Presented:

21st Annual Rusty Duncan
Advanced Criminal Law Course

June 26-28, 2008
San Antonio, Texas

BASIC BRIEF WRITING

by
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TRAP 38. REQUISITES OF BRIEFS

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of parties an counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

(b) *Table of contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Issues presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(f) *Statement of facts.* The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(g) *Summary of the argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the

issues or points presented for review.

(h) *Argument*. The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

38.3 Reply Brief. The appellant may file a reply brief addressing any matter in the appellee's brief. However, the appellate court may consider and decide the case before a reply brief is filed.

38.4 Length of Brief. An appellant's brief or an appellee's brief must be no longer than 50 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix. A reply brief must be no longer than 25 pages, exclusive of the items stated above. But in a civil case, the aggregate number of pages of all briefs filed by a party must not exceed 90, exclusive of the items stated above. The court may, on motion, permit a longer brief.

38.6 Time to File Briefs.

(a) *Appellant's filing date*. Except in a habeas corpus or bail appeal, which is governed by Rule 31, an appellant must file a brief within 30 days - 20 days in an accelerated appeal - after the later of:

(1) the date the clerk's record was filed; or

(2) the date the reporter's record was filed.

(b) *Appellee's filing date*. The appellee's brief must be filed within 30 days - 20 days in an accelerated appeal - after the date the appellant's brief was filed. In a civil case, if the appellant has not filed a brief as provided in this rule, an appellee may file a brief within 30 days - 20 days in an accelerated appeal - after the date of the appellant's brief was due.

(c) *Filing date for reply brief*. A reply brief, if any, must be filed within 20 days after the date the appellee's brief was filed.

(d) *Modifications of filing time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing a brief and may postpone submission of the case. A motion to extend the time to file a brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

38.7 Amendment or Supplementation. A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.

38.8 Failure of Appellant to File Brief.

(b) *Criminal cases.*

1) An appellant's failure to timely file a brief does not authorize either dismissal of the appeal or, except as provided in (4), consideration of the appeal without briefs.

(2) *Notice.* If the appellant's brief is not timely filed, the appellate clerk must notify counsel for the parties and the trial court of that fact. If the appellate court does not receive a satisfactory response within ten days, the court must order the trial court to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or, if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations.

(3) *Hearing.* In accordance with (2), the trial court must conduct any necessary hearings, make appropriate findings and recommendations, and have a record of the proceedings prepared, which record - including any order and findings - must be sent to the appellate court.

(4) *Appellate court action.* Based on the trial court's record, the appellate court may act appropriately to ensure that the appellant's rights are protected, including initiating contempt proceedings against appellant's counsel. If the trial court has found that the appellant no longer desires to prosecute the appeal, or that the appellant is not indigent but has not made the necessary

arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.

38.9 Briefing Rules to be Construed Liberally. Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient, subject to the following:

(a) *Formal defects*. If the court determines that this rule has been flagrantly violated, it may require a brief to be amended, supplemented, or redrawn. If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief.

(b) *Substantive defects*. If the court determines either before or after submission, that the case has not been properly presented in the briefs, or that the law and authorities have not been properly cited in the briefs, the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case.

CASE LAW REGARDING BRIEFING RULES

Unassigned Error

Pena v. State, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006). "We have previously held, reaffirm today, that appellate courts are free to review 'unassigned error' - a claim that was preserved in the trial below but was not raised on appeal . . . We recognize that many, if not most, of the types of error that would prompt *sua sponte* appellate attention need not be assigned because the error involved constitutes an obvious violation of establishes rules. Novel constitutional issues are a different matter."

Citation of Authority

Walder v. State, 85 S.W.3d 824, 828 (Tex. App. - Waco 2002, no pet.). "Appropriate

citations to authorities' should include pertinent cases, statutes, rules and constitutional provisions. when citing cases, counsel should identify and cite, at a minimum, pertinent decisions of the Supreme Court of the U. S., the Court of Criminal Appeals, of this Court when available, and if no cases from this Court can be located on the issue presented, of other Texas intermediate courts of appeals. Counsel need not cite more than three cases on settled issues or principles. 'In citing case, specific page citations should be given to the pages where the relevant holdings or quotations may be found.' Counsel should research the subsequent history of any case cited to be sure that it has not been reversed or modified. When counsel cites a decision of one of the fourteen intermediate courts of appeals, counsel should provide a subsequent history on any petition for discretionary review or indicate that no petition was filed."

Brooks v. State, 990 S.W.3d 278 (Tex. Crim. App. 1999). To adequately brief a state constitutional issue appellant must proffer specific arguments and authorities supporting his contentions under the state constitution.

Review by Court of Appeals: Rules and Procedures

Volosen v. State, 227 S.W.3d 77 (Tex. Crim. App. 2007). "Because the State prevailed at trial, it was not required to raise any allegations before the court of appeals. The [TRAPs] require an appellant to file a brief but impose no such requirement on an appellee. Regardless of whether an appellee files a brief, a first-level appellate court has the obligation to conduct a thorough review of an appellant's claims, including any subsidiary issues that might result in upholding the trial court's judgment. An appellee's failure to make a particular argument is a factor that may be considered when this Court decides whether to exercise its discretion to grant review, but it does not bar this Court from granting review to address the issue if the Court, in its discretion, decides that review is warranted."

