

Writing the Criminal Appeal Brief

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Writing the Criminal Appeal Brief

Mark J. Mahoney¹

The focus of this article is on the task of brief writing itself, and the form of the work, and not on the substantive or procedural doctrine which might apply to the case at hand.

The task of persuading appellate judges of the correctness of a criminal defendant's appeal is a highly individual and creative task. It is an art. And as an art, it will be performed differently by each practitioner. Two briefs submitted by capable advocates can vary widely in every respect and still be as effective. The proper consideration is not in adherence to a set of abstract rules. The point is whether the final effort is reasonably designed to achieve its persuasive objective and whether the attorney, in performing the task, stayed in harmony with the broad objectives and rules of the legal system in which he seeks to be an effective and "cooperative" part.

However, having said that, there is one step beyond this to which I always allude: by completely mastering the objectives and rules of the legal system, and the doctrine which has evolved within it, the attorney can sometimes incrementally and sometimes with broader strokes, actually effectuate change in that doctrine. The change may perhaps not come in this case, but it may surface unpredictably in other cases.

Notwithstanding the characterization of appellate advocacy, and brief writing, as an "art," there is nothing so mysterious or esoteric about it that the essentials cannot be taught and learned. As stated by Frederick Bernays Weiner, in his classic work, "any competent lawyer has the ability, with study and proper application, to write a brief and make an argument that will likewise be competent—and that will further his client's cause."

§ 1. Preparing to write the brief

In theory we get more time to pay attention to appeals than most other stages of criminal practice. In reality, having time to actually mull over strategies and test out different theories is a rare luxury. To a significant extent, especially for those who do not exclusively do appeals, it is hard to get going on an appeal, and never soon enough, partly because of the relative urgency of matters pending trial, and partly because of the laboriousness of the beginning of the appeal process. The most mundane and tedious, even arduous, tasks comes first: assembling and mastering the record in the case..

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[a] The record

Sometimes there are choices about what is in the record, and what “method of appeal” to choose, whether it is a Record or Appendix method or something else,² and this may be affected by whether the client is proceeding *in forma pauperis*. This is not in the scope of this outline (and is too abstract to talk about in general). However it is necessary to make sure that all the transcripts of proceedings, all the pleadings, all the verdict sheets and notes from jurors, and all the exhibits are assembled and reviewed, at least to insure completeness.

Review these materials in the indictment file at the court and any clerk’s minutes in the part of court where the case was tried, or the docket entries, wherever they are, for notes about court appearances, adjourn dates, conferences, etc. is necessary to have a complete picture of the chronology and proceedings in the case. Get a copy of the “judgement” which is simply the certificate of conviction showing the verdict and the sentence as it is communicated to the prisons. All this will all be necessary when it comes to writing the preliminary statement.

And sometimes this review will yield surprises, even to the lawyer who tried the case. Because the rules in most jurisdictions require the parties to agree on what is in the “record,” doing this early, even if not mandated in a scheduling order, is important so any disagreements can be addressed.

[b] Expand the record?

In every case consider whether there is a need to expand the record. State procedures for post verdict or post-judgment attacks, or a Rule 33 motion or a *habeas corpus* petition are vehicles by which to explore facts that otherwise would not appear in the record about events occurring during the case which affected the outcome. See, *United States v. Outen*, 286 F.3d 622 (2d Cir.2002) (discussing 2255 *habeas* while direct appeal is held in abeyance) Of course, in the rare event that a reversal or new trial were to be ordered as a result of these applications, that would obviate the direct appeal. But if efforts are not successful, they may be pursued on the appeal, or through consolidation of the appeals. (Where permission to appeal the denial is required, as in a NY Art. 440 motion, the granting of that motion may be

² "Record" method refers to the parties assembling a full record, and reproducing it for submission to the court. An "Appendix" method involves the selection of parts of the record to be submitted by the parties, either in a joint appendix or separate appendices. Proceeding on the "Original Record" involves a record that is transmitted from the trial court to the appellate court with the parties perhaps submitting appendices in addition. Sometimes these are dictated by the rules of the jurisdiction, sometimes by habits. But both rules and habits should be required to succumb to the needs of an individual case. Institutional defenders or assigned appellate advocates who are accustomed to sending a brief only, with the appeal being heard on the "original record" need to consider using an appendix where helpful to make a point or ease the task of the judges.

more likely if the motion for permission to appeal could be filed before the perfection of the direct appeal)

Although this is of interest in cases of late revelations of the suppression of prior statements or favorable information, most typically this is of concern in appeals involving concerns for effective assistance of counsel, and, therefore, where the counsel on the appeal is new to the case. For that reason alone it can be a daunting thing to attempt, partly because of any statutory time limitations on bringing post-verdict applications (7 days unless extended, under Rule 33), and also because of the need to drop everything to investigate the whole matter. Nevertheless, in cases where it is apparent that the inclusion of facts and events not appearing in the record will provide the very best opportunity for the defendant to get any relief, it must be considered.

Additionally, there may be documents in the possession of the parties, correspondence between the parties and the court, etc. which rightly belong in the record. Often the parties can stipulate to the inclusion of such materials in the record.

[c] Pagination of Records and Appendices

There is another very important reason to be clear at the outset as to the “method of appeal” as referred to above, and the contents of the record. A big advantage of submitting a record or appendix is that it allow for less confusing references to the “record” on which your appeal is based. Simple references to [R-] or [A-] are much easier on the reader. Especially where there are several hearings, and a trial, this avoids the confusion arising from citations to several different transcripts and collections of records which require a key in a footnote to follow.

To efficiently achieve the aesthetics of having simple references to the record, any record or appendix must be assembled at the outset, so that you can start out preparing your brief with the numbering system you will end up using. This avoids having to later transpose page references to individual transcripts to pages in the record or appendix, especially at the last minute.

There is a useful shortcut to this. If you are binding the trial transcript together with other record documents, then try to come up with a numbering scheme for those materials that will implement your trial transcript pagination. Because it is usually required to put certain documents first in the record or appendix, like the notice of appeal and the judgment of the lower court, it is simply not possible to have the physical first page of your appendix also be page “1” of the trial. However, if the necessary record documents and any pretrial transcripts were numbered with a suffix—“a”—like “A-1a” through “A-323a,” for example, the trial transcript could start as “A-1” and then you could simply use the natural transcript page numbering when making references to the trial evidence in the brief. Planning to do this allows some flexibility in the determination of the ultimate contents of the appendix.

Experienced appellate printers will be able to give guidance on what techniques like this have been used in the court you are dealing with.

§ 2. Mastering the facts: the “transcript summary”

The most easily recognized, and perhaps most annoying practice in brief writing is the “transcript march.” This is the presentation of the facts in a witness-by-witness fashion tracking the presentation at trial. As discussed below in relation to the Statement of Facts itself, this is never the most effective or efficient method of presenting the facts. It only seems efficient because it parallels a straight reading of the record and allows one to create a “Statement of Facts” as one goes along. It is, by prescription, devoid of drama and persuasive ability.

To escape the “transcript march” one has to decide what organization of the facts is most suited to the case. Generally the ultimate statement of facts will involve a chronological arrangements of topical issues — the conduct underlying the accusation, the facts and issues involved in the investigation, prosecution, trial, and sentence. Whatever the topics and order contemplated, the task in reading the transcript is to cull the facts which are relevant to each section so that, then or later, they can be presented in that order.

The challenge in doing this arises from the following reality:

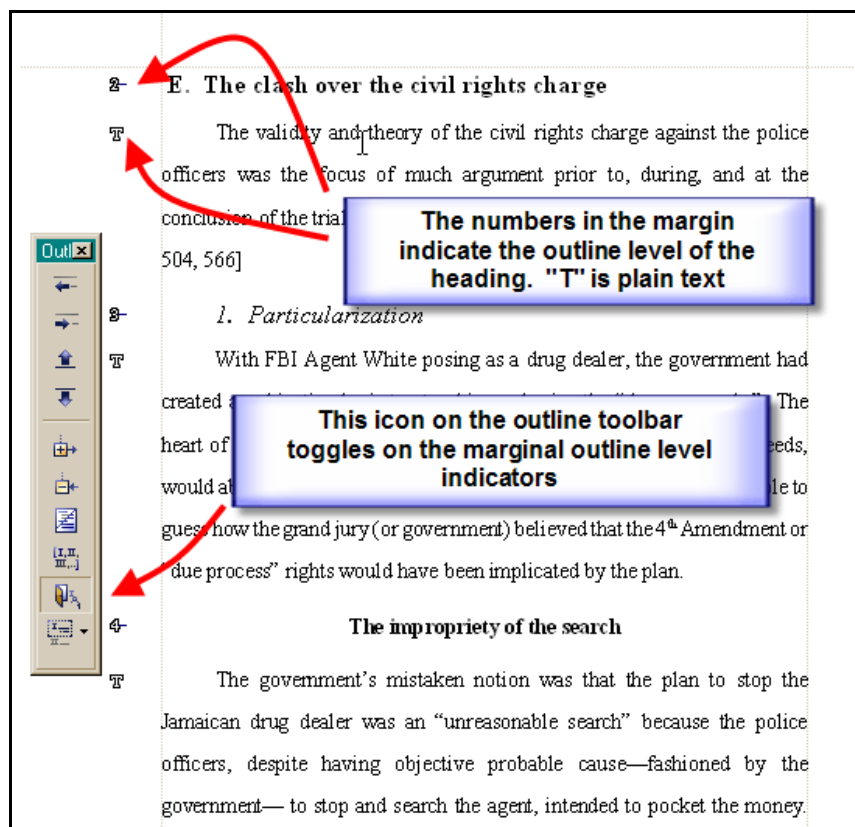
- one fact in the record may apply to several issues
- there are different, often competing versions of the same “fact” which have to be compared and reconciled
- you may also need to arrange some facts chronologically
- some facts or issues become important only after review of the whole transcript

The difficulty in dynamically adjusting to these concerns on a first read of the record is the primary reason the “transcript march” is seen so commonly. It is also the reason that many advocates later clutter the points of argument with factual assertions that should have been in the statement of facts. It is also why the best advocates simply commit themselves to doing a “quick” first read of the record, writing very little, and then produce a statement of facts on a second read.

