal writing. Take for example, the following:

Mario Andretti may select a Ferrari; a college student a Volkswagen Beetle; a family of six a mini-van. A Minnesotan’s choice will doubt-

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If you want to stretch yourself as a legal writer but are stretched for time, in just under 100 pages, Part 4: The Words provides a mini-writing workshop tailored specifically for the legal writer. I recommend sitting down with Part 4: The Words when you have a first or second working draft. With the overall structure in place, the writing is now ready to be tweaked and retooled. Part 4: The Words is divided into seventeen specific techniques that delve into the nitty-gritty of a legal writer’s word choice, phraseology, sentence structure, and sentence placement. In an effort to strip away the legalese and stilted structure often found in legal briefs the seventeen techniques provide the advocate with immediate changes that create legal writing that “doesn’t sound like it was written by a lawyer.” The pages of concrete examples demonstrate how to write prose that a judge (and most importantly, a judge’s clerks) will want to read. Take for example, trimming stock phrases and replacing them with Zingers: Colorful Verbs such as “hoodwink” (Joe Jamail), “coined” (David Boies), “thwart” (Morgan Chu), and “dupes” (Bernie Nussbaum). Each of these examples is given in context and illustrates how the great writer uses a single verb choice to color the reader’s impression. Similarly, this example from Associate Justice Ruth Bader Ginsburg writing in Craig v. Boren: “Goesaert is a decision overdue for formal burial” shows how “punchy” prose reflects confidence.

After reading hundreds of briefs, Guberman suggests that, for the fifty lawyers referenced in Point Made, writing is a pleasure. He asserts that regardless of their various writing styles, backgrounds, and areas of expertise, these advocates, across the board, write with a passion for the law, their client’s case, or both. In crafting their passionate prose, these advocates use a variety of words, sentence structures, and transitions to turn their functional writing into an art. Part 4: The Words runs the gamut, providing examples for using figures of speech and analogies in fresh ways. There are examples on how to craft and place appropriately the pithy sentence as well as how to write an elegant and balanced long sentence. There are examples of how to employ the dash, the hyphen, the semicolon, and colon— not just correctly,
but effectively. There are examples of how to ask the persuasive rhetorical question and how to use logical connectors and transitions. Nothing is abstract. Because the examples are lifted out of real briefs, the technique’s use and effectiveness is immediately understood. And since each technique is illustrated by a variety of examples, it is easy see how each technique is applicable to the advocate-writer’s own writing. For the brief writer stepping away from a document for inspiration and direction, *Point Made*’s Part 4: The Words provides both.

Guberman has done what I do not have time to do. He has located the snippets of legal writing where the craft and art of writing shine. He has assembled example after example of creative, clever, clear, common-sense legal writing. He’s compiled in one book the great writing that will cause a legal writer to sigh, “I wish I’d written that.” But he did not stop there. Guberman has written a useable handbook that will aid the writer in crafting similar envy worthy moments of argument.

*Point Made* is not a tome or a textbook. It’s smaller than an iPad, has just over 300 pages, and fits comfortably in the glove compartment of my car. This is not a book to stash on the shelf after you’ve read it once. It’s a book to revisit before you start a new brief. It’s a book to take with you. It’s a book to keep in the Redweld with the brief you are revising. Guberman’s techniques provide immediate ways to improve, tighten, and enliven the language and persuasive force of your prose.

To learn more about Ross Guberman and *Point Made: How to Write Like the Nation’s Top Advocates* visit: www.legalwritingpro.com.

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**A Method to the Madness: Preparing for Oral Argument Before Appellate Courts**

*By Colonel Louis J Puleo* *

Every year the Court of Appeals for the Armed Forces, the highest military appellate court within the military justice system, holds several outreach sessions at various law schools around the country. The purpose of the event is to showcase the military justice system and act as an informational and exchange forum. These events consist of an oral argument by military attorneys followed by a question and answer session during which the Court and counsel field questions from the audience. Inevitably the question is posed, “how does counsel prepare for an oral argument before an appellate court”?

Equally inevitable is the response, “know the facts of your case and the relevant law, have a theme, and moot your argument.”