State v. Bailey, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006). "[I]t violates 'ordinary notions of procedural default' for a court of appeals to reverse a trial court's decision on a legal theory that the complaining party did not present to the trial court. Accordingly, we have established that an appellate court may not reverse a trial court 'on a theory that the trial court did not have the opportunity to rule upon and upon which the non appealing party did not have an opportunity to develop a complete factual record.'"

Bufkin v. State, 179 S.W.3d 166, 173-74 (Tex. App. - Houston [14th Dist.] 2005), *aff'd*, 207 S.W.3d 779 (Tex. Crim. App. 2006). "[T]he state chastens this court for failing to address its contention that appellant has failed to present anything for review by omitting citations to the record regarding this point of error. [I]t is the court's prerogative, not the parties', to insist on unerring compliance with the briefing rules. Where . . . the court has had no difficulty locating the pertinent review the point of error."

Garrett v. State, 220 S.W.3d 926 (Tex. Crim. App. 2007). It was not error for court of appeals to fail to address an issue (factual sufficiency of the evidence) that was not raised by defendant in his original brief, but upon which court of appeals ordered supplemental briefing. Because the court of appeals' order for supplemental briefing did not grant or even impliedly grant a supplemental issue for review, Rule 38.1(e) controlled resolution of the issue. That rule requires that an appellant designate all issues for review in the original brief. No merit to defendant's contention that Rule 47.1 in conjunction with Rule 38.7 required court of appeals to address factual sufficiency of the evidence in its written opinion. But if defendant had raised sufficiency of the evidence in his original brief, or if court of appeals had explicitly granted the supplemental issue for review when it requested supplemental briefing, then the court of appeals, under Rule 47.1, would have been required to address the issue concerning the factual sufficiency of the evidence in its

written opinion.

Sanchez v. State, 209 S.W.3d 117 (Tex. Crim. App. 2006). Errors that are subject to procedural default may not be remedied by the appellate court as unassigned error unless the error was in fact preserved in the trial court.

Laney v. State, 76 S.W.3d 524 (Tex. App. - Houston [14th Dist.] 2002), affirmed, 117 S.W.3d 854 (Tex. Crim. App. 2003). Court declined to review issues in pro se brief where defendant was represented by counsel who filed brief, and defendant's request for leave to file pro se brief was denied. There is no absolute right to hybrid representation.

Young v. State, 10 S.W.3d 705 (Tex. App. - Texarkana 1999, pet. ref'd.). Once an appellate court has jurisdiction over a case, the limits of the issues that the court may address are set only by the court's discretion and any valid restrictive statutes. Court considered issue not raised by defendant and reversed conviction.

Adequacy of Briefing

King v. State, 17 S.W.3d 7 (Tex. App. - Houston [14th Dist.] 2000, pet. ref'd.). Conclusory arguments that cite no authority present nothing for review.

Hicks v. State, 15 S.W.3d 626 (Tex. App. - Houston [14th Dist.] 2000, pet. ref'd.). Nothing presented for review on claim of error to deny motion to quash indictment for unconstitutionally of statute defining offense, where defendant presented no argument as to how and why statute was unconstitutional.

Price v. State, 15 S.W.3d 577 (Tex. App. - Waco 2000, pet. ref'd.). Nothing presented for review where defendant presented no authority to support his position.

Mosley v. State, 983 S.W.3d 249 (Tex. Crim. App. 1998). Where ground of error relied on two statutory provisions but presented no argument in support of one of them, it was inadequately

briefed under prior rule 74(f) and current rule 38.1(h) as to that statutory provision, and was therefore rejected by appeals court.

Torres v. State, 979 S.W.3d 668 (Tex. App. - San Antonio 1998, no pet.). Nothing presented for review where defendant did not identify where in record state offered evidence challenged on appeal. Statement of facts included about 1500 pages of testimony and appeals court had no duty to search record to find reversible error.

Hutto v. State, 977 S.W.3d 855 (Tex. App. - Houston [14th Dist.] 1998, no pet.). Nothing presented for review by point of error that trial court erred by denying motion to dismiss based on insufficiency of the evidence and failure to prove elements of case, where defendant failed to make any discussion of the evidence that might warrant a dismissal, nor argue how evidence was insufficient under any standard of review, and provided no argument and authorities in his brief.

Adams v. State, 969 S.W.3d 106 (Tex. App. - Dallas 1998, no pet.). Nothing preserved for review on claimed error in exclusion of evidence, where defendant did not reference any place in record showing what excluded evidence was, and did not even assert in his brief what the evidence would have been.

Dorsey v. State, 117 S.W.3d 332 (Tex. App. - Beaumont 2003, pet. ref'd.). Nothing presented for review on claim it was error to overrule hearsay objections to testimony that murder victim made statement that she believed defendant would harm or kill her, where testimony at defendant's record citations included no such testimony.

Williams v. State, 937 S.W.3d 479 (Tex. Crim. App. 1996). Defendant's allegation of his "singular pose as being suggestive of guilt" did not constitute adequate briefing of his claim that in-court identification of defendant was tainted by impermissibly suggestive photographic array.