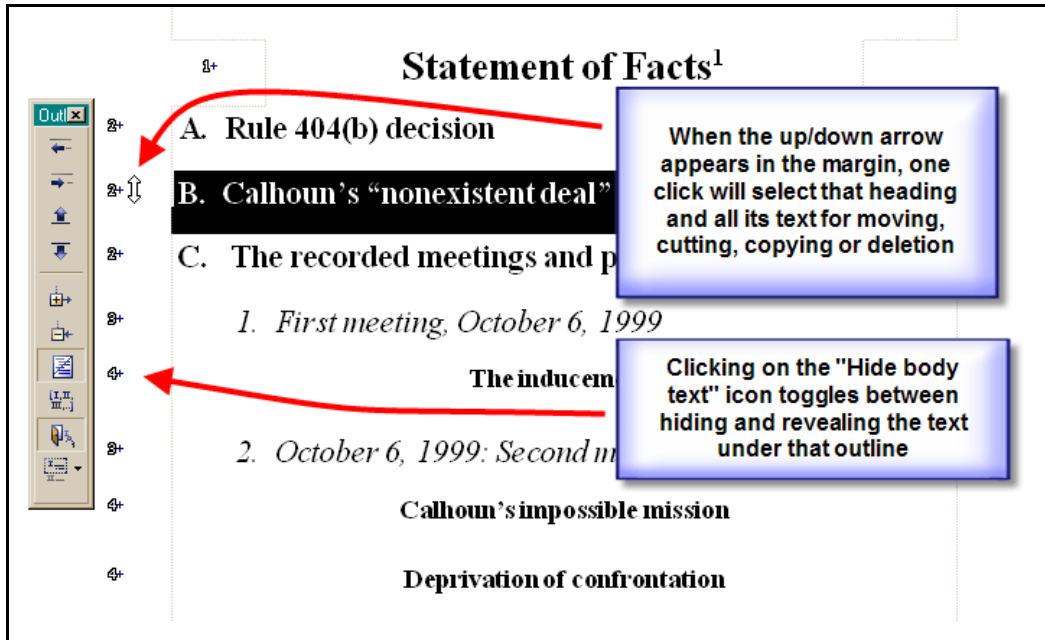
There are techniques you can use, taking advantage of technology, to efficiently review the record while simultaneously associating each pertinent fact with its topical or chronological position, with complete freedom to rearrange the order of presentation to make the most compelling presentation.

[a] Begin with an outline of the facts if you can

If you can begin with an outline of the facts, organized to bring out the facts and the issues in a logical, dramatic and compelling order, then it is possible to flesh out that outline with the facts and events in the record as you read through it. In this regard thorough familiarity with the outlining capabilities of your word processing software will be most essential. Generally, the outline feature allows easy creation of headings at different outline levels, and permits the easy relocation of headings with their accompanying text to a new location. The text body can be “hidden” so only the outline shows, again to relocate headings (with their text) and to view the structure of the document.



WordPerfect's Outline Tools lets you add, promote/demote headings and reveal heading levels



Hiding the text reveals the outline headings. Selecting a heading grabs all the text under that heading tool

You may not be able to *begin* with a full outline if you are not familiar enough with the case. But using outline tools you can build the outline as you go along, adding new headings and subheadings as you discover facts supporting them. As you go along, or at the end, you can rearrange the order of presentation using the outline tools.

One of the main advantages of using the outline feature in your word processing program is that, by incorporating outlining headings to organize your material—whether in Word or WordPerfect—you already have done what you need to do to create a Table of Contents. The table of contents at the beginning of this monograph was created in this fashion (and in WordPerfect the hyperlinks to each page can be created, and, as here, preserved when you create a PDF file from it). This required no more work than simply designating where the Table of Contents was to be inserted.

Thus, there is absolutely no excuse for not creating a Table of Contents in any legal memorandum or brief, and no reason to do it manually. However, in even the largest firms, I have seen briefs where the table of contents had to be created manually, after the fact, because no one understood how to use the heading styles or, in default of that, how to mark individual manually created headings for the table of contents.³

³ In general, see my monograph entitled "Document Processing for the Criminal Defense Lawyer"

[b] The trial record as a database

The challenge of selecting and ordering the facts described above is the kind of problem that databases were designed to solve — permitting the entry of information in any order, and then rearranging it by selected criteria and in a selected order. Using database tools that exist on most computers, and even within word processing software, it is possible to create a transcript summary which contains each factual assertion or event in the record which can be identified by the page, witness or exhibit, the date (or dates--date of event, date of reporting), and the issues it relates to.

Using this input method, it is then possible to rearrange or select the material by any of these categories. This would allow you to collect all the references to a single event, or a single point in an event, in one spot, in order to write a compelling narrative of what occurred at that point in time according to all the testimony.

WordPerfect tables and merge files can be sorted by the contents of any field. Tables can be converted to merge data files as well, which also have the ability to select records by testing whether any field contains certain text. These are essentially database functions. But if you have more than a few issues, and if too many issues arise during the review of the record, then the design of the project becomes cumbersome. Other dedicated text-oriented databases may be more flexible, such as AskSam or FileMaker. The databases which come bundled with your computer or the Corel Suite, with Paradox, will serve perfectly well. The discontinued, but still available program, Lotus Agenda, is ideally suited to this task.

However, this approach requires a homegrown system and a level of comfort and skill with the computer that might be daunting for most. Yet, this discussion of the theory of it is helpful in understanding the task of mastering the facts, and understanding how the true mission of the statement of the facts, which cannot be fulfilled by the “transcript march,” requires real thought and effort.

[c] Using the “ASCII,” or “.txt,” electronic transcript

Often overlooked by lawyers is the availability of transcripts in electronic format. It is a huge advantage to begin with the text of your transcript in electronic form. At very least you will not have to retype material in the transcript when quoting it in the brief or when creating your summary. Do not make the mistake of thinking that one can scan a hard copy of a transcript, then “OCR” it to get the text if you need it. The output of this process is completely different from an original text file.

“ASCII”⁴ refers to a file that consists of plain text, with no formatting codes in it. It

⁴ (American Standard Code for Information Interchange, pronounced "ask-ee") is the built-in binary code for representing characters in all computers consisting of 128 characters, including upper and lower

is usually designated with the file extensions “.asc” or “.txt.” While it may seem attractive to obtain files from court reporters in a standard word processing format, this should be avoided, for default settings on your computer can dramatically change the format, and hence pagination, of what you see on your screen. Moreover those files cannot be imported into transcript management or litigation support software, which are designed to accept ASCII transcripts.

More advanced reporters may provide transcripts in “.ptx” format, which is specifically designed to be imported into transcript management programs like RealLegal’s Binder. If you receive such a file it can be treated like any ASCII file, but can also be viewed in a free reader program.⁵

[i] Index, lists

Just within your word processing program with an electronic transcript at hand you can create your own index to the record using the “Index” functions right in WordPerfect and Word. While some stenographers provide their own “index” to the record, it is just a word index, where virtually every word is indexed. For analysis purposes it is more useful to index the record manually according to the relevant topics. Current indexing features in word processing programs are cumbersome, but effective in analyzing a small number of issues.. The ability to create a “concordance file” that works with the indexing means that you can automatically include in the index any reference to specific words or names if that is helpful.

Outlines are cumbersome in WordPerfect because the

“List” is a very useful feature, but only found in WordPerfect. Several lists can be created in the same document. A list is created by blocking the relevant text, and then, in the reference tools dialog, selecting or creating the list name, and selecting “Mark.” Designate where the list shall be displayed in the document by putting the cursor at that point and, again in the reference tools dialog, “Define” the list and A text list when “generated” shows each block of text which the reader has marked marks in the document ordered in the same order as they appear in the document. The generated list, for example of the Prosecutor’s outrageous comments, or the rulings denying defense objections to evidence, can contain a “hyperlink” to the page in the transcript where the comment actually appears.

This technique is especially useful if attempting to catalog a particular type of repeating errors in a trial. Here it the example of a list generated of leading questions not objected to

case alphabetic letters, the numeric digits and special symbols such as the \$ and %. What this really means is that there are no formatting codes included in the file, such as “**bold**” or line spacing, etc.

⁵ E-Transcript Viewer™, available for free at <http://www.reallegal.com/download.asp>

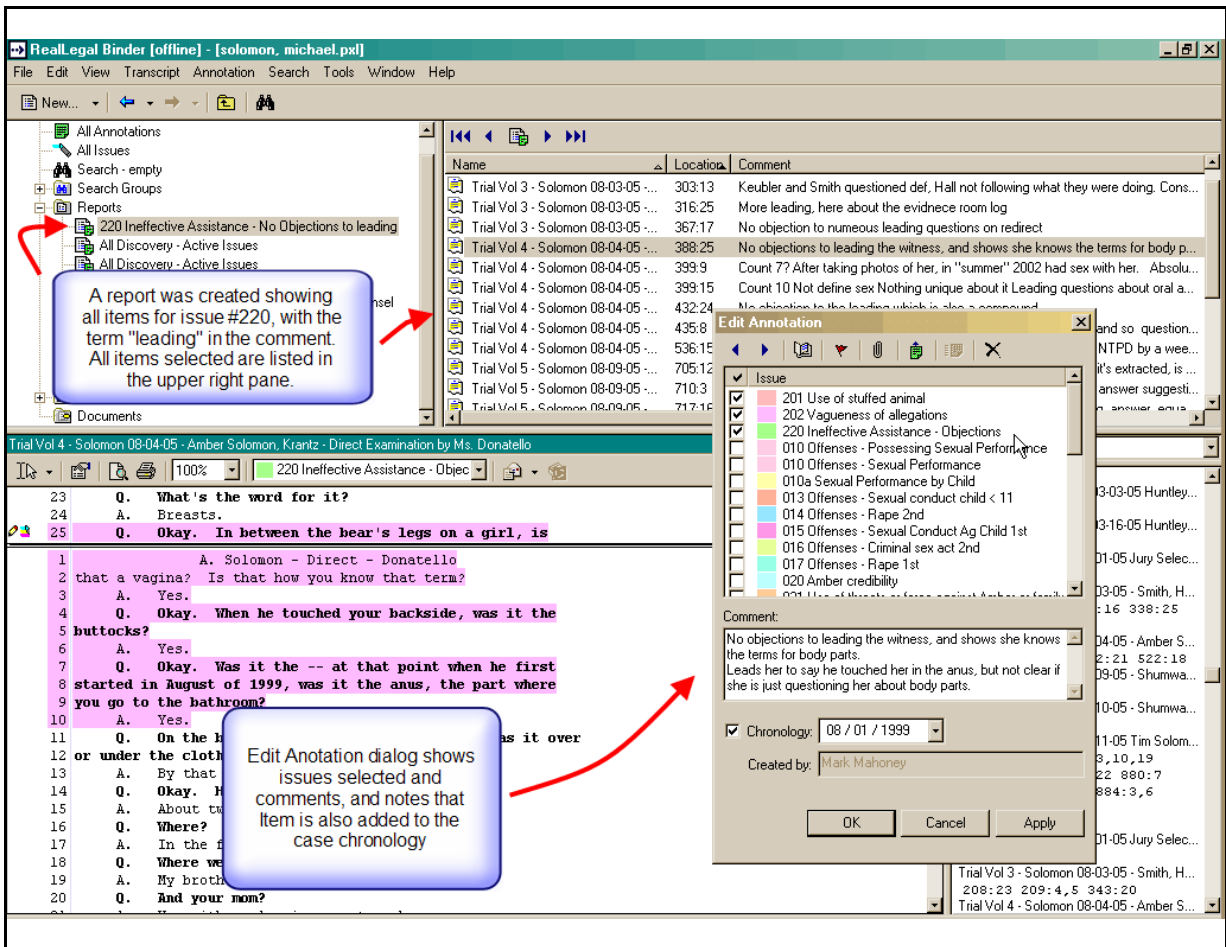
[d] Transcript Management software

By far the best approach currently available to automate the task of reviewing the trial transcript and culling the relevant information, is to use transcript management software such as RealLegal Binder or Live Note SR. There are other programs that can be used for this, such as the heavyweight litigation support program Summation, and a small dedicated transcript program called “Almost Paper”(www.almostpaper.com).⁶ But the advantage of Binder and Live Note is that they are dedicated to transcript management and also accept live feeds of simultaneous transcription in court or in depositions. And so they do double duty.

Note: your chances of really learning a software program increases the more you use it. If you do trials or depositions and appeals you can use these programs a lot.