While this is sound and practical advice, I believe it overlooks the basis of the question, which I interpret as: is there a method for preparing for oral argument that will assist counsel in knowing the facts and law, developing a theme, and effectively mooting the argument? I believe there is and the purpose of this article is to suggest a four-phase approach that requires counsel to organize the facts of the case, identify the essential principles of law, ascertain the broader policy concerns and consequences of counsel’s position, and effectively moot the argument.

This model may not be appropriate in all circumstances; however, the approach does impose a certain methodology that advances the four fundamen-

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tal tenets of appellate advocacy: 1) know the facts of your case and relevant law better than anyone else; 2) organize your material so that you are in control of the facts and law during argument; 3) do what is necessary in order to make it easier for the court to rule in your favor; and 4) capitalize on every opportunity to support the critical elements of your case.

The Purpose.

A natural starting point is to ask: “what is the purpose of oral argument.” This is an important consideration for it would seem impossible to develop a method to fulfill such a purpose without first identifying it. While judges differ over the usefulness or necessity of oral argument, at the very least, there is general agreement that argument provides an opportunity to persuade the court to rule in your favor or adopt your position on a certain issue. This, however, misses the mark. Persuasion alone is not the purpose; rather, to be truly effective — and prepared — a more subtle purpose is suggested: I propose that oral argument provides counsel with the opportunity to assist the court in how “to think” about the issues presented. The term oral “argument” is a misnomer, since it is not an “argument” at all but rather a dialogue, where counsel should assist the court in structuring the legal framework from which the court will then decide the issue. The method suggested here promotes this purpose and is designed to support an argument “in-depth” that surpasses merely distinguishing precedent as supporting or opposing an issue.

It is intended to be the foundation for an argument that aids the court in accepting the legal framework that supports your case. This requires counsel to understand how the issues fit within the broader legal context. Experienced appellate attorneys know, and young attorneys soon discover, that reconciling precedent into a consistent thesis is the rare exception rather than the rule. However, counsel who is able to organize the legal framework and demonstrate how the issues logically fit within that construct will aid the court in resolving the matter in his favor. I do not mean to suggest that counsel adopt a didactic attitude during oral argument, but I do propose that in preparing for oral argument one do so with that mindset.

First: Managing the facts in the record.

It is axiomatic that counsel should know the record and be able, during argument, to invite the court’s attention to the particular page in the record to support counsel’s point or answer a question. This is a necessary but daunting task. I have witnessed numerous ways counsel has attempted to organize the facts, and most methods prove to be not only cumbersome and awkward but also ineffective. Rarely is counsel, in the middle of argument, able to quickly manipulate notebooks, files, or the record in order to find and confirm the exact location of a fact without a long and uncomfortable (and usually futile) pause. This is true even in those jurisdictions that require an abridged appellate record such as a joint appendix to the briefs.

Even if one had the skill to quickly and confidently manipulate the record during argument, approaching the lectern with an unwieldy array of papers and binders does not inspire an impression of confidence or mastery. While there are several ways to organize the facts, the way I have found to be the most helpful is to construct a fact “cheat-sheet.” It is simply a table, divided into three columns with as many rows as necessary. For each issue, I list the relevant fact in the first column, the relevance of that fact to the issue in the next column, and the page number where that fact can be found in the record in the last column. Each fact or set of associated facts has a row on the cheat-sheet. The entries within the table should be merely memory ticklers, a word or phrase that provides counsel with enough information without having to stop and read a long sentence or paragraph. Constructing the table serves several purposes: 1) it provides, by issue, an easy reference chart during argument, without having to flip through the record; 2) it requires counsel not only to record the fact in some shorthand way onto the table, thus reinforcing the ability to retrieve that fact later, but also compels counsel to articulate why that fact is relevant to the issue; and 3) condenses the relevant facts into an easy-to-manage format. It is important to be succinct
when constructing this table. Color, highlighting or other methods of distinguishing text can refine your product; however, it is important to use the cheat sheet during moots. Not only will this reinforce your ability to quickly locate facts but will also expose any weakness in your system, e.g., font too small, too verbose.

Second: Identifying the essential legal principles of your case.