Judd v. State, 923 S.W.3d 135 (Tex. App. - Fort Worth 1996). Point of error is sufficient if

it directs attention of appellate court to error about which complaint is made.

Burns v. State, 923 S.W.3d 233 (Tex. App. - Houston [14th Dist.] 1996, pet. ref'd.). Defendant's claim that he was entitled to new trial due to fact that videotape of allegedly suggestive line-up was inadvertently omitted from record on appeal was inadequately briefed and would not be addressed; while defendant claimed that lack of tape made it impossible to determine unequivocally that line-up was not suggestive, defendant failed to articulate why tape might have been suggestive and cited no specific relevant authority to support his claim.

Tidrow v. State, 916 S.W.3d 623 (Tex. App. - Fort Worth 1996, no pet.). Although defendant failed to discuss facts or cite authorities to maintain his hearsay argument regarding life insurance policy on murder victim other than mentioning that hearsay was one ground for objection to policy's admissibility at trial, because defendant's brief mentioned statement of facts page containing hearsay objection, court would accept that bare reference as substantial compliance with appellate rule addressing points of error.

Burks v. State, 876 S.W.2d 877 (Tex. Crim. App. 1994). Defendant's challenge to admission of felony-murder victim's statements under dying declaration exception to hearsay rule was not preserved for review; in his brief, defendant did not cite any place in record where victim's wife and daughter testified about his dying declarations, where treating physician testified about victim's condition at time of statements, or where appellate objected to their testimony and obtained ruling.

Murchison v. State, 93 S.W.3d 239 (Tex. App. - Houston [14th Dist.] 2002, pet. ref'd.). Defendants waived for appellate review any error as to sufficiency of evidence to support jury's findings as to intent to defraud in prosecution for securities fraud, where defendants' argument, record citations, and authorities did not address their intent to defraud.

Gallo v. State, 239 S.W.3d 757 (Tex. Crim. App. 2007). Defendant's claim that the trial

court improperly denied his motion for a mistrial when the prosecutor used curse words twice during closing argument was waived for appeal; defendant's general objection at trial did not comport with his argument on appeal, he failed to explain on appeal exactly which of his federal constitutional rights were violated, and this portion of his argument was inadequately briefed.

Williams v. State, 937 S.W.2d 479 (Tex. Crim. App. 1996). Defendant's failure to explain why autopsy or crime scene photographs would "cause jury to rely upon emotion" constitutes inadequate briefing of claim that photographs were unduly prejudicial.

Walder v. State, 85 S.W.3d 824 (Tex. App. - Waco 2002, no pet.). Defense counsel's appellate brief arguments that State failed to prove that defendant's failure to pay her fine and community supervision fees was intentional were deficient, and thus rendered brief inadequate, although counsel did an adequate job of identifying pertinent evidence, and counsel identified legal principle at issue, where counsel did not identify appropriate standard for appellate review of a revocation order, and counsel cited only one statute and one case and improperly identified lower court.

Massey v. State, 933 S.W.2d 141 (Tex. Crim. App. 1996). Defendant failed to adequately brief point of error in which defendant alleged that trial court erred in failing to suppress his personal writings, since defendant failed to indicate any personal writings that were admitted at trial.

Lawton v. State, 913 S.W.2d 542 (Tex. Crim. App. 1995). Claim of error with respect to prosecution's opening and closing arguments that did not complain of any specific statement, but instead simply directed court to relevant portions of record was inadequately briefed and presented nothing for review.

Francis v. State, 746 S.W.2d 276 (Tex. App. - Houston [14th Dist.] 1988, pet. ref'd.). Defendant's argument that court erred in instructing on parole law in aggravated robbery case would

not be considered on appeal where defendant incorporated into his brief by reference his argument and authorities contained in another brief defendant filed with another court.

Lockett v. State, 16 S.W.3d 504 (Tex. App. - Houston [1st Dist.] 2000, pet. ref'd.). Conclusory statement, that extraneous offense should not have been argued by prosecutor as "addition" in assessing punishment, presented nothing for appeal, where defendant provided no argument and cited no authority supporting statement.

Bullard v. State, 891 S.W.2d 14 (Tex. App. - Beaumont 1994, no pet.). Defendant's point of error that criminally negligent homicide statute, as applied to his case, violated due process because no provision was made for intervening negligence of the deceased causing death was inadequately briefed, although the case was one of first impression, where defendant failed to provide a discussion of analogous due process cases and failed to apply those cases to facts of his case which was necessary to give the Court of Appeals some idea as to scope of appellate complaint.

Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995). Defendant's claim that trial court erred in refusing to conduct individual voir dire and in refusing to sequester jury at competency phase of capital murder prosecution was inadequately briefed and presented nothing for review, where defendant provided no argument or authority regarding such issues.

Jenkins v. State, 912 S.W.2d 793 (Tex. Crim. App. 1993). Appellant's failure to cite authority to support his constitutional claims on appeal presented nothing for appellate review.

Garcia v. State, 960 S.W.2d 151 (Tex. App. - Corpus Christi 1997, no pet.). Defendant did not preserve for review claim that trial court abused its discretion in failing to allow him to withdraw guilty plea absent reference to relevant pages in record and discussion of facts that might support his argument.