I use Binder, both during trials and in preparing appeals. Annotations can be made by selecting text and assigning the text to relevant issues, adding comments that contain either a summary of the section of the transcript or an explanation of how it relates to an issue. One can also identify which facts fit into a chronology, and the relevant date. Numerous reporting vehicles are available to select the annotations that are relevant to a particular issue or issues, which then can be the clay from which to mold your facts.

⁶ I have not viewed this program, and it does not appear to have been revised since 2001.



Using Binder – a report of all annotations assigned to issue #220 and with a comment referring to “leading” – to find where trial counsel failed to object to leading questions

§ 3. Meeting with prior counsel

Always meet with the prior lawyer. It is an indispensable tool for getting started on an appeal. Obviously there are many purposes to be served by this, such as looking at the original trial file, and getting hints about the dynamics behind the cold record. Get a sense of what might have gone wrong, and why. Naturally, explore any matters not appearing in the record which may have affected the outcome and warrant development in a collateral attack which can be brought prior to a direct appeal, having the effect of expanding the record. See “Expand the Record?” above at p. 2.

§ 4. Meeting with accused & family

It is always helpful to meet with the accused and his or her family to explore possible issues for postconviction relief. They will also need to learn what an appeal really involves and what expectations to have, and not to have. They must be aware, even as you inquire about matters not appearing in the record, of the limitations of the appeal *to the record*.

Nevertheless, especially in those cases where the effectiveness of the trial lawyer might be in issue, it is necessary to find out the client's perspective on the case, and the issues which ought to be raised.

This is even more important where the client is imprisoned and has taken an active interest in the appeal. I have often gotten useful suggestions from client which they have discovered on their own or with the help of “jailhouse lawyers.” Their instincts about the case, especially since they sat through the whole trial, may be extremely valuable in bringing life to the record. While it is a burden to read long letters from the client about the issues on appeal, and suggesting issues or fact which do not appear in early drafts of your brief—or which would never appropriately be included in the brief— it is valuable to the appeal and to the satisfaction of the client with your services.

§ 5. Who is this brief for?

As with any type of written advocacy, it is important to consider the audience.

[a] The Court: court is the true adversary

The noted appellate advocate, and NACDL’s third President (1960-61), Harris B. Steinberg, in one of a series of memorable lectures to the Association of the Bar of New York City in 1968, spoke about the challenge to the advocate for the accused in criminal appeals. His and other lectures were reprinted in a book called “Counsel on Appeal” (McGraw-Hill). He said the real adversary faced by the appellate lawyer is not the prosecutor. However respectful one might be of the abilities of prosecutors, it may well be, as Stanley Fuld, a New York Court of Appeals Judge and Chief Judge from 1961 to 1973, is reported to have said on one occasion, that more than 80 percent of the criminal appeals would be affirmed even if the prosecution failed to submit a brief at all. In an especially close case, the skill and credibility of the prosecutor may be the deciding factor. Usually the prosecutor stands, somewhat near the sidelines, taking measure of and commenting upon the appellant’s arguments, but any good advocate will have already perceived his own potential weaknesses anyway.

No, the true battle is between the appellant's lawyer and the appellate court. The court has an instinctive desire to protect organized society against harmful and anti-social conduct and it has a great stake in the legal institutions, which includes courts from the top

to the bottom. The court, in other words, has a stake in reaffirming the validity of the entire judicial process including the process in each case that leads to a guilty verdict.

Steinberg maintained that the court in a criminal case is not, as in a civil case, merely an arbiter between two equal combatants in a dispute with, generally, little impact on society as a whole. In a criminal case in the appellate court, no matter how capable or inept the prosecutor, feels bound itself to subject the defendant's argument to careful scrutiny. We can find strong evidence to support the proposition that, in the criminal field, the real adversary is the court's reluctance to take a step which would have a practical effect on undoing a conviction and putting at liberty a person who is considered by so many to be a threat to society.

Apart from the court regarding itself as a protector for organized society against evil doers, there is a natural reluctance on the part of judges to change the results of a criminal case. A trial conviction is achieved at the end of a long process which, while in some sense distant from the appellate court, is in other ways very close to the appellate court. Appellate judges were once trial judges and know how they felt when their rulings were challenged by defense lawyers at trial and later after conviction. How often does the trial judge see an objection or a motion as an attempt to "trap" the judge in error, instead of an aid to conducting a fair?

Even when an appellate judge cannot dispel the need for reversing of a conviction, it takes an affirmative effort to do it. The inertia of the *status quo* generally makes it much easier to affirm a conviction than reverse.

Appellate judges read the newspapers too. Some of them must seek reelection. They all want to be governor or Chief Judge. It is not uncommon for appellate judges to be attacked, the same way trial judges are attacked, when they enforce individual rights in cases involving disreputable persons. In most cases the reversal of convictions may be required by relatively abstract legal principles which may be hard for the public to understand. That same public, however, will be very quick to understand that the only beneficiary of the decision will be an unpopular defendant and maybe other criminals similarly situated. Our judges will never be free from the subconscious desire to avoid adverse publicity or rejection at the polls by an uninformed public.

Finally, Mr. Steinberg believed that another difficulty, in obtaining reversal, is that the one seeking reversal is a criminal defense lawyer. We find it hard to instruct judges (trial and appellate) about what they ought to do in such a manner that they are happy to go about doing it. Whether we are esteemed and senior advocates, or novices at the bar, no matter how gentle the touch, appellate judges just don't like being told what to do by defense lawyers.

In my own experience this has a corollary: even when the court grants your relief, don't be surprised if they find some other reason for it than what you have advocated!

Perhaps it is out of a sense of pride that the judge tries to find some other way to bring about a necessary reversal than the manner advocated by the accused. Of course this sometimes happens in huge cases such as *Mapp v. Ohio* and *Miranda v. Arizona*, where the advocate for the defendant before the Supreme Court never argued for the actual favorable ruling which they obtained.

While there is undoubtedly a generalized desire on the part of all judges to do justice, this is an abstract feeling and may not have any particular practical effects. Criminal cases have a tempting black-and-white simplicity. The court's generalized desire to be fair can often be covered by a layer of callousness developed over the years by hearing so many claims of error in the past which turned out to be completely meritless. It may in part be the product of the fact that, unlike in Canada, for example, prosecutors in the U.S. cannot appeal an acquittal.⁷ The expectation may be that there is generally nothing to do but figure out a way to circumvent the arguments or facts presented by the defendant.

This defines the task, for the advocate, Steinberg said: shake the court into some state of imbalance, meaning open-mindedness, so that then the judges will at least be open to reversal based on the errors which the advocate has exposed.

How does one practically respond to this “insight” about the role of the court as the “adversary”? If the judges are seeking to reconstruct the facts to avoid reversal, make a compelling presentation of the facts which is immune to it. Because the judges look to blame the accused or his attorney for failure to reverse, the brief must hedge off any such arguments. The judge who feels institutionally disinclined to reverse must be shaken by the succession of fundamental errors, and the doubts about the guilt of the accused or reliability of the process.

There are those who fear even the attempt to sway judges with claims of unfairness. Judge Whitman Knapp, in his 1968 lecture to the Association of the Bar in the same series as Harris Steinberg, discussed the psychodynamics of the judicial function.

Criminal law is a nasty and archaic business: taking a man from his home, locking him up, or even killing him. It's an uncivilized business, and whether we admit it or not, we are all basically ashamed of it.

We have gotten more civilized and more squeamish in the recent centuries, and no one wants to take responsibility for killing a man or locking him up. . . . We have devised a complicated system, operating

⁷ As it stands now, affirmative development of the law in a way that is sympathetic to the accused depends on the willingness to reverse. I have often speculated that the development of our criminal law would not be nearly so conservative if the court's bias towards affirmance forced allowed it to say, on a People's appeal claiming legal error in a case resulting in a judgment of acquittal, that it was *correct* for the trial court to have made this or that ruling in favor of the accused.

under well-defined rules, whereby no individual human being is required to take total responsibility for anything but whereby every individual can concentrate on his or her small task and leave ultimate responsibility up in the air. The police investigate. The prosecutor prepares and presents the case. The judge lays down the rules. The jurors, each sharing responsibility with eleven others, makes the finding of fact. The trial judge, with a complicated and formal statutory system and a detailed probation report to fall back on, imposes sentence. Finally, the appellate court, from its Olympian heights, views the situation and makes sure that everyone has played the game according to the rules.

The essential lubricating agent that makes this process possible is the ability of each person in the chain to have confidence in the essential competence and integrity of every other such person. . . .

The point is this: the appellate judges know that they must function and that the system must survive, They, therefore, have a strong vested interest in their belief in the integrity of the system, the belief that affords them the necessary isolation from individual responsibility.

It follows that if you come to them with a contention that the system has totally failed, that the jury's finding is so wrong as to require them to assume responsibility for the reappraising of it, the appellate judges are going to resent your argument and set their minds against agreeing with anything you have to say. In short, it is my oversimplified suggestion that no appellant's brief should ever have a point that "guilt was not established beyond a reasonable doubt."

Later Judge Knapp put this perspective into play:

The point is that judges decide a case only once; and judges are human beings, and judges are advocates. If you get a judge riled on an advocate's point against you, it's unrealistic to assume that he will reverse his field and decide some minor point in your favor.

While I do not agree with Judge Knapp's conclusion, and have seen some cases reversed on evidentiary sufficiency, this was a real insider in the system, whose sense of it is worth considering. Indeed, his model for the system, as a way to avoid individual responsibility for the selection and imprisonment of citizens mirrors my own view that the system of criminal laws is a mere substitute for rituals of human sacrifice and scapegoating which have reinforced every human culture.⁸ Gradually developing into cultural and religious and then civil institutions and then the legal system, the role of the process has remained the

⁸ See, René Girard, *The Scapegoat*, (Johns Hopkins 1986), originally *Le bouc émissaire* (Paris: Bernard Grasset, 1982).

same throughout the history of human society.

Indeed, the extent to which the judges will impute magical powers to the jury to render “justice,” without jurors knowing the rules of law, and with unreliable or incomplete or distorted facts, and subject to all the pressures to convict, attests to the ritualistic function of the trial. It is more important, generally, that the matter be settled than that it be settled correctly. The secret, however, is not in the system, as Judge Knapp thought, but in its anthropological origin. The cultural imperative is always to find someone else to blame. If the advocate can first escape having the accused or the defense attorney blamed for sustaining the conviction, and then substitute something other than the system itself (in which the judge has a stake) to blame for the failure of justice, the anthropological dependence on having a scapegoat may be satisfied at the same time the accused is let go.

However theoretical this all may sound, it remains the case that figuring out how to shake the institutional conservatism of an appellate bench is the highest form of the lawyer's art, even if, at the end of the day, we have no idea whether it was our persuasiveness or the independent reaction of the court to the particular case, that won the day.

[b] Prosecutor

As I have said, the prosecutor is merely a spectator in the first round, someone the Appellant hopes to suck into the fray and substitute as the court's victim instead of the accused. But each case need a scapegoat, and the prosecution has to be the primary target for the defense.

[i] Throw down the gauntlet

In most cases Appellant's main Brief should merely be the setup for the Reply brief. This means not only presenting appellant's arguments preserved in the lower court, but also defeating the responding arguments that were made there by the prosecution. When the defense's presentation accounts for all of the facts, and has defeated all the arguments made below, the prosecution is challenged to do more on the appeal than it got by with at trial.

