

**APPELLATE BRIEF WRITING:  
MAKING A BRIEF HELPFUL AND PERSUASIVE**

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## BRIEF WRITING: TIPS FOR MAKING A BRIEF HELPFUL AND PERSUASIVE

### I. INTRODUCTION

This paper identifies specific tools for making a brief more helpful and persuasive. Part II of this paper suggests general goals for writing a winning appellate brief. Part III provides specific advice for making each of the required sections of the brief helpful and persuasive. Although this paper focuses on briefs in the court of appeals, most of the goals and advice are equally effective for trial courts motions and briefs, as well as briefs on the merits in the Supreme Court of Texas.

### II. THE CHARACTERISTICS OF A WINNING BRIEF.

The purpose of writing an appellate brief is different from many other types of writing. The purpose of paperback fiction is usually to entertain. The purpose of academic journals and law review articles is usually to edify. The purpose of personal journals is usually self-expression. But the purpose of an appellate brief is to persuade the judge that your client should win.

To win, a brief writer must think of a brief differently from other writing. We do not use the same writing techniques that we would find in a law review article or fiction. Because the purpose of a brief is to persuade the reader, writing a successful brief requires understanding the perspective, and the needs, of the reader.

#### A. A winning brief is written from the perspective of the reader, not the writer.

One of the most serious flaws in many appellate briefs is that they are written for the wrong audience. The two most common wrong audiences are (1) the writer, and (2) the ideal judge.

The first wrong audience is the writer of the brief. Too many lawyers stop working on their brief when it finally sounds persuasive to themselves. But to make the brief understood, and persuasive, to someone else requires much more work. It requires more work because most of us write with a voice in our head that provides all of the necessary emphasis for our own writing. For instance, a long, complex sentence can make perfect sense to the writer, yet be completely incomprehensible to the reader. It takes work to make our writing as clear as possible so that our audience will understand it.

The second wrong audience is the ideal judge. The

audience many advocates imagine is an ideal judge who has full knowledge of the law and great interest in the case. This ideal judge has infinite time to read, research, and consider the arguments. This ideal judge also reads briefs in a quiet, library-like setting. Many advocates routinely write briefs under the assumption that, if the judges are smart and fair, the judges will certainly agree with the advocate's side of the issue because they will understand and be persuaded by it.

The reality, of course, is that judges rarely meet this ideal. Second Circuit Judge Ruggero J. Aldisert identified the difficult reading environment that judges face:

Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.

Judge Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 24-25 (rev. 1st ed. 1996).

Most judges are not experienced in every substantive area of the law. Most judges frequently deal with some issues in cases that are not of great interest. Most judges do not have the amount of time to read, research, and consider arguments that advocates believe judges have. And most judges do not read in a quiet, library-like setting.

In their speeches and papers, more and more judges are asking advocates to do more to help judges do their job. As Supreme Court Justice Ruth Bader Ginsburg said about appellate briefs:

The cardinal rule: it should play to the audience. . . . The best way to lose that audience is to write the brief long and cluttered. . . . The concentration of court of

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appeals sittings means that the judges will lack time to ferret out bright ideas buried in complex sentences.

Justice Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

To understand how judges read our briefs, it is important to place ourselves in the shoes of real judges and the circumstances in which they typically read briefs. Real judges want to be able to understand the argument quickly, and they need to quickly understand the most persuasive reasons why you should win.

### **B. A winning brief helps the court understand the argument more quickly.**

Because reading briefs is a difficult task, often performed in difficult circumstances, judges often criticize legal writing that does not help make it easier to understand the argument. Judge Aldisert explained that judges frequently criticize briefs for these reasons:

- Absence of organization.
- Uninteresting and irrelevant fact statements.
- Failure to prepare an accurate table of contents.
- Failure to set forth a summary of argument before proceeding into a discussion of each point.
- Unclear, incomprehensible, irrelevant statements of reasons.
- Discussing unnecessary details of precedents and compared cases.

Aldisert at 23-24.

A common theme in these complaints of judges is that advocates need to do a better job to help judges understand the argument of a legal brief more quickly. Judges frequently admonish advocates to make their briefs easier to read through organization, clarity, and tools, that make legal briefs more useful for readers. Most judges desire briefs that are easy to read quickly.

### **C. A winning brief is persuasive.**

The other important goal of brief writing is to help judges understand why the advocate's position is more persuasive. A key to making writing more persuasive is for the advocate to understand the perspective of the judge. Advocates often are locked in the point of view of their own side. Although it is essential that an advocate

understand and argue for the client's point of view, an advocate should also understand the point of view of the judge. An advocate who understands the judge's point of view can more easily help the judge see the merits of the client's position.