Huerta v. State, 933 S.W.2d 648 (Tex. App. - San Antonio 1996, no pet.). Rules of appellate

procedure require that argument and authority be offered in support of each point of error in order for issue to be properly before court, and additionally, appellant must direct court to specific portion of record supporting complained-of error.

Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992). Capital murder defendant's objections to admissions of photographs of victims' bodies found at crime scene, on grounds that photographs were unfairly prejudicial, was not preserved for appeal where defendant failed to specify pages in record where alleged error could be found.

Harris v. State, 827 S.W.2d 949 (Tex. Crim. App. 1992). Defendant failed to preserve for appellate review claim that trial court erred in admitting into evidence, at guilt phase of capital murder prosecution, incriminating, tape-recorded statements he gave to police shortly after he was arrested, where defendant did not cite any place in record where his arguments were made to trial court, or where ruling was obtained on such arguments.

DeJesus v. State, 889 S.W.2d 373 (Tex. App. - Corpus Christi 1994, no pet.). Appellate court is not required to examine brief in another case in order to evaluate complaint appellant desires to advance on appeal.

Castillo v. State, 810 S.W.2d 180 (Tex. Crim. App. 1990). State's contention that affidavit for wiretap established probable cause even absent allegedly tainted information would be considered inadequately briefed and would not be addressed by Court of Criminal Appeals where State failed to cite particular pages or allegations in 21-page affidavit or 53 pages of other affidavits incorporated by reference.

Molinar v. State, 910 S.W.2d 572 (Tex. App. - El Paso 1995, no pet.). Defendant's raising 11 alternative assignments of error in footnote was inappropriate method of presenting error on appeal.

Cardenas v. State, 30 S.W.3d 384 (Tex. Crim. App. 2000). Defendant failed to present argument and authorities as required by appellate rule, and thus he inadequately briefed his claims in capital murder trial that trial court erred in failing to include jury instruction as to voluntariness of his statements to police, where no cases cited by defendant concerned alleged failure to include voluntariness instruction, and defendant did not address question of whether alleged error was harmless.

Tong v. State, 25 S.W.3d 707 (Tex. Crim. App. 2000). Defendant did not adequately brief his novel claim that trial court's changing method of jury selection in middle of voir dire amounted to constitutional error, and thus Court of Criminal Appeals would not consider claim on appeal from capital murder conviction, where defendant failed to provide any relevant authority suggesting how the trial court's actions violated any of defendant's constitutional rights.

Smith v. State, 907 S.W.2d 522 (Tex. Crim. App. 1995). Defendant convicted of capital murder inadequately briefed point of error that the state's allegedly improper questions and sidebar remarks to him during cross-examination denied him a fair trial, where he asserted that prosecutor showed a continuation of misconduct detailed in three previous points, not recognizing that those points dealt not with prior occurrences but with subsequent ones, where the arguments he incorporated from those points were inapplicable to the instant point, and where he failed to apply the limited authorities he cited to the facts of his case.

Briefing Rules to Be Construed Liberally

Smith v. State, 923 S.W.3d 244 (Tex. App. - Waco 1996, pet. ref'd.). Appellant's point and argument on appeal were to be construed liberally.

Briefing State Constitutional Argument

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005). Appellate court would not

consider defendant's claim that trial court violated his right to confrontation under Texas Constitution when the trial court admitted in evidence State's exhibits since defendant provided no argument or authority with respect to the protection provided by the Texas Constitution.

Sonnier v. State, 913 S.W.2d 511 (Tex. Crim. App. 1995). Defendant was required to present argument and authority in order to convince Court of Criminal Appeals that his assertions that State Constitution afforded greater protection against cruel and unusual punishment and stronger guarantees of equal protection than that afforded by Federal Constitution were correct; without such argument or authority, defendant's argument not only was unconvincing but also was inadequately briefed.

APPENDIX

The Ten Commandments of Writing
An Effective Appellate Brief

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

The First Commandment: Know Why Your Client Should Prevail

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

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

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

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

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

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

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

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

The Second Commandment: Know Your Standard of Review

This is what separates appellate lawyers from trial lawyers.

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

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

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

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

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

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

Prepare an outline.

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

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

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

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

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

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

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

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

The Fourth Commandment: Use a Mapping Technique

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

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

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

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

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

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

The Fifth Commandment: Know Your Order of Authority

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

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

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

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

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

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

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

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

The Sixth Commandment: Focus on Transition

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

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

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

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

The Seventh Commandment: Edit

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

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

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

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

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

   Are your thoughts in sequence? Is the transition clear?

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

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

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

   Does each paragraph have a topic sentence?

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

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

   Use short sentences. Break long sentences in half.

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

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

Eliminate alphabetical short forms.

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

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

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

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

Turn any passive tense to active tense.

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

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

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

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

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

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

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

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

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

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

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

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

The Ninth Commandment: Edit Again

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

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

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

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

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

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

Have someone cold to the case proof read the brief.