In other words, do not allow the appeal to be a reprise of the argument in the trial court, at least in the structural sense. Advance not only your own arguments, but show why the prosecution's arguments are wrong. In the right case, point it out if the respondent *has no answer* to an argument you have made.

[ii] set up reply brief

In this you set up the Appellant's Reply brief, in which you point out either how the prosecution has ignored the facts, or distorted or ignored Appellant's arguments, or distorted or ignored the law in order to argue for affirmance. Alternatively, if the People actually address all of your claims, you can now have the last word on the failure of their analysis.

[c] Client

The client, and his family, will rarely understand the extent of effort behind the preparation of the brief. However, it remains the most tangible reflection of your effort on behalf of the client. Try to give the client drafts for the brief to review. Take every effort to account for the client's concerns. The clients' sense of what went “wrong” at the trial is too easily discounted. As a byproduct of your success in keeping the client informed of your efforts and progress, the client will sense no need for a *pro se* supplemental brief, the frequency of which seems on the rise.

§ 6. Writing skills

Follow basic rules of grammar and punctuation. Rewrite for clarity of language and thought. Use simple sentences. The grammar tools in Word and WordPerfect are often useful to identify long sentences or fragments.

Each sentence must clearly express the thought on a first quick reading. One quick reading is all it might get by the judge writing the decision.

Edit your own writing as harshly as possible. Look closely at:

- sentences beginning with “While . . .” or “Although . . .” and “However” and other words that introduce clauses that really should be separate sentences.
- sentences longer than 30 words
- sentences with more than two commas
- sentences with more than one citation or sets of citations.
- Sentences with more than one point where there are references to the Record

[a] Organization of thoughts

Clear thinking is a prerequisite to clear writing. But clear writing can inspire clear thinking too! Use paragraph breaks to separate ideas. Then reorganize the ideas into a sensible flow.

[i] headings, subheadings

Use headings and subheadings in the brief to show the flow in the argument from one point to the next. These headings will be repeated in the contents as a summary of the argument, and to help the Court locate specific factual and legal points. If you are using the available outline tools, you will already have a heading structure.

[ii] single sentence paragraphs

Sometimes instead of paragraphs and headings, a single sentence or question set off from the rest of the text will be the best way to make a point. Too often it reflects repetition.

[b] Proofreading

After working with a document for several revisions, it becomes nearly impossible to notice, in the third or fourth reading, the errors that escaped attention in the prior two or three readings. Have someone available to proofread the brief when it is near completion. Adequate time must be allowed for this task.

[c] Editing

Having a capable editor is a luxury. If you do not have a person available to volunteer for this, it may well be worth it to contract with a person with editing experience to review the brief for grammar, language, logic, completeness, tone, and persuasiveness.

§ 7. Questions presented

More time *per* word of text should be spent on the “Questions Presented” than any other part of the brief. Carefully worded “Questions” will demonstrate the legal issue, as applied to facts, and suggest that the desired result is required. The “Questions” should be a succinct road map for the judge. It should not be laden with details of facts or law, but should have enough information to recognize the unique aspects of this case.

The manner in which the question is put, and the skill of counsel in framing it, can grab the attention and respect of the reader, early on. Judges have to read so many bad briefs, they are eager to read the good ones. The “Questions Presented” gives the first real cue as to how good the rest of the brief will be.

Although some advocates suggest writing the “Questions” after the brief is done, when the argument has been mulled over more, I prefer the exercise of trying to frame the issues first. Revise the questions as you go, and especially at the conclusion of the writing effort. “Questions” written at the outset will serve as a target for you in writing the facts and argument.

Good “Questions” will have the reader begin with a sense of the case and a feeling that the case may require reversal. For example, it might be sufficient and commonplace to put the question as “Was there sufficient evidence of the conspiracy?” But what if the question were actually pinioned:

1. Can the government rely on a mere *inference* that a conspiracy exists in a case where, if there *really was* such a conspiracy, it could have

been proven directly through the alleged co-conspirators, all of whom testified for the government?

One question might lead to the next:

1. Does the law in this Circuit permit conviction of conspiracy for one whose alleged co-conspirators are all acquitted in the same trial?
2. In any event, did the unopposed jury instructions establish it as the “law of the case” that the acquittal of the co-conspirators required the acquittal of appellant?

[a] A question for each point

Make sure that there is a question which covers each point, and at least one point for each question. Do not restate the same issue as more than one question, just because more than one point may be needed to address everything encompassed in each question. But do not have the “Question” just be a rephrasing of the Point heading.

[b] “Answers” to questions.

Some rules state that the “Questions Presented” should include the “answer” in the court below. However, it is not often necessary to contrive a separate “answer” in a criminal case where it is obvious that there would have been none (*e.g.* where the question is the sufficiency of the evidence) or obvious from the question what the ruling was (*e.g.* where the question specifically refers to a ruling). One can usually state the question in such a way that it is clear how the court ruled on the matter, or did not rule on it at all.

It may be possible that briefs have been rejected in cases where there was no separate “answer,” but I have not seen one.

[c] *Brief* factual summary followed by the questions

In some cases where there are a series of questions that flow from a factual circumstance that is difficult to put succinctly, consider the possibility of stating these facts or circumstances in a short paragraph which is then followed by the actual questions. For example:

Questions Presented

The Criminal Justice Act, 18 U.S.C. § 3006A(c), authorizes “mid case” appointment of counsel, in the interests of justice, for one who

becomes “financially unable to pay counsel whom he had retained.”

1. To avoid applications for “mid-case” appointment of counsel under §3006A(c), may district courts bar accused persons from initially appearing with retained counsel (even for emergent proceedings to determine bail or detention issues), unless they are financially able to “fully retain” that counsel to represent the accused for the most complex and extended proceedings imaginable?

2. May an accused be found ineligible for appointment of counsel under §3006A(c), merely because he has *some* funds which he could contribute to his defense, but without considering what it would actually *cost* to obtain the needed legal services?

Here the initial statement avoids formalistic repetition of “Criminal Justice Act, 18 U.S.C.” in each question and supplies the common the context for the two questions.

While it may be true that the ultimate question is whether the Appellant should get a new trial or whether the indictment should have been dismissed, stating questions generically, such as “Should there be a new trial” or “Was the evidence sufficient to prove guilt beyond a reasonable doubt” are less than helpful, because they not only fail to inform, they also suggest that the advocate has not actually thought about what the issues really are from the appellate court’s viewpoint.

§ 8. Preliminary statement, the “nature of the case”

Almost every set of appellate rules requires that there be what is most generally known as a “Preliminary Statement.”⁹ In general, the preliminary statement answers the judge’s question “What kind of case is this?” It tells the substantive and procedural categories the case falls into. In specific cases it can suggest that the case is unusual in a way which relates to the grounds for reversal. Without delving into the facts, or arguing a point, it can alert the court to an issue: “That motion was denied without a hearing.” By the same token, do not include that in the preliminary statement if the summary nature of the ruling is not relevant to the error complained of.

Confusion about what is supposed to be in the Preliminary Statement, and what is supposed to be in the Statement of Facts is probably the most prevalent problem in brief writing, even among experienced appellate advocates. They are distinct segments with distinct purposes. Compare FRAP 28(6) and (7). While a workmanlike preliminary statement will not significantly advance the argument, one that leaves important procedural questions unanswered, or which digresses into argument or factual details, will undercut the credibility of the advocate from the start.

⁹ FRAP 28(a)(6) describes this as a “statement of the case briefly including the nature of the case, the course of proceedings and the disposition below.”

The preliminary statement should, again without unnecessary factual recitations and without argument, cover the following matters, *if pertinent to the case*.

- Institution of proceedings
- The charges
- Key proceedings and results of each
- Manner of disposition of charges: was it a plea or trial?
- Was it complicated factually, legally, or procedurally?
- Is it novel in any way?
- Did the judge, jury or prosecutor have doubts about the case (as suggested by reduction or dismissal of charges, mistrial motions, long deliberations, *etc.*)?
- Was any affirmative defense raised or precluded?
- What kind of remedies are being sought?
- Representation at each stage
- Judge at each stage
- Prior collateral proceedings
- Existence of and determinations as to co-defendants
- Sentence
- Status of accused pending appeal

While the Preliminary Statement should have a point of view — there should be no room to mistake which side wrote it — it should not be so argumentative as to invite a response from the opponent.

§ 9. The Statement of Facts

Every experienced advocate knows that the Statement of Facts is the most important part of the brief. While the “Questions Presented” allows the attorney to show his or her skill in framing the issues, the Facts challenges the attorney to establish himself or herself as candid, objective and thorough.

[a] Most important part of the brief

No matter how much the judge knows about the law, the judge knows nothing about the facts unless it was a high publicity case. While the law may be clear, the facts are always subject to dispute. Second only to blaming counsel and the accused for waivers and omissions, the contortion and obliteration of the facts by appeals panels is the most frequent method used to avoid reversing convictions. The statement of facts must rule out any other reasonable view of the facts than that advanced by Appellant.

The Statement of facts:

- Must be objective
- Must be thorough
- Must be persuasive
- Must be easy to read and digest
- Must be impossible to get around without obvious cheating
- Must show no “hesitation, deviation, or repetition”¹⁰

[b] Goal of the Statement of Facts

At the end of the facts the court must be persuaded that relief is required and know why. Legal argument, no matter how brilliant, cannot make up for the absence of facts calling for relief. But if those facts are in the statement of facts, then the judge will discover the argument on his or her own before you even make it, and will be ready to reverse the case.

[c] *All the facts in the Statement of Facts*

The single most prevalent *and* serious mistake in brief writing is the use of the “Statement of Facts” portion of the brief as a mere *introduction* to the facts of the case, or a repetition of the procedural history of the case or the facts relating to the offense conduct alone. The Statement of Facts is not a preliminary statement.

The Statement of Facts must be a persuasive account which contains the details of all the factual assertions upon which each Point of argument can rest, without unnecessary filler, without digression into matters, however interesting, not “relevant to the issues,” FRAP 28(a)(7), or repetition. Focus on the relevant facts for the most detail, summarizing fairly those that are not determinative.

There is no real exception from this. If an issue has to do with what happened at trial procedurally, include all those facts as well in the statement of facts. If it is the sentencing that is in issue—tell the story in the facts, not in the later point on the sentence. The impulse to delay detailed discussion of the facts until later, in the argument, has many sources. Among them are the fear that the reader can’t remember the facts, the difficulty of writing a compelling coherent statement of facts, or hedging on the facts — an urge to deal only with the facts that support the argument and not deal with those that the opponent will be bringing out. None of these are acceptable.

Following the “just the facts” rule obviates the need to repeat any but the most critical

¹⁰ To quote the theme of the famous BBC radio program “Just a Minute!”

facts in the argument. As a result, you have the license to characterize the facts, and draw conclusions from the facts in the argument points without appearing to mix conclusions and facts together. If you find any page references in the argument, question carefully whether the factual assertion should not be moved to the Statement of Facts, where your perspective on the facts must be most forcefully presented.

Let no factual question be begged in a statement of facts that is not immediately answered in the next sentence, or in the same paragraph. If you are avoiding facts, it will be apparent in your brief, and in your opponent's response. Unresolved questions arising in your factual presentation will create doubts about the thoroughness or accuracy of your facts.