### **D. The most important stage in brief writing is not writing, but editing.**

A key step in making a written argument both easier to read and more persuasive is to edit it from the perspective of the judge, rather than the perspective of the advocate who wrote it. Ideally, the advocate should wait a few days between drafting and editing a written argument. This allows the advocate to step back from the tone and emphasis that he or she intended as a writer, and to experience the tone and emphasis as a reader.

The important questions the editor must ask include the following:

- Is this written argument easy to follow and understand?
- Could a judge skim this written argument quickly and still understand the main points?
- Does the argument address both sides of the issue and explain why the advocate should prevail?
- Are the most important arguments emphasized?
- Is the argument interesting, so that it will maintain the judge's attention?

Asking these questions when editing should help the advocate produce a final product that is more comprehensible and more persuasive to the judge.

## **III. ADVICE FOR SPECIFIC BRIEF SECTIONS.**

In light of the general goals discussed in Part II, this part provides specific advice for each required section of a court of appeals brief.

### **A. Cover: the most persuasive cover is a professional cover.**

Texas Rules of Appellate Procedure 9.4(g) provides the required contents for brief covers. Tex. R. App. P. 9.4(g). The required contents include the case style, the case number, the title, the party's name, and counsel's

name, state bar number, mailing address, phone number, and fax number. *Id.* If a party would like to request oral argument in the court of appeals, that request must appear on the front cover. *Id.* Usually, that request is designated with the phrase “Oral Argument Requested” at the bottom of the cover.

Because the cover is the first part of the brief that the reader sees, the cover is the first step in persuasion. The cover can give counsel credibility. Or it can detract from counsel’s credibility. When a cover looks professional and follows standard formatting conventions, it suggests that counsel is professional and has experience in the court of appeals. When a cover is not professionally formatted or when it fails to follow standard conventions, it gives the opposite impression.

**B. Identity of parties and counsel: list all counsel, not just current counsel.**

Rule 38.1 requires that an Appellant’s Brief include “a complete list of all parties to the trial court’s judgment or order appealed from, and the names and addresses of all trial and appellate counsel.” Tex. R. App. P. 38.1(a); *see also* Tex. R. App. P. 55.2(a) (petitioner’s brief on the merits in the Texas Supreme Court). A list of parties and counsel is not required in an Appellee’s Brief “unless necessary to supplement or correct the appellant’s list.” Tex. R. App. P. 38.2(a)(1)(A); *see also* Tex. R. App. P. 55.3(a) (respondent’s brief on the merits in the Texas Supreme Court).

From the court’s perspective, this list serves several purposes: it helps the court identify the parties; it provides the court with contact information for counsel; and it provides the necessary information for a conflict of interest check.

It can be a serious problem for the court when the list of parties and counsel is not a complete list of all parties and counsel, including all former counsel in the case. An illustration of this problem is the recent *Tesco* decision. *Tesco American, Inc. v. Strong Industries, Inc.*, 49 Tex. Sup. Ct. J. 448, 2006 WL 662740 (Tex. March 17, 2006). In *Tesco*, the law firm of Baker & Botts had briefly appeared in the case for the Appellee before being replaced by other counsel. *Id.* at \*1. In the court of appeals, the case was assigned to a panel that included a justice who had worked at Baker & Botts at the time the firm had appeared in the case, but the justice had no involvement with the case when she worked for the firm. *Id.* at \*1. Because the briefs did not mention Baker & Botts’s brief involvement in the case, the justice was not aware of a potential conflict of interest. *See id.* at \*1.

Nonetheless, the Texas Supreme Court held that the justice was disqualified. *Id.* at \*3. The lesson of *Tesco* is that judges have no way to learn of possible conflicts of interest unless the parties list all former counsel in the list of parties and counsel.

**C. Table of contents and index of authorities: make the tables clean; make them right.**

The TRAPs require that all briefs include (1) a “table of contents with references to the pages of the brief”; and (2) an “index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.” Tex. R. App. P. 38.1(b), Tex. R. App. P. 38.1(c), Tex. R. App. P. 38.2(a)(1), Tex. R. App. P. 55.2(c), Tex. R. App. P. 55.2(d), Tex. R. App. P. 55.3.

Several aspects of the table of contents and index of authorities are important. First, the table of contents is required to “indicate the subject matter of each issue or point, or group of issues or points.” Tex. R. App. P. 38.1(b), Tex. R. App. P. 55.2(b). If the issues in the statement of the issues are short, the best practice is to copy them into the table of contents.