The Tenth Commandment: Be honest With Your Court

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

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

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

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

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

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

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

Selected Bibliography

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

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

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

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

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

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

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

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

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

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

BEST BRIEF: A SELECT BIBLIOGRAPHY OF BRIEF WRITING MATERIALS

This bibliography can be used to find brief writing materials available in the Law Center Library. Locations and call numbers appear at the end of each entry. For some entries, chapters and pages applicable to brief writing have been noted. To locate more books and articles on this topic, search the Touro Libraries Catalog and periodical indexes.

BOOKS

Aldisert, Ruggero J. Winning on Appeal: Better Briefs and Oral Argument. Rev. 1st ed. Deerfield, IL, Clark Boardman Callaghan, 1996. RES/MAIN KF 9050 .A935 1996 *(ch. 6-14, pp. 81-295)*

Alterman, Irwin. Plain and Accurate Style in Court Papers. Philadelphia, ALI-ABA Committee on Professional Education, 1987. REF KF 251 .A47 1987 *(ch. 7, pp. 95-129)*

Bast, Carole M., and Margie Hawkins. Foundations of Legal Research and Writing. 2d ed. Albany, West/Thomson Learning, 2002. MAIN KF 240 .B27 2002 *(ch. 18, pp. 487-516; includes sample briefs)*

Bentele, Ursula, and Eve Cary. Appellate Advocacy: Principles and Practice: Cases and Materials. 3d ed. Cincinnati, Anderson, 1998. RES KF 9050 .A7 B46 1998 *(ch. 8, pp. 322-362)*

Berry, Carole C. Effective Appellate Advocacy: Brief Writing and Oral Argument. 2d ed. St. Paul, West, 1999. RES KF 251 .B43 1999 *(ch.4-6, pp. 54-121; includes sample briefs in Appendix C,D,E)*

Block, Gertrude. Effective Legal Writing for Law Students and Lawyers. 4th ed. Westbury, NY, Foundation Press, 1992. RES KF 250 .B56 1992

Calleros, Charles R. Legal Method and Writing. 4th ed. New York, Aspen Law & Business, 2002. RES KF 250 .C34 2002 *(ch. 21, pp. 417-477; includes sample brief)*

Charrow, Veda R., and Myra K. Erhardt. Clear and Effective Legal Writing. 2d ed. Boston, Little, Brown, 1995. RES KF 250 .C452 1995 *(ch. 15, pp. 259-283; includes sample brief)*

Dworsky, Alan L. The Little Book on Legal Writing. 2d ed. Littleton, CO, Rothman, 1992. RES KF 250 .D88 1992

Edwards, Linda Holdeman. Legal Writing: Process, Analysis, and Organization. 2d ed. Gaithersburg, MD, Aspen Law & Business, 1999. RES KF 250 .E39 1999 *(ch. 16-22, pp. 247-370; includes sample brief in appendix C)*

Enquist, Anne and Laurel Currie Oates. Just Writing: Grammar, Punctuation, and Style for the Legal Writer. Gaithersburg, Aspen Law and Business, 2001. EXT. RES KF 250 .E57 2001

Faulk, Martha, and Irving M. Mehler. The Elements of Legal Writing. New York, Macmillan, 1994. RES KF 250 .F38 1994

Flesch, Rudolf Franz. How to Write Plain English: A Book for Lawyers and Consumers. New York, Barnes & Noble, 1981, c1979. RES KF 250 .F57 1981

Fontham, Michael R., Michael Vitiello, and David W. Miller. Persuasive written and oral advocacy in trial and appellate courts. New York, Aspen Law & Business, 2002. EXT. RES KF 251 .F658 2002 *(ch. 11, pp. 281-307; includes sample brief in appendix II)*

Gale, Frederic G., and Joseph M. Moxley. How to Write the Winning Brief: Strategies for Effective Memoranda, Briefs, Client Letters, and Other Legal Documents. Chicago, ABA Section of General Practice, 1992. MAIN KF 251 .G34 1992

Garner, Bryan A. A Dictionary of Modern Legal Usage. 2d ed. New York, Oxford U. Press, 1995. REF KF 156 .G367 1995

Garner, Bryan A. The Elements of Legal Style. 2d ed. New York, Oxford U. Press, 2002. EXT. RES KF 250 .G37 2002

Garner, Bryan A. Legal Writing in Plain English... Chicago, University of Chicago Press, 2001. RES KF 250 .G373 2001 *(sample brief in Appendix B)*

Garner, Bryan A. The Redbook: A Manual on Legal Style. St. Paul. West Group, 2002. RES/EXT. RES KF 250 .G375 2002 *(§19, pp. 331-360; includes a sample brief)*

Garner, Bryan A. The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts. New York, Oxford U. Press, 1999. RES KF 251 .G37 1999

Gaubatz, John T., and Taylor Mattis. The Moot Court Book: A Student Guide to Appellate Advocacy. 3d ed. Charlottesville, VA, Michie, 1994. RES KF 281 .A2 G38 1994 *(ch. 3, pp. 41-79; includes sample brief in appendix)*

Goldfarb, Ronald L., and James C. Raymond. Clear Understandings: A Guide to Legal Writing. New York, Random House, 1982. MAIN KF 250 .G64 1982

Goldstein, Tom, and Jethro K. Lieberman. The Lawyer's Guide to Writing Well. 2d ed. Berkeley, University of California Press, 2002. MAIN KF 250 .G65 2002

