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# Mastering the Art of Persuasive Appellate Briefs: Practical Tips From Former Appellate Law Clerks

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THURSDAY, SEPTEMBER 10, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Bennett Evan Cooper, Member, **Dickinson Wright**, Phoenix  
Rachel C. Hughey, Partner, **Merchant & Gould**, Minneapolis

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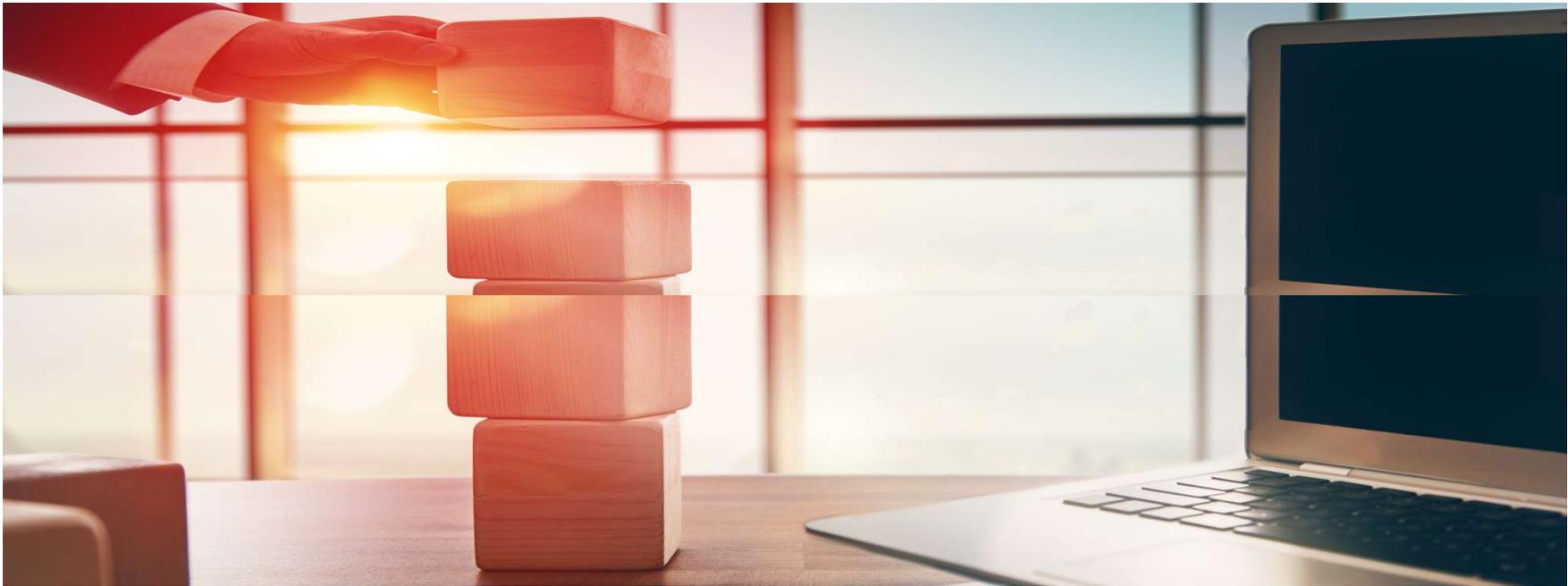
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# Mastering the Art of Writing Persuasive Appellate Briefs

Strafford Webinars  
September 10, 2020

**Bennett Evan Cooper**, *Dickinson Wright PLLC, Phoenix, AZ*  
**Rachel Clark Hughey**, *Merchant & Gould P.C., Minneapolis, MN*

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# I. Stating the issues persuasively

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# How appellate briefs differ from other legal writing

- Theory versus anticipation  
*More is expected, which isn't saying much.*
- Standards of review  
*This is not a second bite at the apple.*
- Formal structure of the brief  
*It's kabuki, not free verse.*
- Judicial exposure  
*One shot, Nicky. One shot.*
- Different audience, different strategy  
*You can't fool all of the people all of the time.*

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# Focusing on the brief's formal goals

- The brief's sections are layers of advocacy, whether patent or latent.
- Different sections have different tones but the same purpose: convincing the court why your client should win
- Different judges have different ports of entry into the brief

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# The brief's opening sections

- Cover
- Table of Contents
- Table of Authorities
- Jurisdictional Statement
- Statement of Issues Presented

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# Can you judge a brief by its cover?