Second, although not required by the rules, the standard convention is for the “Argument” section of the table of contents to include the outline of all of the argument headers in the argument section in the brief. This not only helps judges locate the page on which a specific argument is made; it also allows judges to see an outline of the entire argument in one place. Providing an argument outline in the table of contents allows the judge to see the logical relationship between primary argument headers in the outline and the subordinate headers.

Third, the advocate gains credibility when the table of contents and index of authorities look clean and professional, follow standard conventions, and provide accurate page numbers. These portions of the brief are the most difficult portions to format, and usually must be prepared after all other parts of the brief are completed because page numbers often change with editing. Thus, it is always important to complete the rest of the brief early enough to allow time for the table of contents and index of authorities to be accurately prepared.

**D. Statement of the case: include only the information required by the rule.**

Rule 38.1(d) requires that an appellant’s brief include a “statement of the case,” which accomplishes the following:

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

Tex. R. App. P. 38.1(d). A statement of the case is not required in the appellee's brief unless the appellant is dissatisfied with the statement in the appellant's brief. Tex. R. App. P. 38.2(a)(1)(B). A statement of the case in a petitioner's brief on the merits in the Texas Supreme Court also requires additional information: the name of the judge who signed the order or judgment appealed from; the designation of the trial court and the county in which it is located; the parties in the court of appeals, the district of the court of appeals; the names of the justices who participated in the court of appeals decision and the identity of the authors of all opinions; a citation for the court of appeals' opinion; and the disposition by the court of appeals. Tex. R. App. P. 55.2(d).

The best approach for a statement of the case is to provide the required information and only the required information. The brief writer should not use the statement of the case as opportunity to discuss facts, provide a thorough procedural history, or to make arguments. The rules specifically prohibit any discussion of facts. Tex. R. App. P. 38.1(d), Tex. R. App. P. 55.2(d). The rule governing the statement of the case in the court of appeals also suggests that the length should not be more than one-half a page. Tex. R. App. P. 38.1(d); *but see* Tex. R. App. P. 55.2(d) (not mentioning the desired length for the statement of the case in a brief on the merits in the Supreme Court of Texas).

### **E. Issues presented: balance the need for brevity with the need for persuasive detail.**

A brief must "state concisely all issues or points presented for review." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). A statement of the issues is not required in the appellee's brief or a respondent's brief on the merits. Tex. R. App. P. 38.2(a)(1)(B), Tex. R. App. P. 55.3(c). But it is a mistake for an appellee to omit this section because it provides a valuable opportunity to frame the issues persuasively.

There are three strategic issues to consider when drafting issues presented. How many issues is too many? How short or long should an issue be? Should the

statement of the issues sound objective or persuasive? These questions are the subject of many different opinions and debate among practitioners. Nonetheless, the goals of briefwriting in Part II suggest some answers to these questions.

#### 1. Number of issues.

There is such a thing as too many issues. An appellant's brief can list so many issues in a brief that individual issues are diluted and counsel's credibility is damaged. Judges frequently complain about advocates who present too many issues. Aldisert at 120-21. Chief Justice Lucas of the California Supreme Court advises counsel to "spend time on issues with potential merit; shotgun approaches that do not distinguish between important and insignificant claims weaken your presentation." *Id.* at 121.

But how many issues is too many? Judge Aldisert suggests, in general, when an appellant's brief lists more than three issues, the lawyer's credibility begins to slip. When a brief lists eight issues, there is a "strong presumption that no point is worthwhile." *Id.* at 120.

In rare instances, counsel may have a strategic interest in demonstrating that the trial judge made many errors and that the cumulative effect of those errors resulted in an unfair trial. In these instances, it may be possible to raise the cumulative errors under a single issue. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f).

#### 2. The length of issues: one sentence vs the "deep issue".

Since the 1997 amendments to the Texas Rules of Appellate Procedure, appellate lawyers have had more freedom in framing the issues. Part of that freedom is the ability to depart from the prior convention of one-sentence issues. That freedom has led to two common approaches to statements of the issue.

One approach is to use a one-sentence issue. The rules provide that this issue may be stated as a question or a positive statement about the error the trial court committed. Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). This is the more common, and the most traditional, approach.

Another approach is Brian Garner's "deep issue." A Garner deep issue consists of separate sentences, contains no more than 75 words, incorporates enough detail to convey a sense of the story, and ends with a

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question mark. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 1 (1994/1995). In practice, most deep issues include one or two sentences about the relevant law or the key facts of the case, followed by a question that poses the legal issue.