Skillfully presented, the facts expose the dramatic tension which is inherent in the case and which engage the attention and sympathy of the reader. The masterful presentation of the facts will take advantage of the most minor, and seemingly unimportant details and weave a compelling narrative which smacks of confidence and integrity.

Without sacrificing accuracy or thoroughness, the Statement of Facts should extract any advantage to be had from the record. But stating the dramatic fashion is not enough — thorough annotations to the record are necessary to give it credibility and inoculate it from attack

[d] Tell the bad facts too

Cases with all good facts for the accused do not often go to trial. Tell about the facts that hurt too. No matter how bad the fact might be, it will be worse if the court first hears of it in the responding brief. Your answer in a Reply brief will come too late. Take advantage of the opportunity to put the bad facts in context, where they are neutralized or qualified by other facts.

[e] Order of presentation of the facts

Unlike at trial, we are not stuck on appeal to a witness-by-witness unfolding of the facts. Perhaps the most uniformly criticized practice is that of creating a Statement of Facts based on a witness-by-witness account of the events: the “transcript march” referred to previously, at p. 4.

The “transcript march” is a weak approach because it squanders the opportunity to weave the witnesses' testimony into the larger story, or to discuss at one time the various versions of the same event or fact. It is counterproductive where the defense has presented a case or has a particular view of disputed facts—why shouldn't the defense view be presented first and the prosecution view as the questionable alternative?

[i] database abilities come to the rescue

Your transcript “database” or your flexible electronic outline of the facts allows you to acquire the information about what the witnesses have said in the normal linear fashion, as you read through the record, and then reorganize it so that the events can be described in chronological or dramatic order. Then each factual assertion, in whatever detail is required, can be supported as a composite of all the testimony. An example of this, from the introductory paragraph in a case of an unsuccessful insanity defense, follows:

Blood-soaked, he shrieked at the police: “I’ve cut the demon devil’s head off.” (103, 142, 242, 349) Repeatedly he raged, “I get my power from God, you can’t stop me.” (101-103, 141) “I get the power from Jesus. He gives me the right to do this.” (160, 181) He screamed about being the son of Christ and having “killed it,” referring to the devil. (241, 331)

Like a “madman” with an “angry shriek” he charged the police. (103, 154) He was wild and agitated, howling, yelling, growling, irrational and babbling nonsensically, incoherently. (103, 106, 147, 157, 184, 241, 346-7)

Inside the apartment building, Geneva police officer Francis D’Amico followed bloody footprints backward through a demolished doorway to the dead body of Frances B. Gigliotti, an elderly woman. (164, 365) There was blood on the walls and all over the body, and a great deal of it on the floor of the disturbed bedroom. (169, 196, 207)

On the head and neck there were over 30 lacerations beneath which there were fractures of the skull, orbit, nose, and jaw. (196-208) The neck was cut from the front through the spinal cord. There were a large number of superficial lacerations about the shoulders. At least one wound, a deep gash on the left thigh, was inflicted after death. (167) The tenant directly above had only heard the tumult and the “animal sounds” of the killer, but that was enough to make her vomit and terrify her beyond the capacity to call the police. (91)

Frances Gigliotti had been on the phone with the police moments before her death, reporting “a man going crazy.” (305) She had never met the young man who lived in the apartment below her and who now stood outside the apartment building in bloodied stocking feet with a meat cleaver in his hand. But she was right: all four psychiatrists testified that he suffered from a mental disease and that he was psychotic at the time. Outside 28-year-old Stephen stood disheveled and dirty, his eyes staring, wild, darting. (255, 256, 377)

He threw the knife into the air.

Consider the difference in effect if the reader was left to learn these details in a succession of summaries of the testimony of several witnesses.

[f] Facts not opinion

Clearly distinguish between facts and inferences, and do not get caught passing the latter off as the former. Call a conclusion “compelled,” but do not call it a fact. Avoid parenthetical or oblique assertions, as “fact,” of propositions which the neutral reader would immediately consider disputable or doubtful, even on collateral issues, unless thoroughly demonstrated to be true.

If the reader is compelled to stop and ponder or investigate in the record whether a “fact” is true, you are in trouble. A court reading a statement of facts wants to know that it is getting the facts and not opinions or contentions. A good statement of facts is one where the reader is not even tempted to actually check the record.

[g] Mastery of the record

The prosecution can get away with a myopic view of the facts, the defense cannot. We cannot avoid the bad facts, but we can show the facts that put the bad facts in context, the facts that cumulatively establish our version over that of the prosecutor, or show the variety of ways an error was preserved or was prejudicial. The burden is all on the defense to show the injustice in what happened below, and the appellate court cannot be trusted to read between the lines to help us out. The paths of escape for the prosecutor must be blocked before they have their chance to speak. They must be forced to either ignore the facts or look foolish in trying to reconstruct them.

This means that each fact that can favor the defense must be found and put to its best uses. With your computerized index, list, database, summary or outline, this is much less difficult than it might have been years ago.

[i] use appropriate headings

After deciding what type of order—it is almost always a mixture of chronological and topical—to use to arrange your presentation, reinforce this with headings. Heading can help drive the argument. They help keep the reader oriented as to the flow, and relevance, of the facts.

While I typically reserve four sub-heading levels in the argument (rarely using more than two), for the facts I generally prefer to use only two subheading levels. These are centered headings, in the same font size as the text, one **bold** and one *italicized*. I find this less distracting and easier on the reader than lettered and numbered subheadings. Perhaps the use of different headings in the facts from the argument helps suggest that, while the outline style of the argument is my own construct, the facts are the facts and I cannot manipulate them. Also, avoid headings as argumentative as might be found in an argument Point.

But even the most subtle twist in a subheading in the facts can suggest the argument:

Probable cause?

Though not argumentative, such a heading reinforces the point of view of the Appellant.

[ii] Show by reference to the record that you have thoroughly scoured it, that you are objective about the facts

Ordinarily discuss facts *as facts*, [but with citation to the page in the record] rather than what a witness said or an exhibit contained. Discuss what witnesses a particular said when trying to demonstrate why the version of one must be accepted over the version of another. Use cumulative references, perhaps with parenthetical reference to the witness, to show that a fact was conclusively established.

Support your assertions about the facts with thorough references to the record. The advantage of frequent and accurate citations to the record is that a judge who finds your references accurate and always supportive of your argument will have confidence in your brief and you as an advocate. There is a no substitute for a reputation for accuracy on the part of an appellate advocate. To the same end, avoid hyperbole or excessive use of adjectives or adverbs to sway the reader. Err on the side of understatement.

[h] Making references to the Record

Sometimes there is an “Appendix.” Sometimes there is a “Record.” There are slight variations from jurisdiction to jurisdiction as to what is meant by these terms. I have already made the point that we can try to continue to use the original pagination of the trial transcript by using an “a” suffix for all the pages of the record before the trial transcript, and then begin marking the transcript as “A-1.”

Make references to the record or appendix should be simplified as much as possible. For example, if you make it clear that simple references to number in parenthesis is a reference to the trial transcript, [7896] is better than [Tr. 7896]

If you are using a Record or Appendix, there is no need to explain what “[R-]” or “[A-]” mean. However, where it has not been possible to collect all the reference materials into bound volume, some explanation will almost certainly be required in the brief for what the particular page number prefixes mean.

Where to insert the references to the record? Although there may be times when, to enhance the fluidity of the text, all of the references would be at the end of the paragraph, it is best to put the page references at the end of the sentence containing the actual factual assertion which is supported by that page in the record. Always bear in mind the ease with which you allow the judge to verify your facts.

[i] Persuasiveness without argumentative conclusions

While it is often said that the statement of the facts is not supposed to be argumentative, it is necessary that it be *demonstrative*. Do not leave it to the Court to come up on its own with a conclusion about which of competing versions of the events might be true. The discussion of the facts should make it clear what the issues are on the appeal, and the required remedy. Let the facts persuade the Court that the witness was lying, or the evidence unreliable, or the judge was a tyrant, or the prosecutor was out-of-bounds, or the sentence excessive, and so on.

[j] Describing the parties

Throughout the brief, use the same designation for the same party. The point is to make the brief easier for the judge to follow, not to use technically correct, but confusing designations of parties, such as “the plaintiff - appellant.” Use the designation that promotes understanding and clarity and especially one that will enable the reader to identify with your client. In other words, generally use a client’s name.

When referring to an individual, use “Mr.” or “Mrs.” or “Ms.”, and treat all parties, whether on the prosecution side or the defense side, the same. Don’t call your witness “Dr. Jones” and the prosecution physician just “Smith.” Generally, refer to anything done by the prosecution as being the People, the State or the government. Only on rare occasions is it necessary to identify the individual Assistant District Attorney in discussing the errors or overreaching on the part of the People.

In other words, what serves to properly designate the parties in the caption of the brief is not helpful in the body of the brief. Although there may be times where designating your client as the defendant or as the appellant might be appropriate, it is generally not the case when setting forth the facts.

§ 10. Summary of the Argument

A Summary of the Argument is required in federal cases FRAP 28(a)(8), though often it is lacking. Though not required in other jurisdictions it may be extremely useful if well done, but extremely annoying if not well done. A summary is especially useful to clarify the relationship or distinction between several arguments, or to alert the court to differing types of relief being sought in different points, or the reach of individual points, or to highlight anything unusual about the presentation which follows.

For example, here is a part of a summary in a case highlighting that some, but not all, of the counts hinged on an “interstate commerce” point:

Five of the ten counts of conviction (Counts 5, 6, 8, 9, 10) can only

stand if this Court adopts the rule that was announced, and then forgotten, in *United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1982), that federal jurisdiction could obtain so long as interstate commerce would have been affected *if things really were as the accused believed them to be*. That particular holding was so anomalous that it has not been relied on for this principle by *any* other court, in *any* circuit, except for the court below, and there is no reason for this Court to adopt such a rule now.

Preparing a succinct summary is an excellent exercise to help refine and clarify your argument. It may be a very handy reference when you prepare for oral argument.

As FRAP 28(a)(8) mandates, the summary of the argument should stand on its own and “not merely repeat the argument headings.” Obviously this rule, added in 1994, was penned based on the experience that this is exactly what a lot of lawyers were doing.

A rule of thumb would be that no more than a brief paragraph is necessary for each issue raised in the argument. Headings could also be used to break up the summary in accordance with the points of argument.

Of course, many advocates have discovered the usefulness of a summary at the *beginning of each point of argument*. If you have a “Summary of the Argument” section, then do not begin each point with its own summary. If you feel the urge to restate your summary, consider rewriting it rather than adding a duplicative, and possibly confusing, paragraph in the argument point.

If the order of your points of argument is not predictable or intuitive, the summary might be a good point to alert the judges, in one way or another, that, for example, you have not necessarily put the strongest argument first.

§ 11. Argument

Trivial as it may sound, think through the arguments to be made before writing. In some cases virtually every issue may have been researched and briefed in the trial court. But it would be rare for that research to be complete enough for the appeal. Of course if a phrase or paragraph comes to mind write it down before it is forgotten. But until the research is done, much effort at making the argument will be wasted.