Handbook of Appellate Advocacy, prepared by UCLA Moot Court Honors Program; edited by Lawrence Brennan... 3d ed. St. Paul, West, 1993. RES KF 251 .H36 1993 *(ch. 2, pp. 6-17; includes sample brief in appendix A)*

Haggard, Thomas R. The Lawyer's Book of Rules for Effective Legal Writing. Littleton, CO, Rothman, 1997. RES KF 250 .H34 1997

Harris, Myra A. Legal Writing: Principles of Juriography. Upper Saddle River, NJ, Hall, 1997. RES KF 250 .H37 1997 *(ch. 7, pp. 121-144)*

Introduction to Advocacy: Research, Writing, and Argument, prepared by Board of Student Advisors, Harvard Law School... 6th ed. St. Paul, Foundation Press, 1996. RES KF 281 .A2 I57 1996 *(pp. 39-56; includes sample brief in appendix E)*

Katz, Lucy V. Winning Words: A Guide to Persuasive Writing for Lawyers. Clifton, NJ, Law & Business, 1986. MAIN KF 250 .K38 1986

Knibb, David G. Federal Court of Appeals Manual: A Manual on Practice in the United States Courts of Appeals. St. Paul, West Group, 2000. MAIN KF 9052 .K63 2000 *(ch. 31, pp. 528-568; includes sample brief)*

The Lawyer's Craft: An Introduction to Legal Analysis, Writing, Research, and Advocacy, by Cathy Glaser et al. Cincinnati, Anderson, 2002. RES KF 240 .L374 2002 *(ch. 19-23, pp. 313-387; includes sample briefs in Appendix D,E)*

LeClercq, Terri. Guide to Legal Writing Style. Boston, Little, Brown, 1995. MAIN KF 250 .L3913 1999

Levy, Herbert M. How to Handle an Appeal. 4th ed. New York, Practising Law Institute, 1999. MAIN KF 9050 .L4 1999 *(ch. 6-7, pp. 6-1 – 7-39; includes sample briefs in appendix C)*

Martineau, Robert J. Modern Appellate Practice: Federal and State Civil Appeals. Rochester, NY, Lawyers Cooperative, 1983. RES KF 9050 .M3 1983 *(ch. 11, pp. 151-207)*

Maugans, James D. The Grammatical Lawyer II. Philadelphia, ALI-ABA Comm. On Continuing Professional Education, 1996. MAIN KF 250 .M28 1996

Mellinkoff, David. Legal Writing: Sense and Nonsense. St. Paul, West, 1982. MAIN KF 250 .M44 1982

Moskovitz, Myron. Winning an Appeal. 3d ed. Charlottesville, VA, Michie Butterworth, 1995. MAIN KF 9050 .M63 1995 *(ch. 3, pp. 13-49; appendix includes 3 sample briefs)*

Neumann, Richard K. Legal Reasoning and Legal Writing: Structure, Strategy, and Style. 3d ed. Boston, Little, Brown, 1998. RES KF 250 .N48 1998 *(ch. 27-29, pp. 345-373; includes sample briefs in Appendix F,G)*

Oates, Laurel Currie, Anne Enquist, and Kelly Kunsch. The Legal Writing Handbook: Research, Analysis, and Writing. 2d ed. Boston, Little, Brown, 1998. RES KF .Q18 1998 *(ch. 8, pp. 253-367)*

Peck, Girvan. Writing Persuasive Briefs. Boston, Little, Brown, 1984. RES KF 251 .P36 *(includes sample briefs in appendix A,B)*

Potuto, Josephine R. Winning Appeals: Persuasive Argument and the Appellate Process. Notre Dame, National Institute for Trial Advocacy, 1992. MAIN KF 9052 .P67 1992

A Practical Guide to Legal Writing and Legal Method. 2d ed. by John C. Dernbach... Littleton, CO, Rothman, 1994. RES KF 250 .P72 1994 *(ch. 19-24, pp. 215-294; sample briefs in appendix B,C,E,F)*

Pratt, Diana Volkmann. Legal Writing: A Systematic Approach. 2d ed. St. Paul, West, 1993. RES KF 250 .P73 1993 *(ch.18-21, pp. 259-318; includes sample briefs in appendix D,E)*

Rambo, Teresa J. Reid, and Leanne J. Pflaum. Legal Writing by Design: A Guide to Great Briefs and Memos. Durham, Carolina Academic Press, 2001. RES/EXT. RES/MAIN KF 250 .R35 2001 *(ch. 19-27, pp. 329-466; sample briefs in ch. 35-37, pp. 589-654)*

Ray, Mary Barnard, and Barbara J. Cox. Beyond the Basics: A Text for Advanced Legal Writing. St. Paul, West, 1991. RES KF 250 .R38 1991

Ray, Mary Barnard, and Jill J. Ramsfield. Legal Writing – Getting It Right and Getting It Written. 2d ed. St. Paul, West, 1993. MAIN KF 250 .R39 1993

Re, Edward Domenic, and Joseph R. Re. Brief Writing and Oral Argument. 8th ed. Dobbs Ferry, NY, Oceana, 1999. RES KF 251 .R4 1999 *(ch. 5-8, pp. 43-135; sample briefs in Appendix B,D)*