In choosing the best approach in a particular case, a brief writer should consider two goals. First, courts have expressed their desire that issues be short. The United States Supreme Court Rules require that a statement of the issue be “short and concise.” U.S. Sup. Ct. R. 14.1(a) (1991). Similarly, the rules require that the issues be stated “concisely.” Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). The brief writer has the opportunity to summarize the argument in the summary of argument section of the brief. There is no need to summarize the entire argument in the statement of the issue. For instance, consider this long “deep issue” from a brief filed with the Texas Supreme Court:

This Court in *In re Perry*, 60 S.W.3d 857 (Tex. 2001) confirmed that immunity afforded to legislators extends beyond mere immunity from liability, and includes immunity from the burdens of defense, including discovery. The unanimous Court ruled that the district court abused its discretion when it *permitted* discovery from members of the Legislative Review Board and its staff regarding their individual acts and communications concerning a redistricting plan adopted by the Board. The Court of Appeals in this case has held that the district judge abused her discretion when she *failed to permit* the deposition of Mr. Joe, a city councilman, pertaining to his “individual acts concerning the moratorium” adopted by the Irving City Council. *Is an elected member of a city council entitled to the same immunity from discovery as a member of the Legislative Review Board?*

Brief on the Merits of Petitioner Harry J. Joe at vii-viii, *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004) (No. 02-0218) (emphasis in original). Although this issue provides a great deal of persuasive detail, it is so long that it hardly serves as a “short” or “concise” statement of the issue. Apart from the final question mark, this statement of the issue looks more like a summary of the argument, and takes about as long to read.

Second, an issue is an opportunity to frame the legal issue in terms of the most persuasive reasons for ruling in favor of your side. An issue that is too general tells the court nothing. For instance, one issue presented in a Texas Supreme Court brief asked simply:

Whether the court of appeals erred in reversing the trial court’s summary judgment in favor of Delta and Perez, and against Black?

Delta Air Lines Inc., and Al Perez’s Brief on the Merits at 2, *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745 (Tex. 2003) (No. 02-0255). Apart from telling the court that the case concerns a summary judgment, this issue is so general that it tells the court nothing about the case. It is neither helpful nor persuasive.

The best issue is both short and detailed enough to persuade. One sentence is often sufficient to clearly frame the issue with some persuasive details. For instance, consider this effective one-sentence issue:

Does a liability insurer have a duty to defend its insured against a claim involving an injury allegedly resulting from multiple causes, when the injury would not have occurred, and thus the claim would not exist, “but for” conduct expressly excluded from coverage under the policy?

Brief of Petitioner Utica National Insurance Company of Texas at ix, *Utica Nat. Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004) (No. 02-0090). This one-sentence issue is specific enough to frame the legal issue persuasively, but not so long that it takes more than thirty seconds to read and understand.

In some instances, more than one sentence may be required to adequately frame the issue. In these instances, the “deep issue” format may be the best approach. In other instances, however, the “deep issue” format is counterproductive because it encourages brief writers to make issues longer than they need to be.

### 3. Objective issues vs. persuasive issues.

A final strategic consideration in drafting an issue is whether to phrase the issue (1) objectively, or (2) positively and persuasively. The rules do not speak to this issue. See Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f).

The best approach is usually to use the question to persuasively suggest the answer. A recent survey of

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Texas appellate judges indicated that 58 percent preferred a positive statement of the issue that suggests the answer. Daryl L. Moore and Amy Hennessee, *Judicial Response to the Questionnaire*, in STATE BAR OF TEXAS 17<sup>TH</sup> ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 5, at 1-2 (2003). Because most judges prefer a persuasive issue, it makes sense to use the issue as an opportunity to persuade.

### F. Statement of facts: avoid argument, but use the opportunity to persuade.

Rule 38.1 provides that the appellant's brief in the court of appeals "must state concisely and without argument the facts pertinent to the issues or points presented." Tex. R. App. P. 38.1(f). Similarly, Rule 55.2 provides that a petitioner's brief on the merits "must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. Tex. R. App. P. 55.2(g). The appellee or the respondent is only required to provide a statement of facts if they are "dissatisfied with the statement" in their opponent's brief. Tex. R. App. P. 38.2(1)(a)(B); Tex. R. App. P. 55.3(b). But all parties should almost always provide a statement of facts because it is the opportunity to tell their side of the story.

The best statement of facts tells a persuasive story without argument. The key is to persuade without argument. There are several methods for achieving that goal.

#### 1. Avoid inferences, legal conclusions, and unnecessary adjectives and adverbs.

Rule 38.1(f) prohibits "argument" in the statement of facts. Tex. R. App. P. 38.1(f). But what is argument? The most obvious type of argument is an inference or legal conclusion made from a fact. For instance, it is permissible to state in a statement of facts:

Jenny Francis testified that she saw Smithers' car run the red light.