[a] Make an outline of the argument

Begin with an outline. Conduct basic research around that outline. Modify the outline as needed. For efficiency, use the outline feature in your word processing program. Instead of legal pads with arrows, strikeouts, “sticky notes,” and illegible insertions, the outline can be prepared, maintained, reordered and studied without tedious rewriting. More important, it can later become the word processing skeleton on which your argument takes shape. (See discussion below of word processing tools, especially “outline styles”)

Only when you have fully researched a point should the writing begin.

[b] Order of Points

It is generally regarded as the rule that counsel should put the strongest argument for reversal first. This is most sensible. However, there are exceptions to this “rule.” If you have carefully thought through the “Questions Presented,” the order in which you have stated the issues will most likely be the most natural order for the points of argument.

[i] “Strongest argument” vs. “most desired relief”

Where strongest argument only leads to a new trial, but another argument, less certain of being accepted, calls for complete dismissal (or dismissal of the most serious charges), which might otherwise get overlooked, it might be best to advance the second argument first.

[ii] Logical order

The flow of the argument may dictate that one point be argued before another. One point might be dependent on the correctness of a previous point. A point about jury instructions may not make sense if put before other points addressing the facts or legal principles at work in the jury instruction point. A point dedicated to the cumulative effect of all the errors, or the harmlessness of the errors, might be put toward the end. Even though it might be the most likely source of relief, it would be rare to put a sentencing point before others.

[c] Point headings

Each point is a separate ground for relief, even if it is a point dealing with cumulative errors. Make each headings readable, cogent, and succinct identification of the “point” being made.

Preparation of appropriate point headings represents the same type of challenge as the preparation of “Questions Presented.” Indeed, Points should track the “Questions Presented.” Point headings are more specifically argumentative. But they must be kept succinct, no more than three lines, better two lines, best one line.

Do not waste the space to simply state “black letter law” or very general conclusions. And there is no need to clutter up the Point heading with full citations to statutes or cases. It is fine in a heading to refer to the “Right to Present a Defense” without citing the “6th Amendment to the U. S. Constitution.”

Headings of all types can take advantage of the availability of larger type sizes and typed attributes such as bold and italics. Usually a slightly larger font, and bold will do. DO NOT USE ALL CAPITAL LETTERS!! Capital letters are very difficult to read quickly and are very annoying to most readers. And to such a reader, the disappointing fact that the brief

uses ALLCAPS for headings will be apparent at the outset since the headings are recited in the Table of Contents.

[d] Subheadings

It is necessary to use subheadings in the argument. Carefully prepared subheadings serve a number of purposes:

[i] Appearance

Subheadings first help with the look of the page, making it more attractive and readable. Almost every page should have a heading.

[ii] Organization

Using headings forces the writer to review the organization of thought in the brief. If the headings do not flow, the brief needs to be reorganized.

Additionally, the use of headings themselves, if those headings are part of an outline, actually facilitates the reorganization of the argument, using the outline tools illustrated above at p. [5](#).

[iii] Persuasiveness

Headings that fit with the argument, and reflect organization of thought, convey the idea that the argument is confident, logical, and meritorious. When the actual text of the headings flows from one to the next, it moves the argument more persuasively.

But this is not just in the argument itself. It begins with the Table of Contents. That Table will be more useful to the reader who is trying to move back and forth within the brief. But the Table of Contents becomes a summary of the argument, composed of the persuasive headings and subheadings.

[e] Number of points

The general advice from judges is that the number of points be kept low. And this is a point often repeated by those who have heard judges say it. And often what are presented as several points can be consolidated into a single point involving cumulative error or effect.

But the number of points has to be dictated by the needs of case. It should not be arbitrarily truncated to avoid annoying the court. And it often happens that meritorious points for reversal and dismissal are not accepted, the court accepts an “stronger” but actually less significant point in ordering a new trial. Does this mean that the “weaker” points for dismissal should not have been brought? How many sentence modifications are influenced by the “weaker” arguments about the fairness of the trial?

Certainly the number of points should not be curtailed while sacrificing legitimate and separate claims. Sometimes error is pervasive, and the pervasiveness must be demonstrated in order to shake the judges into accepting the fact that the system can fail. This is especially true in some of the most difficult cases.

Especially in state court proceedings, the desire to limit the number of points to three should not sacrifice viable federal issues. The appellate attorney had preservation obligations paralleling those of trial counsel and federal claims should not be abandoned for the sake of brevity.

[f] “String” Citations

It is generally advisable to avoid a string of citations to support any particular assertion of law, especially if it is a generally accepted proposition. If there is a controlling case on the point from the Supreme Court or federal Circuit, or the highest court of the state, you can use that and nothing else.

If the controlling case is from the Supreme Court, or is older than a few years, it is advisable to then cite recent precedents from your state or circuit to reinforce the point. If the issue is nuanced, it is important to show that you have researched cases showing the rule in different factual settings. Here, however, you have to decide how to communicate either the commonalities or distinctions between these cases in an efficient way. Usually a brief parenthetical explanation after each case is enough for this purpose.

Sometimes a parenthetical description of the holding or differentiating fact in a case is not enough. More of the facts, or more on the nature of the holding might be required. However, a very big, but very common mistake, is the practice of devoting an entire paragraph to each precedent, explaining the facts and how the rule was applied in that case, typically followed by regurgitation facts of the current case to demonstrate the difference. This is not only a tedious as a way to deal with precedent, it tends to recirculate the same argument over and over with diminishing returns.

However, there are times when you need to demonstrate that a principle has been adopted in other courts, such as other districts within a circuit, or other intermediate courts in a state, or other states or other circuits. In these instances order those citations according to the numeric or alphabetical order of the jurisdictions.

There are times also when it is necessary to show the linear history of a particular proposition in cases that should be well recognized by the court. In these situations more citations may be required.

The point behind string cites can often be made by referring to one case which cites others, with a parenthetical remark, such as “(citing cases).”

[g] Dealing with precedent

One could go on at great length discussing how to deal with precedent. How to distinguish unfavorable cases, how to find the favorable kernel in a decision which gives an adverse result, how to explain the absence of precedent in support of your position, or how to point out what would appear to be precedents against you is actually mindless repetition of an earlier error or *obiter dictum*.

Mastery of the relevant doctrine and its historical development is the only way that the attorney can truly overcome apparently adverse precedent, or lead the appellate court to change or develop the doctrine in a more favorable way. Sometimes doctrine which appears to be “well-settled” is not well settled at all except when put in the most general terms.. This is one of the highest challenges of the advocate. See, James C. Schroeder and Robert M. Dow, Jr, “Arguing for Changes in the Law,” *Litigation*, Vol. 25, Number 2, p. 37 (ABA, Winter 1999)

However, in all of this process there is absolutely no room for disingenuous treatment of precedent. An appellate advocate for defendants can never risk obscuring or misstating established legal precedents. Argue for change in the law, argue for nuance, argue for the application of special principles to an anomalous the case, but never give into the temptation to ignore truly well-settled doctrine, or to misstate it. .

[h] Address the standard of review

It is sometimes required, but always advisable to deal directly with the applicable standard of review in a case. This is especially true because we have so often heard appellate judges attempt to dispense with claims of error as “harmless” or as reviewable only for an “abuse of discretion.” In fact counsel often fail to make any effort to demonstrate that the error affected fundamental constitutional rights and required *de novo* consideration.

For example, while appellate judges will frequently say that the question of admission or exclusion of evidence is a matter committed to the discretion of the trial judge, in fact the exclusion of evidence offered by the accused almost always involves the Right to Present a Defense under the compulsory process clause. The trial judge never has the “discretion” to deny that right, but the failure to raise such questions, at trial and on appeal, as one of fundamental rights is one of the most repeated and damaging errors in criminal advocacy.

Deference to the trial court, so often undeserved, is the real enemy in so many cases, and every angle must be pursued to prevent appellate courts from comfortably abjuring on that basis. At the very least, whether in oral argument or in the brief, we must emphasize the limitations on such deference.

While the district court is generally regarded, in determining CJA

applications, as having “discretion,” an uncertain concept,¹¹ the district court is not free to take such an imbalanced approach as this, ignoring whole sets of pertinent facts in concluding either the ability to hire counsel, or the fairness in refusing to appoint counsel.

[i] Rely on specific constitutional rights first

While most trial and appellate advocates understand the need to articulate claims of error in constitutional terms, advocates at both levels often fail to perceive the critical difference between raising such claims under specific constitutional guarantees, especially under the state constitution, and raising them under general protections, such as “fair trial” and “due process.”

The use of a specific constitutional provision may genuinely affect the outcome of the case. It is now clear that the courts will apply less rigorous standards in considering and reviewing "fair trial" claims of right than in considering a claim of violation of a specific provision of the Bill of Rights. See, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); *People v. Daly*, 98 A.D.2d 803, 470 N.Y.S.2d 165 (2nd Dept.1983) (Where appellant raised it as an issue of "due process," the erroneous exclusion of the defense investigator's testimony about unsuccessful efforts to locate some witnesses was subjected to "harmless error" analysis. See dissenting opinion of Justice Lazer arguing that the case was really a compulsory process issue which was so fundamental that "harmless error" analysis was inapplicable.)

§ 12. Writing style in the argument

Say what the law is, supporting it with appropriate citation to precedent. Don't recite a string of “holdings,” leaving the articulation of the applicable rule in our case to the Court or your opponent. Then show how this doctrine applies to the facts to require the results you are seeking and no other.

[a] Positive language

Be positive and direct. Avoid weak phrases like “Appellant submits . . .” and “Appellant argues.”

¹¹ What do we mean when we speak of the discretion of the trial judge? Most definitions of discretion are not very helpful as applied to the problem of the power of a reviewing court.

Friendly, Henry J., *Indiscretion about Discretion*, 31 Emory L.J. 747, 754 (1982).

Never, never, never use the word “*clearly*,” which should be universally understood as (and should always be attacked as) a talisman that the writer has no authority for what he says other than that he has said it. Avoid attempts at humor or sarcasm or other devices.

[b] Memorable quotations, epigrams

The trial advocate is consumed with themes and images to help the jury understand the case and persuade the jury. The same can be done with the appellate court. Quotations from famous cases, from literature or classics works of religion or philosophy can be used to add to your argument. Obviously this can be overdone, and it can backfire. This is something especially to try out on a critical colleague first.

[c] Slippery slopes

Show the negative impact of refusing to apply the law in this case if the decision will have precedential effect.

[d] Avoid personal attacks

However tempting it might be to target the prosecutor or the trial judge for accusations of wrongdoing or intellectual failure, there is no doubt that this will, generally, undercut the credibility of a brief. Understatement, which allows the court to reach the desired conclusion is a much more suitable approach in these areas.

Moreover, simply characterizing conduct as “flagrant” or “gross” is also not persuasive. Let the facts speak for themselves, and if your impressions are correct, the appellate court will reach them as well.

When confronted with a situation where the judge has grossly erred, it is useful to always look for ways to pin the responsibility upon the prosecutor who invited or demanded the ruling, or failed to speak up to assist in correcting an obvious misstep by the court, or who led the court to make the ruling through overstatement or deception.

§ 13. Conclusion

Appellate judges almost never look at the conclusions, because they so often simply say that “For the foregoing reasons the conviction must be reversed.”

Writing a Conclusion that will actually add to your argument, or the persuasiveness of that argument is indeed a challenge. But one can summarize the points at least, and make it clear exactly what relief is sought for each point raised — which is not always clear in appellants’ briefs.