- Follow the rules as to layout and content
- Use the court's required caption, if any
- Favor legibility over "traditional" look, e.g., regular caps or small caps, not all caps, and no "Ye Olde Font Style" for the court's name
- Identify the brief conspicuously, because e-briefs don't usually have color covers
- To ease navigation, make the cover "silent page 1" and paginate consecutively so nominal page numbers match PDF page numbers, or adjust the PDF number

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# Table of Contents: Roadmap to the brief

- Run it early and often
- Make it easily readable
- Keep it consistent stylistically
- The fact headings should tell a story
- The argument headings should identify the issues
  - “We win because . . .”
  - Avoid abstract legal propositions not applied to the facts
- The table should tell you about the soundness of the argumentative structure

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# Table of Authorities: Reader's guide

- Judges actually use these to find arguments
- Don't wait until the end
- Inaccurate tables are *worse* than useless
- Pass on *passim*
- Highlight page numbers for important discussions and important authorities, particularly when the rules so require

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# Jurisdictional Statement: Checking the boxes

- A classic “rule-satisfaction” work: functional checklist, not usually argumentative
- Key jurisdictional statutes or case law, where potentially at issue
- Key trigger dates with record citations

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# Statement of Issues: Be persuasive

- In less than a few sentences (ideally 75 words or less), present the theory of the case and sufficient facts and law to support that theory.
- The question
  - a factual element
  - a legal element
- The answer
  - a conclusion from the facts and the law
- Making the issue a syllogism

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# Statement of Issues: Less is more

- If you don't win on your first three arguments, what are your chances on number four?
  - "[I]f you have two or three shots at the trial forum in your questions and you can't hit it, then the rest of your shots really aren't very useful."<sup>1</sup>
- Increasing issues = decreasing chance of success
  - "[E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one."<sup>2</sup>

<sup>1</sup> Judge S. Jay Plager, *Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 277 (1999).

<sup>2</sup> Justice Robert Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 15, 119 (1951)

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## II. Telling the client's story with the Statement of Case and Statement of Facts

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# Statements of Case and Facts

- Statement of the case: How did the issue arise and get to the appeal?
- Statement of the facts: What is the story to which the legal principles must be applied?
- Merged statements of the case and facts, e.g., FRAP 28(a)(6)
  - Where jurisdiction permits it
  - Where the facts of the case *are* the facts, i.e., issues focused on the litigation itself
  - Intertwined procedure and facts requiring consolidated exposition rather than separate series of case and facts

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# Statements of Case and Facts: *Goofus & Gallant*

- Details, details: What hath God overwrought?
  - Statement of Case reads like the docket
  - Statement of Facts reads like a badly written opinion
- What not to do
  - Avoid detail without focus, precision without coherence.
  - Don't say things without a supporting record citation.
- What to do
  - Statement is for basic story; detail is for argument
  - Put advocacy in selection, arrangement, and coordination of facts, not in explicit argument
  - Be candid and pull teeth of less-advantageous facts

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# Statement of Facts: Focusing your client's story

- Choose facts that make your legal analysis inevitable
  - Abandon gratuitous precision if details don't matter, e.g., dates, names, places
- Be more journalistic, e.g., the Five Ws
  - Don't feel shackled by chronology, because some legal stories are not time-based
  - This ain't Hitchcock: keep the suspense down
- Narrative should funnel from general and contextual to key issues for appeal and analysis
- Think about story's point of view and organizing principles, e.g., protagonist, geography