It is improper argument, however, to conclude that Smithers ran the red light based on an inference from the evidence:

Because Francine Jones had a green light as she crossed the intersection from the cross street, Smithers necessarily ran a red light when he entered the intersection from the perpendicular direction.

This sort of inference needs to be reserved for argument. Similarly, it is improper argument to draw a legal conclusion in the statement of facts:

Smithers' negligence was established by Jenny Francis's testimony that she saw Smithers' car run the red light.

Legal concepts, such as negligence, should rarely appear in a statement of facts because they almost always constitute improper argument.

A less obvious type of argument is the improper use of adjectives and adverbs in a statement of facts. "Adjectives are opinions about facts and therefore generally don't belong in a fact section." Steven D. Stark, *Writing to Win* 106 (1st ed. 1999). Similarly, adverbs often are opinions about facts. Of course, adjectives and adverbs are appropriate when they are contained in quotes from witnesses' testimony. They are also appropriate when the adjective or adverb is not a characterization of the fact, but an objective, observable fact, such as "the light was red."

#### 2. Organize the facts persuasively.

Although the statement of facts cannot use argument, it is an opportunity for the writer to organize the facts in a persuasive manner. It is helpful to consider the organization of facts on both the level of the larger narrative and the level of the individual sentence.

On the level of the larger narrative, brief writers frequently make the mistake of falling back on a chronological ordering of facts, when a non-chronological ordering is more persuasive. For instance, consider the following paragraph with a non-chronological ordering:

On September 17, 2005, WidgetCorp.'s President, Thurston Grey, announced in a shareholder meeting that the corporation's financial health "is excellent and is almost certain to improve for the remainder of the year." One week earlier, Grey received a memo from WidgetCorp.'s CEO stating "WidgetCorp. may face a serious financial crisis in October 2005 when the government releases its safety report." Only a few days before the September 17 meeting, Grey was told by the company's Vice President of regulatory compliance that, "this safety report may do us in."

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Like the movie *Pulp Fiction*, this narrative jumps around in time, but it does so with a purpose. The President's representation is followed by earlier events that demonstrate he knew his representation was false.

Organization can be equally important at the sentence level. Readers remember best the information at the end of a sentence. George D. Gopen, *The Sense of Structure: Writing from the Reader's Perspective* 35 (2004). Readers remember least the information in the middle of a sentence. *Id.* Thus, if it is important to emphasize a fact, it should appear at the end of a sentence. If it is important to disclose but minimize a fact, the writer may want to place that fact in the middle of a sentence. Professor Gopen offers a useful example:

- 4a. Although Fred's a nice guy, he beats his dog.
- 4b. Although Fred beats his dog, he's a nice guy.

*Id.* at 51. Although these sentences use almost identical words, sentence 4b paints a much more positive picture of Fred. It buries the bad fact that Fred beats his dog in a subordinate clause in the middle of the sentence. It emphasizes a good fact, that Fred is a nice guy, at the end of the sentence.

### 3. Disclose bad facts.

The example about Fred raises a question: If you are defending Fred, why tell the reader that he beats his dog? In the statement of facts, it is important to disclose this type of bad fact when it is relevant because the other side will almost certainly tell it to the court. If you do not disclose it, you lose credibility because it looks like you are trying to hide from important facts. "One would think that after Watergate, Iran-contra, and the Lewinsky matter, lawyers would realize that the coverup is almost always worse than the crime." Stark at 101-02. The most effective approach is often to disclose the bad facts, but use the organization of the statement of facts to minimize their importance in the story.

### **G. Summary of argument: it is not just a summary.**

A summary of argument is required in every appellate brief. *See* Tex. R. App. P. 38.1(g), Tex. R. App. P. 38.2(a)(1), Tex. R. App. P. 53.2, Tex. R. App. P. 55.2. A summary of argument should be "a succinct, clear, and accurate statement of the arguments made in the body of the brief." Tex. R. App. P. 38.1, Tex. R. App. P. 55.2(h).

It "must not merely repeat the issues or points presented for review." *Id.*

The summary of argument is one of the most important parts of the brief. It is where readers expect you to crystalize your best arguments in a short statement about why you should win. As Steven Stark explains:

Unless readers know right up front where you're heading and why, it's very difficult for them to follow a complicated explanation or argument, much less be convinced by it.

Stark at 6-7.