A conclusion provides the opportunity to put in other words, or in another context, the significance of the case. It can be a parting thought that might resonate with the reader. For example, in a murder case where no body had been found and therefore even the death was

a matter of inference:

The jury may well have been convinced -- even by only the proper evidence, though we cannot know that -- beyond a reasonable doubt. But history, philosophy, and our modern life are loaded with judgments which are both certain *and* erroneous. Many people have been taken with similar circular arguments such as relied on here. In this case there can be little question as to the substantial gaps in logic over which the jury must have leapt in order to reach its verdict, and away from the ambiguity of the proof. Such logical errors, as opposed to errors in the evaluation of witnesses must be corrected by this Court.

§ 14. Charts, Tables, Photographs

Even where not used at trial, do not overlook the assistance that can be provided by charts or graphs or diagrams, or even photographs in the brief. Recently, in order to demonstrate that doubling the attorneys fees in capital cases in Indiana in 1992 resulted in halving the rate at which the death penalty was sought and imposed (compensation levels directly affect effectiveness, in other words) I could have used the raw data alone, but the graph was much better at illustrating the point. In two other cases in federal court I used a graph to show the penalty experienced by the defendant for going to trial, and the possible conspiracy theories encompassed by an indictment which the court refused to require to be particularized.

Examples might include a chart illustrating the sentences imposed for certain types of felonies, obtained from the state, for use in a sentencing appeal. There are two examples in the Appendix. A photograph could easily be included in the text, which may have been an exhibit at the trial. Current computer capabilities make this easily done. Of course, it could be very quickly overdone and the lawyer should be most circumspect about loading the brief up with graphics.

§ 15. The Reply Brief

Appellate judges who I respect have said that sometimes the Reply brief is the first one they read. It tells them a lot about the case. And they are sometimes mystified at the extent to which Appellants forego the opportunity to file a reply. Maybe if everyone did file a reply they would get stingy like the district courts who *wish* they were appellate courts and require *permission* before a reply may be submitted to them.

[a] Why reply?

I see the opportunity to prepare a Reply brief as one of the main benefits of being the Appellant. It can be the most gratifying, if not most effective, form of written advocacy. It

serves very practical purposes.

By taking the time to do a Reply you can save precious argument time at oral argument that you might otherwise spend addressing the Respondent's arguments. In this one avoids the anxiety associated with oral argument about whether you will be able to address all the points you need to make. You can be confident that the Court will have in written form, rather than in hurried conclusory remarks, the myriad ways that the prosecution has fallen short. This in turn may force the prosecutor into difficult questioning right at the beginning of his or her argument.

In answering the responding brief, the advocate is answering the questions most likely to arise in the mind of the court. But by destroying the argument when it is raised by the prosecutor, the advocate can destroy the argument in the mind of the court without the judge feeling the attack so personally. By attacking the prosecutor the defense shows the judges that they need to avoid the embarrassment of adopting the same reasoning. Seeing the prosecutor vanquished may be the type of unsettling factor which leaves the judge open-minded to the possibility that reversal might be required.

[b] Reply, How?

You can contribute to the persuasiveness of your position by showing that the Prosecution have no legitimate answer to your claims. “We said that they had no answer, and they didn’t.” Where the prosecution tries to answer, point show how what they said was wrong.

However, a Reply is not an excuse to restate your main argument. The focus must be on the errors or omissions of your opponent.

[i] Facts in the Reply

Frequently the Prosecution simply offer a counter statement of the facts, with no effort to assist the Court in figuring out where the disputes might be. This can be pointed out, as well as how dependent the Prosecution’s argument is upon ignoring or misstating the critical facts.

[ii] Argument in the Reply

Keep control of the issues. It is rare that you ought to rearrange your argument to fit, point-by-point to the arguments, and order of argument, by the opponent. Stick to your original order of presentation, and answer the corresponding arguments made by the opponent. By doing this you can not fail to point out the parts of your original argument, or facts, to which the Prosecution have not responded—an important part of the reply.

Always point out where the Prosecution have, by ignoring the arguments, failed in their duty to the court to *answer the arguments*, rather than simply state a contrary position.

Point out how this presumes that the Court will do the prosecutors's job to come up with the answer. (Without mentioning that the Court was probably preparing to do that on its own anyway).

§ 16. Form of briefs

There is an aesthetic about brief writing that is understood by some but ignored by most. Why even the largest law firms still produce memoranda and briefs in monospace Courier type style is most baffling. Although the capabilities of today's word processing software and printers may tempt one to get too experimental about typefaces and layouts, there is no excuse for not taking advantage of these tools to present your argument in the most readable and attractive format.

[a] Don't pretend you are using a typewriter

I may put more stock in the aesthetics of brief writing than is justified (even if I don't win I can at least say my brief *looked better*). But I firmly believe that an attractive brief which is appealing and easy on the eye will be better read than one that mimics what would have been produced on a typewriter 40 years ago. In this regard see the 7th Circuit's "Requirements and Suggestions for Typography in Briefs and Other Papers" available on their web site, but reproduced as an attachment here.

Additionally, there is the very informative paper by Judge Mark P. Painter, of the Ohio First District Court of Appeals in Cincinnati, called "Legal Writing 201," which is also attached.

My aversion to the use of ALL CAPITALS for headings, and underlining for case names and emphasis may well correlate with my aversion to the typewriter "look" which depended on these means of emphasis. But the bottom line is readability, and one will not find in the sphere of written communication professionals—from advertising, to journalism, to corporate communications, to periodicals and books—the use of these means of emphasis before type size and attributes, such as *italics* or **bold** or typeface changes of one sort or another. So take a hint from the world of graphic arts and use classic typographic techniques, which are in fact older than the typewriter, to convey the message.

[b] Get "style"

The typographic look you create for your office can be captured in a "style" embedded in the "standard template" used to create documents. Elements of these styles would include margins, typeface, type size, line spacing, spacing between paragraphs, space between special text such as quotes and headings and surrounding text, the format of headings and so on.

This often takes into account the desire to have ample "white space" in the printed

page. Another suggestion is that each point, the statement of facts and the conclusion, begin on a separate page.

[c] Formatting covers and closing signature blocks

In general, formatting of a brief cover, just like formatting of captions in pleadings, should be effectuated without use of extensive tabs, underlining, etc, and other characters. Use the “Table” feature to organize the areas of the cover in blocks:

The diagram shows a legal brief cover with several callout boxes explaining formatting techniques:

- Use 'Flush Right' code to keep text to the right margin:** Points to the text "Oral Argument Time Requested: 20 minutes" and "To be argued by: Timothy P. Murphy, Esq." which is aligned to the right margin.
- Use the "Table" feature to format text in a caption, rather than Tabs or spaces. Use lines in the tables, or individual cells instead of underlining or dashes. Here a one-column table is used for the caption, three columns for caounsel names, etc.:** Points to the caption area containing "The People of the State of New York v. Jason Williams" and the list of counsel names below.
- Table gridlines and margin settings show here but do not print:** Points to the gridlines and margins of the table containing the counsel names.

The cover text includes:

Oral Argument Time Requested: 20 minutes
To be argued by: Timothy P. Murphy, Esq.

State of New York
Court of Appeals

—><—
The People of the State of New York
v.
Jason Williams
—><—

**Brief of the
New York State Association of Criminal Defense Attorneys,
New York State Defenders Association and
Buffalo, Inc, Amici Curiae**

THE LEGAL AID BUREAU OF BUFFALO, INC 237 Main Street Suite 1402 Buffalo, New York 14203 (716) 853-9555 Ext. 545 (716) 853-3219, <i>facsimile</i> (Timothy P. Murphy, <i>Of Counsel</i>)	NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS 475 Park Avenue North, Suite 3300 New York, New York 10017 (212) 532-4434 (212) 532-4448, <i>facsimile</i> (<i>Patrick J. Adkinson, Of Counsel</i>)	NEW YORK STATE DEFENDERS ASSOCIATION 194 Washington Avenue, Suite 500 Albany, New York 12210 (518) 445-3524 (518) 445-3249, <i>facsimile</i> (Alfred C. Comer, <i>Of Counsel</i>)
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April 11, 2005

[d] Citations

Coming from a state that has its own separate “official reports” of decisions, to which we did not subscribe, I used to insist on having the “unofficial” (West) citations as well, so that in trying to recycle an earlier brief we would easily be able to look up the case. Now that we use electronic versions of cases, and can as easily look them up using the official citation, we are content to use the official citation only. Of course this saves room in the brief as well.

I also have noted that certain organizations use the official citations in the same format as the Court uses in the official reports. *E.g.* “(People v. Bigelow, 66 N.Y.2d 417)” (The explanation: if it is good enough for the Court of Appeals it is good enough for us”) I think that the use of parentheses to set off the citation is distracting, and the absence of the year of the decision is annoying. I therefore recommend the standard “Blue Book”(the *other* Blue Book) format. Of course, we use *italics*, not underlining to set off the name of the case.

[e] Quotations

Quoted material should be single spaced, double indented and offset from the text above and below, and in a smaller typeface. This is easily accomplished with the use of the “style” function in WordPerfect. (See below)

[f] Footnotes

The practice of footnoting evokes strong feelings, and some delightful mockery. Charles A. Maher, “The¹ *¹Infernal Footnote²,” *American Bar Association Journal*, April 1984, p. 92. The best advice is to do without them because they distract from the flow of the writing and reading. Some appeals courts, like the Fourth Department of the Appellate Division in New York, forbid footnotes.

Footnotes should only be used sparingly, and where the context makes it clear that the reader need not look at the footnote to understand fully the argument being made.

Certainly if you hope to have your brief read with the intensity of a mystery thriller, footnotes will be a distraction. Avoid them where you can, even if permitted to use them.

Do not put an important argument in your footnote. Indeed, one way to attack any argument made in a footnote in an opponent’s brief is simply to point out that they considered it only worthy of a footnote.

[g] Binding

It is very inexpensive to have briefs bound at the left margins so that they can be opened flat. The most preferred method short of saddle-stapling, which is done routinely by the better commercial legal printers, is a “taped” thermal binding. Many of the office supply stores can reproduce your briefs and “tape” bind them in less than an hour. On the other hand, there are relatively inexpensive thermal binding systems that can be used in the average and small law office.

In any form of a brief which can lay flat, whether saddle-stitched, thermal bound, or ring bound, consider printing on both sides of the page to leave less bulk in the document. When doing this, however, use thicker and better quality paper with sufficient opacity to ensure that the reader cannot see the print through the back of the page.

Because they stack so poorly and tend to be messy with small scraps and paper dust, and get caught up on each other, I do not prefer the plastic ring binders over thermal binding. When the client can afford it, however, I always prefer a professionally printed booklet which is stapled together.

§ 17. Word processing tools

Millions of dollars have been spent on developing time saving features for your use in word processing programs. Take time to learn how to use the most important ones.

[a] Use of styles

The “styles” feature in WordPerfect is the single most powerful feature of this product which can save, literally, hundreds of hours of attorney or secretarial time each year. On the other hand, it is the one of the least known features of this software. Although there is a “style” feature in Word, which will also greatly enhance productivity, it suffers in comparison with power, flexibility or functionality of the styles function in WordPerfect. Unfortunately, users are rarely ever trained in its use.