Schultz, Nancy L., and Louis J. Sirico, Jr. Legal Writing and Other Lawyering Skills. 3d ed. New York, M. Bender, 1998. MAIN KF 250 .I57 1998 *(ch. 23-316; samples in Appendix V-I)*

Shapo, Helene S., Marilyn R. Walter, and Elizabeth Fajans. Writing and Analysis in the Law. 4th ed. Westbury, NY, Foundation Press, 1999. RES KF 250 .S5 1999 *(ch. 18, pp. 298-369; sample included in Appendix F)*

Sirico, Louis J. Persuasive Writing for Lawyers and the Legal Profession. New York, LexisNexis, 2001. RES KF 250 .S54 2001

Smith, Robert B. The Literate Lawyer: Legal Writing and Oral Advocacy. 3d ed. Salem, NH, Butterworth Legal, 1995. MAIN KF 250 .S54 1995 *(ch. 6, pp. 113-168, includes sample)*

Statsky, William P., and R. John Wernet. Case Analysis and Fundamentals of Legal Writing. 3d ed. St. Paul, West, 1989. RES KF 240 .S78 1989 *(ch. 21, pp. 279-297)*

Stern, Robert L. Appellate Practice in the United States. 2d ed. Washington, DC, Bureau of National Affairs, 1989. RES/MAIN KF 9050 .S75 1989 *(ch. 9-12, pp. 225-359; sample briefs included in appendix A,B,C)*

Stott, William. Write to the Point, and Feel Better About Your Writing. New York, Columbia University Press, 1991. MAIN PE 1408 .S7665 1991

Strunk, William. The Elements of Style... and a Chapter on Writing by E. B. White. 3d ed. New York, Macmillan, 1979. REF/RES PE 1408 .S772 1979

Teply, Larry L. Legal Writing, Analysis, and Oral Argument. St. Paul, West, 1990. RES KF 250 .T47 1990 *(ch. 9, pp. 339-371; includes sample brief)*

Weisberg, Richard H. When Lawyers Write. Boston, Little, Brown, 1987. MAIN KF 250 .W44

Wydick, Richard E. Plain English for Lawyers. 3d ed. Durham, NC, Carolina Academic Press, 1994. RES KF 250 .W9 1994

ARTICLES

Aldisert, Ruggero J., The Beef of the Brief Isn't Found in the Fat, Nat'l L.J., Sept. 6, 1993, at 17

Boehm, David O., Clarity and Candor are Vital in Appellate Advocacy, 71 N.Y. St. B.J. 52 (Nov. 1999)

Duncan, Sarah B., Pursuing Quality: Writing a Helpful Brief (Appellate Law in the New Millennium: Bridging Theoretical Foundation with Practical Application), 30 St. Mary's L.J. 1093 (1999)

Grey, Lawrence, Writing a Good Appellate Brief, 57 N.Y. St. B.J. 24 (Feb. 1985)

Griffith, Kendall, Effective Brief Writing, 16 Forum 460 (1981)

Hecht, Nathan L, Extra-Special Secrets of Appellate Brief Writing, 3 Scribes J. Legal Writing 27 (1992)

Herman, G. Nicholas, Practice Pointers for Appellate Brief Writing: Arguing the Law and the Facts, 28 Trial 122 (Sept. 1992)

Levitan, Mortimer, Confidential Chat on the Craft of Briefing, 4 J.App. Pract. & Process 305 (2002)

McElhaney, James W., The Art of Persuasive Legal Writing: Briefs Come Alive When Every Word Sings to the Reader, 82 A.B.A. J. 76 (Jan. 1996)

McElhaney, James W., A Matter of Style: What It Takes to Make Legal Writing Look Persuasive, 82 A.B.A. J. 84 (Apr. 1996)

McElhaney, James W., Twelve Ways to a Bad Brief: Following Instincts May Hurt a Submission to the Court, 82 A.B.A. J. 74 (12/1996)

Miner, Roger J., Twenty-Five "Dos" for Appellate Brief Writers, 3 Scribes J. Legal Writing 19 (1992)

Pregerson, Harry, The Seven Sins of Appellate Brief Writing and Other Transgressions, 34 UCLA L. Rev. 431 (1986)

Ramsfield, Jill J., Writing High-Impact Briefs: Effective Persuasion Techniques, 30 Trial 54 (Jan. 1994)

Rosenblatt, Albert M., Brief Writing and Oral Argument in Appellate Practice (New York), 24 Trial Law. Q. 22 (Fall-Winter 1993)

Strutin, Kennard R., Quantity Versus Quality in Writing Appellate Briefs, 215 N.Y.L.J. 1 (1996) *(3/6/96)*

Walsh, Michael G., Points to Ponder Before Writing Your Next Appellate Brief, 44 Prac. Law. 15 (June 1998)

VIDEOS

Brief Writing and Oral Argument, featuring Edward D. Re. Dobbs Ferry, NY, Condyne/The Oceana Group, 1988. RES KF 251 .R41 1988 *(Pt. 1: Writing of the Document; Pt. 2: Trial and Appellate Briefs: Opinion Letters and Memoranda of Law*