Ideally, a judge should be able to look at the summary and quickly identify the following information: (1) a roadmap of the argument; and (2) the most persuasive specific arguments for your position. The summary should get to the heart of the argument in as few words as possible, rarely more than one page. A recent survey of appellate judges showed that one-third responded that a summary should never be more than one page. *Moore and Hennessee* at 2. More than two thirds said a summary should never be more than two pages. *Id.*

For a summary to be persuasive and convey the heart of the argument, it cannot be merely general. It should identify specific, persuasive reasons for the advocate's position, even if the legal and factual support will require substantial development later in the body of the argument. If possible, these arguments should include specific examples rather than general concepts.

The following is a sample summary from an appellee's brief:

The trial court judgment should be affirmed, and the arguments in AB's brief rejected, because AB's arguments fail to follow the correct rule of law and the evidence in this case. First, the rule of law suggested by AB's brief greatly expands the fiduciary duties of a departing employee – far beyond the duties recognized by Texas courts. Previously, Texas law has recognized that a departing employee has the right to make plans to compete with his employer, the right to secretly join other employees in the endeavor, and the right to keep these plans secret from his employer. AB, however, would change Texas law by requiring the departing employee to disclose the plans to compete and by preventing the

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employee from hiring other employees after the employee has resigned.

Second, AB's Brief also ignores the evidence and inferences favoring the jury's verdict. There was substantial evidence to support the jury's verdict that Arizpe did not breach any fiduciary duty when other employees joined his new company after he resigned. There was evidence that Arizpe did not know other employees would follow him until after he left AB. There also was substantial evidence that other employees left, not because of any inducement by Arizpe, but because of their deep-seeded resentment of AB's management. The record in this case establishes no more than a former employee's legal competition with his former employer.

This summary provides the two important parts of a summary. First, it provides a roadmap, which appears in the last part of the first sentence ("the correct rule of law and the evidence in this case") and in the words "first" and "second." Those words provide the roadmap because the argument that follows has two parts, the first about the correct rule of law and the second about the evidence in the case.

Second, the summary includes specific, persuasive arguments, not just general conclusions. For instance, the first paragraph explains how the rule proposed in the other side's brief would specifically change the legal requirements placed on departing employees. The second paragraph points to specific facts that demonstrate that the Appellee did not breach his fiduciary duty.

### H. Argument: winning with persuasion.

The rules require that the argument section "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(h), Tex. R. App. P. 55.2(i). This rule provides few constraints, and little guidance, about how to draft an argument. But professors, commentators, and judges have offered extensive advice about argument in a brief. In this section, I will catalogue some of the suggestions I have found most helpful.

#### 1. Lead with the best argument and the best support.

Except in exceptional circumstances, the advocate should try in most written arguments to place the best, most persuasive arguments first. See Stark at

126. There are several reasons for this approach. First, if the judge has limited time, the judge is likely to devote the most attention to the argument that appears first. Because the first argument may be the best chance for the advocate to catch the judge's attention, that argument should be the most persuasive one. Second, most judges expect that advocates will lead with their best argument. If a very good argument appears after a weaker argument, the judge may have rejected the first argument, and then may assume that the second argument is even weaker. Third, it is important to establish credibility early in the written argument, rather than giving the judge the impression that the advocate is wasting the court's time by focusing on weaker arguments.

#### 2. Join the issue.

The job of a judge is not limited to understanding the legal arguments in favor of both sides. The ultimate job of the judge goes one step further: the judge must choose which side's legal position should prevail.

Brief writers often miss the opportunity to help the judge choose which argument is better. They miss this opportunity because they fail to even acknowledge the best arguments for the other side. Brief writers often make the mistake of seeing only their own arguments, from their own point of view, without acknowledging the best aspects of the other side's argument, let alone acknowledging that a point raised by the other side may have some merit.

The best way to help judges make a decision is to directly clash with the other side's arguments. In other words, the brief should "join the issue." Joining the issue is an emphasis tool because it is a method to focus the judge on the primary reason why your arguments are superior. It involves three steps:

- (1) Make the best arguments for the advocate's position;
- (2) Acknowledge briefly the best arguments for the other side's position; and
- (3) Explain why the advocate's own arguments should prevail over the best arguments for the other side.

Most brief writers accomplish the first step – explaining their own arguments. The second and third steps, however, appear all too rarely in legal writing. This is unfortunate because a brief writer who skips the second and third steps often loses an opportunity to persuade the judge.

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Many briefs avoid the second step – acknowledging the other side’s best arguments – for several reasons. First, some brief writers simply do not listen to the other side’s argument. Second, some brief writers hope that the judge may not have understood the other side’s arguments and see no need to explain them to the judge. Third, some brief writers fear that openly acknowledging the other side’s arguments is a sign of weakness.