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## III. Spoiler alert: Effective Summary of Argument

- The summary of the argument is a key part of the brief
  - It is the roadmap of your argument
  - Judges may read the summary of the argument first
- In a concise matter (less than 2 pages), tell the court what went wrong (or right)
  - Summary of the best reasons you should win, e.g., error of law/misunderstanding of facts/etc.
  - Should follow structure of your argument section
- Consider adding permissive introduction at start of brief as snapshot of what the appeal is

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## IV. Presenting the argument clearly and concisely

- Honing in on the weaknesses in the opponent's position
- Presenting the written argument concisely and with proven techniques of persuasion
- Avoiding common brief-writing mistakes that weaken your client's position

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# The Argument: Principles of advocacy

- Clarity
  - “Judges are not like pigs, hunting for truffles buried in briefs.”<sup>1</sup>
- Make concessions
- The shorter the better
  - “[E]ye fatigue, even irritability, sets in well before page fifty.”<sup>1</sup>
- Get to the point
  - “[I]n the ‘Argument Section’, I often find a great deal of chaff and not very much wheat.”<sup>2</sup>

<sup>1</sup> Justice Ruth Bader Ginsburg, Remarks on Appellate Advocacy, 50 S.C. L. Rev. 567, 568 (1999).

<sup>2</sup> Judge Paul R. Michel, *Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 281-82 (1999).

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# The Argument: Selecting the arguments

- Chart a path to victory
  - Is issue necessary to result or outcome-determinative? Or are you just a sore loser?
  - When faced with alternatives, make a choice
- Does it feel good?
- Get real
- Conquer your fears: show faith in your arguments and your judgment
- Rifles are more deadly than shotguns

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# The Argument: Consolidating arguments

- Avoid complexity and numerosity beyond comprehension, e.g., the “power of three”
- Grouping by like
  - E.g., evidentiary arguments, or hearsay arguments, under a single roman numeral
  - Allows sharing of introductory legal discussions and standard of review

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# The Argument: Principles for ordering arguments

- Power considerations: strongest first?
- Procedural considerations: thresholds first? order raised?
  - Should threshold argument (e.g., jurisdiction, waiver, limitations) go first because judges can avoid work?
  - If threshold argument goes at back, would that concede weakness in light of expectations?
- Logical considerations: chronological? claim elements? statute then public policy?
- Writing considerations: dictates of exposition? building arguments on each other to avoid repetition?

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# The Argument: Using legal authorities

- Be narrow
  - Avoid seeking a broad change in law
- Focus
  - No need to restate well-settled law or belabor authority
  - Avoid string cites & block quotes
  - Confront and distinguish bad law
- Honesty
  - Do not misstate legal authority (you will get caught)
- Perfection
  - Bluebook, California Style Manual, etc.
  - Avoid law-review fetishism as to unpersuasive detail

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# The Argument: Responses, replies, cross-appeals

- Should response track opening brief or use different order?
  - Answer is situational
  - Give cross-references to allow court to move back and forth
- Avoid counterpunching: make your affirmative argument coherent
- Don't follow all red herrings; not everything deserves answers

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# The Argument: Responses, replies, cross-appeals

- Reply brief should not rehash because briefs are read together
  - Reset the stage with what is still in play
  - Refocus the court on the critical issues and path to victory
- Appeal and cross-appeal: Flip sides of same coin or ships passing in night?
  - Consider consolidating and rearranging the appeal and cross-appeal issues into a well-mapped decisional path

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## V. Leaving a lasting impression

- Conclusion
  - Make sure to be clear about what relief you are seeking, including alternative relief
  - Should you be argumentative?
- Appendixes, excerpts of record, and addendums
  - The parties often work together to prepare a joint filing
  - Less is more
    - Do not cite everything
    - Do not include briefs in their entirety (unless you should)
  - More is more
    - Make sure to give the court context

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# Thank You

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