Effective Argument to the Court... ABA Consortium for Professional Education and the Section of Litigation; National Institute for Trial Advocacy... Chicago, ABA, c1989. RES KF 8870 .Z9 E44 1989 *(Tape #EAC1004: Effective Arguments to the U.S. Supreme Court: Brief; Study Guide includes sample briefs)*

Making the Oral Argument: the View from the Inside Out... ABA Center for Continuing Legal Education and the Section of Litigation in cooperation with the Judicial Division Appellate Judges Conference. Chicago, ABA, 1996. RES KF 8870 .Z9 M35 1996 *(The initial section of the Study Guide includes the following article: Writing a Readable, Persuasive Brief. Rev. ed. by Sanford Snetcov.)*

OTHER SOURCES

The Library has microform copies of briefs from the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the New York courts (MEDIA CENTER). Not all briefs are available for each court; consult a Reference Librarian for assistance. In addition, Westlaw and LexisNexis have briefs from the U.S. Supreme Court; consult the directories of each service for coverage.

The Harvard Bluebook (REF/RES KF 245 .U55), and various court rules (RES/OTHER LOCATIONS) should be consulted as appropriate.

The Legal Methods faculty place copies of sample briefs on reserve at the Circulation Desk in the library each year. 1Ls should request samples by name of professor.

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Plain legal language

Recommended reading

1. Troy Simpson, *Win More Cases: The Lawyer's Toolkit* (with a Foreword by Justice Michael Kirby) (Join Write Better English to receive a **20% discount** on this title, until 31 May 2008)

Independent review by Stephen Chakwin, trial lawyer and appellate lawyer, New York

The art of argument (rhetoric) is, like all the arts, based on craft. This book offers a valuable grounding in the skills of that craft, the tools that are there to be used in it, and the ways that mastery of this craft can free you to achieve the artistry that guides thought and moves emotions. Beginners will find this a valuable guide to what they must learn to progress to mastery. The experienced, no matter how skilled and experienced they may be, will find a useful reminder of basics and some new insights into familiar techniques that can broaden and deepen established art.

As one would expect in a book about written communication, this one is clearly written. The style is crisp without being dry, authoritative without being didactic. I found that I was approaching it as a reference book and then getting engrossed in it as if it were a chronicle.

I would have welcomed a discussion of the role of emotions in decision-making and of some current psychological findings such as Robert Cialdini's work on influence tied in to the nuts-and-bolts of argument structuring, but within its still-ambitious limits, this book is a welcome resource.

2. Michael R Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing (Legal Research and Writing)* (2002)

Reviewed by Troy Simpson LLB(Hons)

Lucid and practical.

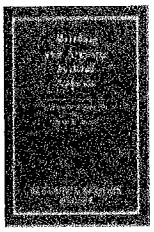
Smith fills a gap in the literature on legal writing. The particular strengths of this book are the sections that explain how to persuade judges and other legal audiences with "medium mood control" and "ethos" (credibility). While

the book incorporates a lot of theory, the book also provides lots of concrete and practical advice, lucidly written, which lawyers can use in their daily writing. Ideal for crafting persuasive "trial briefs" and "appellate briefs" (US terminology), "written submissions" (Australian terminology), "skeleton arguments" (UK terminology), and other legal documents.

3. Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* (1961, 2001 reprint)

Reviewed by Troy Simpson LLB(Hons)

A classic.



I agree with Bryan A Garner, who writes the Introduction to this 2001 reprint, that Wiener's book is 'a brilliant book by a brilliant mind. It's the seminal 20th century book on appellate advocacy, with wisdom, insight, and concrete examples packed into page after page'. Three chapters will particularly interest visitors to Write Better English (Ch III 'Essentials of an Appellate Brief', Ch IV 'Suggestions for Writing and Research', and Ch V 'The Finer Points of Brief Writing'). Some of the reasons the book gets 4 stars rather than 5 stars are that it is dated, its focus is entirely on America, and the book costs quite a lot. But while the book is American, much of the book's advice could apply to other jurisdictions where written argument is important to a case's outcome.

4. Bryan A Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (2004).

Reviewed by Ed Serenson

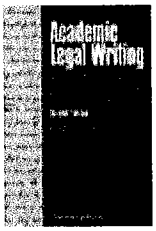
My number-1 pick.

Provides valuable advice on writing clear and persuasive legal language. It is an American work, but many tips would apply to lawyers in other jurisdictions. Useful not only for lawyers, but also law students.

5. Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* (2003).

Reviewed by Ed Serenson

A sentimental favourite.



Academic Legal Writing is an American book, but it still provides helpful advice for law students from other countries. Concise and lucid. Bryan A Garner says *Academic Legal Writing* is "the best ever in its field. Heed it closely if you want to make the grade".

☆☆☆☆

6. Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (2006)

Reviewed by Troy Simpson LLB(Hons)

☆☆☆☆

Persuasive.

The first part of this collection of essays argues the case for plain legal language. For example, Kimble rebuts the myth that plain language is imprecise. In the second part, Kimble explains how to write plain language. Garner's *Winning Brief* is more comprehensive than Kimble's book, but *Lifting the Fog of Legalese* is still useful. The book also has a useful bibliography.