These reasons ignore the fact that acknowledging the other side’s arguments can be a sign of strength. Counsel who acknowledges the best arguments for the other side will come across as more credible, more honest, and more intelligent. Acknowledging the other side’s arguments demonstrates that counsel does not fear those arguments. But most importantly, it is necessary in order to give counsel the opportunity to move to the crucial third step in the process – explaining why his or her position should prevail.

In the third step in this process, the brief writer weighs the arguments for both sides and explains why the scales tip in the advocate’s favor. This may involve explaining why the other side’s arguments are weaker, or it may involve explaining why the advocate’s arguments are stronger, or both.

The following is an example of a portion of a legal brief that acknowledges the other side’s position, and then explains why the other side’s arguments are weaker:

Crown argues that a party must object before expert testimony is admitted in order to preserve an argument that the testimony is no evidence. There are two problems with Crown’s approach. First, it is based on a view that prior Texas cases are incoherent, even though they can be easily harmonized. As demonstrated above, *Maritime Overseas* can easily be squared with *Schaefer*. Second, Crown’s proposed rule would require courts to make a difficult, and false, distinction between “reliability” challenges and “no evidence” challenges. But Crown does not even attempt to define this purported distinction.

This example goes beyond mere argument for the advocate’s position. The first sentence acknowledges the heart of the other side’s position. The remainder of the paragraph then explains why the Court should reject the other side’s position because it is based on the premise that Texas Supreme Court decisions are in conflict. This example joins the issue by giving the judge

a rational basis to choose one side’s arguments over the other side’s argument.

Joining the issue is easier in an appellee’s brief or a reply brief, when the other side already has articulated its position. It is more difficult to join the issue in an appellant’s brief. Often, however, the parties have previously stated their positions on the issue on the record or in writing in the trial court. The appellant can address the position that the appellee took in the trial court.

### 3. Write an argument, not a law review article or a court opinion.

Many brief writers had early experiences as a legal writer doing one of two jobs: writing for law review; or drafting opinions as a law clerk for a judge. Although these experiences are helpful, the style of writing a brief should be very different.

The purpose of writing a brief is very different from writing a law review article or judicial opinion. Most law review articles seek to offer an academic, objective summary of the law, even if they advocate a particular position on changing the law. Similarly, judicial opinions are designed to not only explain a result, but also to provide a set of neutral rules that serve as precedent in later cases. In contrast, the purpose of a brief is to win. Although judges expect that brief to be honest about the law and facts, there is no requirement or expectation by judges that an argument in a brief will sound academic, objective, or neutral. Rather, an argument in a brief should provide an “argument” for “contentions.” See Tex. R. App. P. 38.1(h), Tex. R. App. P. 55.2(i).

There are a few specific conventions from law review articles and judicial opinions that should not be followed in briefs. First, unlike a thorough law review article, a brief need not include every authority for a proposition or long string cites. Usually, one authoritative citation is sufficient.

Second, unlike the “law” portion of an opinion, an argument should not begin with a long listing of broad, neutral legal principles that apply generally to the issue. Rather, a brief should jump right into the argument. For instance, one recent opinion began a discussion in an insurance case with a neutral summary of construction rules:

In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to

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isolate particular sections or provisions from the contract as a whole. *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 433 (Tex.1995); *Gen. Am. Indem. Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660, 661 (1960); see *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 156, 157 (2003). Viewing the policy in its entirety furthers our objective to give effect to the written expression of the parties' intent. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex.1999) (citing *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex.1998); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex.1994)).

*Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). This type of discussion is completely appropriate in a judicial opinion that announces the general principles of law to be followed in future cases. But it is not persuasive argument. It is neutral and detached from the parties in the case. It cites more authority than is necessary to persuade a court that the legal principles are correct.

In contrast, an effective brief that cites the same principle sounds very different:

Dominion's interpretation relies solely on one clause in a policy provision, and ignores other language in the same clause, as well as two other provisions, that contradict its interpretation. Thus, Dominion violates this Court's admonition against isolating "particular sections or provisions from the contract as a whole." *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 433 (Tex.1995).

This example is far more persuasive because it does not waste space espousing general legal principles, but instead concisely applies the relevant principle to explain why one side should win.

#### 4. Use short summaries and topic sentences.

Another effective tool in writing an argument is to summarize the argument of a paragraph in the first sentence, or first few sentences, of the paragraph. This tool is often referred to as the "topic sentence."

The topic sentence serves a number of useful functions. First, much like headers in an outline, a topic sentence helps the reader understand the argument. The

topic sentence tells the reader that the various details in the paragraph will explain or support the main argument found in the topic sentence. In legal writing, the topic sentence is particularly useful because it tells the reader the argument that the paragraph will make.