The goal of this second step is to distill, from the whole body of applicable law, the essential legal principles which the court must adopt in order for you to obtain a favorable decision. This, most likely, was the focus of the brief. However, preparing for argument requires a thorough understanding of not only the relevant law but also how the law developed and how the resolution of your issue fits within the legal framework or, if outside that framework, why the court should adopt your analysis. Preparation becomes more than gathering cases which support your proposition and distinguishing those that do not; it requires a deeper study in order to understand how the relevant principles of law relevant to the issues developed and whether the development is logical and internally consistent. Counsel must then extract from that broader context those legal principles that are necessary in order to resolve the issues.

The purpose of this in-depth distilling process is to identify those critical aspects of your case, which will become the centerpiece of your argument. Regardless of where the court takes you during argument, these are the principles that must be addressed. Thus, these essential concepts form the basis for constructing your initial comments and summarization at the argument. You take a substantial step when you can convey, succinctly and clearly, the legal principles that are essential to the resolution of the issues.

Managing precedent.

As with the facts, counsel must find a way to quickly retrieve supporting precedent during argument. I create an outline that lists each issue, followed by the essential principles distilled from my research along with the underlying legal analysis and supporting case law. This necessarily starts as a weighty document, but as I work through the preparation, I continue to refine and condense the outline; paragraphs become sentences, sentences become phrases, phrases become words. In this way, I distill the analysis and supporting case law into the absolute minimum needed to remind me of the overall legal framework.

Third: Identify the Broader Policy Concerns and Consequences.

While not always the case, the court will often address the broader policy considerations that transcend your case. These considerations vary: social, political, and legal. Thus, you should identify the policy consequences that would arise if the court adopts the position you advocate. While I believe writing your argument verbatim is of no value, it is tremendously important to address difficult issues, such as the policy considerations, by writing a succinct and direct response to anticipated policy questions.

Fourth: Effectively Mooting your Argument.

Having organized your facts, identified your essential principles of law, constructed a concise outline of your analysis, and identified potential policy concerns, counsel should be ready to construct and practice the oral argument.

A. The thirty-second rule, the sixty-second rule, and relate-to rule.

With the essential principles that the court must adopt in order to rule in your favor in mind, counsel must construct an opening statement that specifies and provides a rationale justifying the adoption of these principles. While somewhat of a misnomer, the thirty-second rule requires counsel’s opening comments to capture each issue and the supporting rationale in thirty seconds or less. Likewise, the sixty-second rule requires counsel to construct a summary
that articulates, in sixty seconds or less, the reasons why the court should adopt counsel’s position when deciding the issues. As experience has shown, what sounds plausible and succinct on paper or in thought often does not work when spoken. Thus, during the mooting process, counsel should concentrate on articulating the essential principles, in opening comments and summarization, clearly and succinctly. If there is any true memorization in the preparation process, it is to memorize the initial statement and closing summary. Everything in between is subject to the court’s questioning, which can often lead to discussions which counsel may consider less germane to the analysis. However, as long as you have your essential legal principles firmly established within your opening comments and closing summary, you can be confident that your “must-make” points are brought to the court’s attention.

If the court does not interrupt counsel with questions, then the outline suggested above forms the basis of the argument. However, this is rarely the case and thus the importance of the “relate-to” rule. Based upon the premise that judges expect direct answers to questions, without caveats or conditions, the rule proposes that counsel provide a direct answer but then, if possible, capitalize on the opportunity to demonstrate how the answer supports or relates to the essential legal principles. The goal, which should be practiced during the moot argument, is to tie, to the degree it is logical, the answer to the essential legal principles and counsel’s legal framework.

B. Tackling the difficult questions and opposing arguments.

All too often, counsel fails to satisfactorily address difficult questions, issues, or policy concerns especially those raised by the opposing side. Usually, when confronted with such difficult topics, counsel offers a long explanation or engages in obvious obfuscation. The time to deal with these difficult questions is during the mooting process so that counsel can succinctly address these issues during argument in “10-words or less.” While “10-words” is not to be taken literally, it emphasizes the belief that counsel’s answers must be succinct, responsive, and convincing. While I don’t advocate recording your argument verbatim, I do believe that, in preparation, counsel should address difficult question by writing out the answer in order to accomplish that effect. In the end, it may be that counsel should concede an issue, but it is better to figure that out during preparation than to try deciding, in the middle of argument, how the concession will affect your overall position. A popular pet peeve is counsel’s inability or unwillingness to concede an issue. While this might be caused by obstinacy, it may be that counsel has not contemplated how a concession will affect his case and is thus reluctant to agree to the concession. By using the method outlined here, counsel has the luxury of thinking through the concession and its overall effect on his case.