More about styles appears in my attached memo on “Styles in WordPerfect” which, though a little outdated, provides basic orientation for the use of this feature which any experienced user can set up. Once set up, the process of formatting documents to insert headings, single spaced portions of text, and quoted material becomes a single step, no matter how many dozens of codes are actually involved in each format.

Using styles correctly, the lawyer or secretary almost never selects any other formatting codes except from among the 8 styles. As a result the document almost never contains separate codes for line spacing, margins, fonts, font sizes, paragraph spacing, Table of Contents, Conditional End of Page, etc. The point: no such codes need to be changed in order to completely change the look of the document.

More important, to change the look of the whole document, in a significant way, requires only that the individual style be edited, or, for changing the effect of several individual styles at once (this can be done in WordPerfect only) replacing that one style file be with another style file which differently defines the same individual styles. .

[b] Use of outlining tools

The outline feature was illustrated above, at p. [5](#). I showed how, while using an outline, the text of the brief can be collapsed so only the headings appear. By dragging the icons in the left margin adjacent to a heading, a heading can be moved along with all its associated text to a new position.

The creation of an “outline style” by associating heading styles with outline levels is also discussed in the “Styles in WordPerfect” memorandum.

[c] Lists

I have previously mentioned the “list” feature, above at p. [8](#). A list can be created in a brief as you write it, which adds and blocked text to a list you have created, for example of “Questions” that come up as you write, or citations to check (“Check cite”) or things to find in the transcript (“Need”).

These lists can be generated at the end of the brief, with the page numbers hyperlinked back to the text, for quick reference in that hurried time where you are trying to do the final edits on the brief.

We also use the “list” feature as an integral part of our “Case Collection” template. This is the vehicle we use to control all the legal research on a case, keeping it in electronic format for quick searching. Each case collection has a list of the cases and a section with “Quotes” containing the critical excerpts from the case that are of interest. This replaces piles of printed out, and highlighted or “Post-It” tabbed cases, while at the same time creating an archive that can be kept on your server for future use. Our Case Collection template, together with instructions for using it, are included with these materials.

[d] Master documents

It is often desirable to split up the work on a brief among several persons. Perhaps one can be working on the statement of facts while another marks cases for the Table of Authorities in the argument section. Or different lawyers or clerks might be working separately on different points in the brief. But when there is only one document this is not possible.

Using the “Master Document” feature, a brief can be broken up into “subdocuments” which can then be assembled into a “Master Document.” Each time the Master Document

is assembled it imports the changes in the subdocuments, and any changes in the Master Document can be placed in the subdocuments when the master is saved.

The “Master Document” feature exists in both Word and WordPerfect, but is a little more straightforward and flexible in WordPerfect, where any document can be inserted as a subdocument, from any directory. Word requires that subdocuments be associated with a heading in an outline. Its only advantage is that, it can automatically create a master from a document set up with headings in an outline, converting the text under each heading at a set level to a subdocument.

[e] Grammatik, Spell-checker

These tools are very valuable, although one has to remember the limitations, especially in spell checking. Make sure that you constantly edit you spell checking dictionary to remove misspellings which have been added by mistake or for a specific project.

Remember that spell checkers only stop on a word which it cannot find, it cannot tell you whether have used the wrong word to begin with.

[f] Table of Authorities

Both WordPerfect and Word have the ability to mark initial and subsequent citations to authorities, and to create several separate tables for cases, articles, statutes, etc. These tools are not difficult to use, although the cumbersomeness of the Word iteration of this feature is so great that I have rarely seen it used by law offices. Very often the table is manually created, with, obviously, great effort.

[g] CiteLink

We have had a lot of luck with CiteLink as a program, created by West Publishing, to gather citations for a table of authorities. There are other programs for this as well. CiteLink was distributed as part of the Corel Legal Suite, which no longer is being compiled starting with Corel Suite 2002. However West still makes it available as a free download.¹²

§ 18. Parting thoughts

I think it is as hard for a lawyer to be a great appellate lawyer without being experienced at trial as it is for a trial lawyer to be great without experience as an appellate advocate. The world of the criminal appellate lawyer is a very special one. Though physically circumscribed by the library, the courtroom, and the office, the advocate's imagination is not so bound. Our weapons are books, history, precedent, logic and philosophy. The contest is for very high stakes. The battle requires the same sort of courage

¹² <http://west.thomson.com/software/default.asp>

and perseverance that we might look for in the courtroom.

Few people recognize that the criminal lawyer, including the criminal appellate lawyer is the true believer in the legal system. We constantly battle on an uneven playing field attempting to persuade judges who, while sworn to uphold the Constitution, are resistant to apply it. We must be respectful and constructive in our dissent and conform our argument to the conventional rules and procedures. We seek regress within this framework rather than by destructive anarchic attacks. And yet we constantly suffer defeat. What a true faith in the law this requires! Ours is an intellectual adventure that relatively few are privileged to experience. What is at stake is not only the result of the individual cases, but the true growth of the law, and therefore the forward evolution of society.

Mark Mahoney

§ 19. Bibliography

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§ 20. Appendix

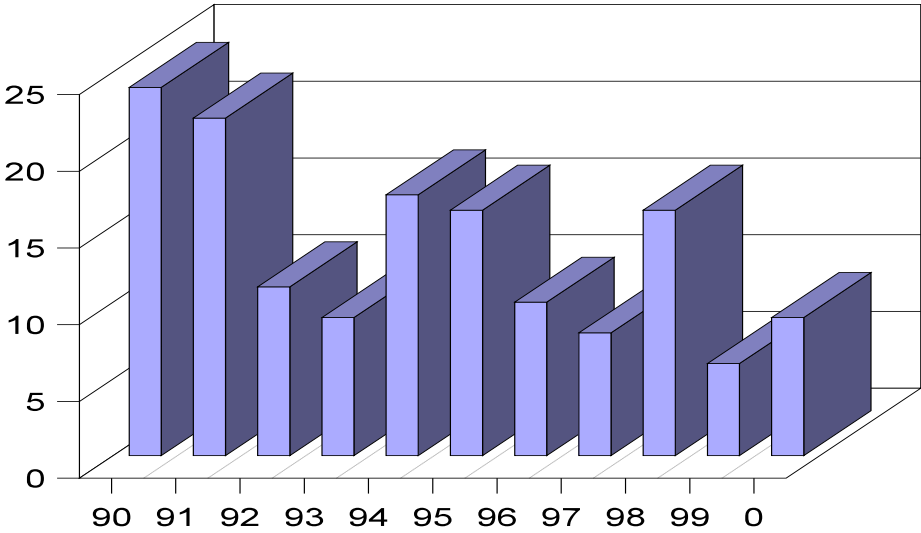
The following pages contain demonstrative materials of the type which can be included in a brief

Mahoney v. Pataki, 98 N.Y.2d 45 (2002)

Below we isolate the “Number of Persons for Whom Death Penalty was Requested” from Table One. To the original 1990-1994 data, we have added completed data from 1994 which had been reported too late to be included in the original published table, and for the several years to date, obtained from the same source. (Indiana Public Defender Council, 309 West Washington Street, Suite 401, Indianapolis, IN 317-232-2490. Contact: Paula Sites) As updated, the first row of Dean Lefstein’s Table One would be as follows:

	90	91	92	93	94	95	96	97	98	99	00
Number of Persons for Whom Death Penalty was Requested	24	22	11	9	17	16	10	8	16	6	9

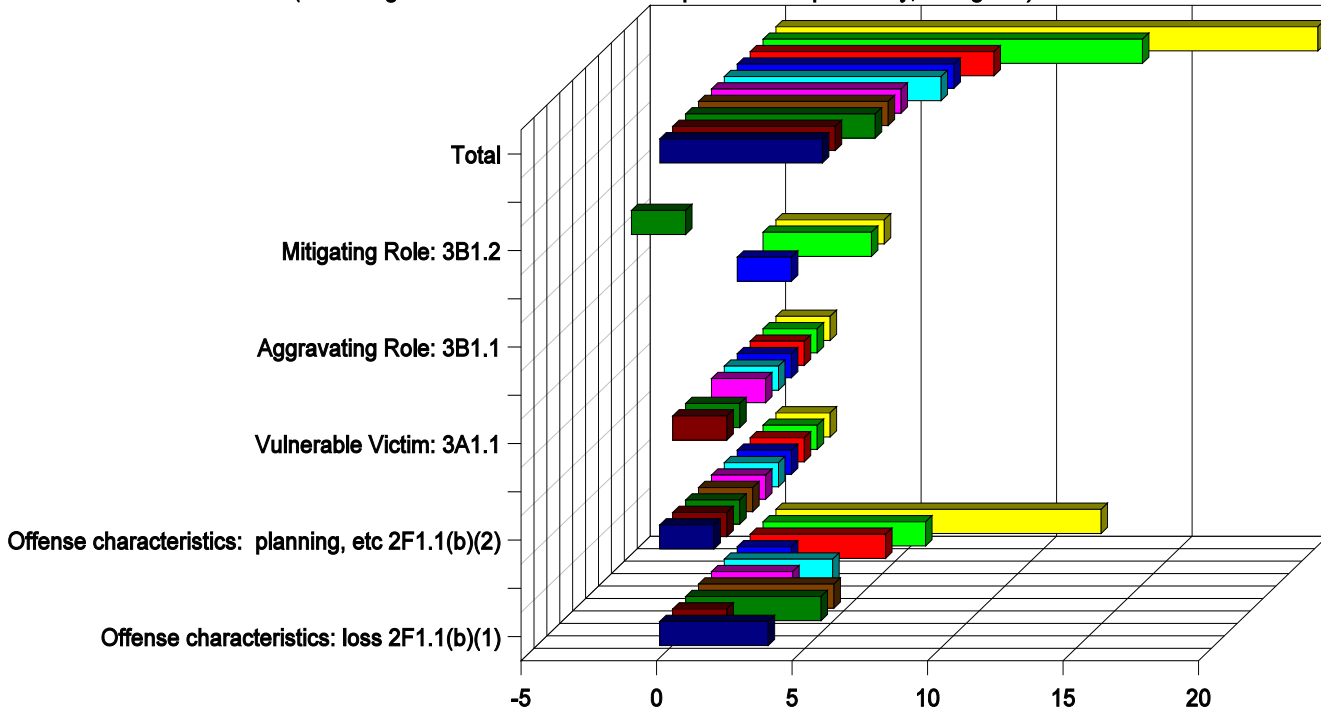
This data may be better visualized in the following graph:



Of course with such a small total number of events, one has to be careful about drawing conclusions. The data is obviously sensitive to episodic occurrences. For example, 1994 and 1998 were election years for all prosecutors in Indiana, which may account for the surges at those times, which nevertheless fall about 33% short of the pre-1992 rates. Even with these surges, however, the post 1992 rate of seeking the death penalty was less than 50% (11.3 per year) of what existed previously. While Lefstein’s data as published in 1996 was based on a small sample of data, the consistent

Comparison of Adjustments: USA v. Saia

(Excluding base offense level and acceptance of responsibility, 10 highest)



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|---------------------|--------------------|------------------|
| ■ Prochnal, Richard | ■ Andrews, John | ■ Kieser, Brian |
| ■ Bauer, Ronald | ■ Hinaman, Gregory | ■ Spear, James |
| ■ O'Neil, Richard | ■ Snyder, Ronald | ■ O'Neil, Dennis |
| ■ Saia, Thomas | | |