C. Constructing Rhetorical Devices.

To illustrate difficult or abstract concepts, it often helps to develop appropriate rhetorical aids such as analogies or similes. Whatever device you use, to be effective it must be simple, intuitive, and direct. If too complex, unrehearsed, or if it requires explanation, it will rarely be useful or effective. Finding the right rhetorical tool, which is tested during moot arguments, can greatly enhance your presentation.

D. The necessary ten.

There are ten questions that counsel must be prepared to answer to be truly prepared. These may or may not be asked during argument, and while an individual question may not be relevant in your case, the ten serve as a good checklist to the foundational issues that counsel sometimes overlooks because he becomes so focused on the issues presented. They are, in no particular order:

1. What is the standard of appellate review and what does that mean for the court’s review authority?

2. What is your strongest/best position; if there are competing grounds upon which to rule, which one would you want the court to adopt, and why?
3. What relief are you requesting and what is the court’s authority to grant such relief?

4. Is there statutory/regulatory requirement or precedent compelling the court to adopt the propositions you advance during argument? Can you answer the question, “What case stands for the proposition . . .”? 

5. For government attorneys) Does your position require coordination with other agencies?

6. Who has the burden during appeal?

7. What right/privilege has been infringed, from what authority is one granted this right/privilege and how has it been infringed?

8. What is the prejudice or lack of prejudice?

9. What would the holding be if you could write the opinion? (other than “I win”)

10. Has the claimed error been preserved, waived, or forfeited?

Again I do not recommend writing out your argument verbatim, but it would be wise to address these questions in writing so you have a clear, succinct, and thoughtful way to respond if required.

E. Dress rehearsal and developing good habits.

While I don’t believe there is a correct number of moots, I do believe counsel should separate strategy sessions from moot court practice. Often the first couple of moots devolve into strategy sessions, with colleagues slipping in and out of “judicial” character to assist in refining the argument or helping counsel answer a particular question. This breeds bad practice habits. Appellate practice is special, more formal than trial work, and requires certain decorum before the court. Moots that devolve into strategy sessions encourage counsel to develop informal habits and mannerisms that they bring before the court. For young counsel especially, moots should take on the look and feel of the “real thing.” The inadequacies and weaknesses of the argument can be addressed after the moot or during separate informal discussions. The moots, however, should be as “real” as possible and the panel should critique counsel on propriety as well as substance. Counsel should display the appropriate attitude and decorum when they enter the courtroom, an instinct developed during moot court practice.

Putting it all together.

However you structure your argument, it is unlikely that it will survive beyond the judges’ first questions. Beyond establishing the fundamental principles, the goal during argument is to be able to answer the judges’ questions directly and then relate, if the context permits, the answer back to these fundamental concepts and your legal framework. The better able you are at getting these principles before the court early in your argument the more likely that the judges’ will focus their questions on those principles.

At the end of my preparation process, I have a final version of the fact cheat-sheet, my succinct outline, with the issues, essential principles, and supporting case law, and my list of difficult or awkward questions with appropriate responses. I know exactly the one or two points I must make before the court, which is the basis for my opening and closing. I am confident I can address most of the difficult questions as well as the “necessary ten.” I have thought through the points I can concede and can articulate why I should not concede others. I am confident that I can retrieve the facts from the record if called to do so.

If I truly am prepared, my cheat-sheets, as condensed as they are, should be left at counsel table and I am ready to engage the court in a dialogue of the issues without a safety net.
**Editor’s Note:** *Appellate Issues* welcomes submissions of interest to appellate lawyers. Practice pointers, analysis of legal issues, book reviews, personal narratives, and interviews are within the range of acceptable material. The deadline for the next issue is May 28. Submissions and inquiries should be directed to David J. Perlman at djp@davidjperlmanlaw.com or 484-270-8946.

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