Second, when a judge only has time to skim the brief, for instance before an oral argument, the judge may simply read the first few sentences of each paragraph to try to understand the argument quickly. This approach gives the judge more detail than a quick review of argument headers, but it still requires much less time than reading every sentence in each paragraph.

Many advocates make the mistake of not identifying the argument of a paragraph until the end of the paragraph. This often leaves judges wondering about the point of the paragraph until the end. One problem with this approach is the judge does not know how to analyze the supporting reasons that are given throughout the paragraph because the judge does not know the conclusion that those reasons are being offered to support. Another problem with this approach is that impatient judges often will not finish the paragraph in an effort to find the point. Instead, they may simply move on to the next paragraph, or argument, or, even worse, the other side's brief.

The following paragraph demonstrates why it is harder to read a paragraph when the main argument of the paragraph does not appear until the last sentence:

In *Johnson v. Brewer & Pritchard*, the Texas Supreme Court specified duties that a departing employee does not owe. 45 Tex. Sup. Ct. J. at 474. First, "[a]n at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed . . . ." *Id.* Second, "[s]uch an employee has no general duty to disclose his plans to his employer . . . ." *Id.* Third, "generally he may secretly join other employees in the endeavor without violating any duty to his employer . . . ." *Id.* Thus, Texas law does not impose the specific kinds of fiduciary duties that the plaintiff seeks to impose in this case.

This paragraph begins by telling the reader the topic of the paragraph – duties not owed by a departing employee – but it does not tell the reader the argument that the paragraph is making. That argument only becomes clear in the last sentence: "Thus, Texas law does not impose

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the specific kinds of fiduciary duties that the plaintiff seeks to impose in this case.” It is far easier for the judge to analyze that discussion of various duties if the judge knows that the paragraph is arguing that the Texas Supreme Court has specifically rejected the duties asserted by the other side.

### 5. Organize the argument around effective headers and a logical argument outline.

Although not required by any rule, the convention for appellate briefs in Texas is to organize an argument with argument headers arranged in an outline format. There are several aspects to this approach.

#### a. Effective headers

The ideal argument header is a one sentence summary of the argument that appears following the header. Headers are usually set apart from the rest of the text single spaced in bold font.

Argument headers help the judicial reader in a number of respects. First, headers provide a quick summary of the argument that follows the header. A judge should be able to read only the headers in the argument section of the brief and have a good overall idea of the argument, even if he or she only has a few minutes to look at the brief before a conference or oral argument.

Second, when judges read the entire argument, headers provide a welcome break in the legal prose. They break the often hypnotic flow of argument and authorities. They provide the judge a chance to take a mental breath so that the judge can prepare to absorb the next argument.

Third, headers often provide judges with much-needed transitions. They provide a signal that readers should shift their mental gears because they are about to read a different point.

Fourth, headers encourage reading by demonstrating organization. They provide an immediately visible structure that reassures the reader that the argument is organized and that he or she is not going to have to work too hard to follow it. The very presence of headers is a signal that the advocate is concerned about the structure of the argument and concerned about communicating to the court.

Fifth, headers make a brief easier to use. If the judge wants to locate a specific portion of the argument, an effective header tells the judge very quickly where that portion of the argument appears.

An effective header usually has several characteristics. First, headers are more effective when

they are not just a phrase, but a complete sentence. Headers that are phrases, instead of sentences, do no more than identify the general subject of the argument. They do not provide a persuasive summary. For instance, the following header says nothing persuasive:

#### Standard of Review

This header does not convey any argument that helps the judge understand the argument of the brief. A more effective header is a complete sentence that makes a persuasive point, such as:

The Court should only reverse the trial court’s exclusion of the Tanner Report if the trial court abused its discretion.

This header places the discussion of the standard of review in the context of the main argument of the brief. The sentence is not just a mere label that says the following discussion will concern the relevant standard of review; it is an argument why the standard of review weighs in favor of affirmance.

Second, a header should be phrased as a positive argument for the advocate’s position. Neutral headers do not persuade. For instance, because the following header simply states a legal rule, without explaining why the advocate’s position is superior, the header is not persuasive:

The existence of a duty to disclose is an element of fraudulent concealment.

This header may contain a legal rule that is an important step in the logic of the advocate’s argument, but it fails to explain why that rule is significant or why the rule means that the advocate should win. The following header is more persuasive:

The summary judgment should be affirmed if there was no evidence that Smith owed a duty to disclose.

This header is more persuasive because it places the rule in the context of the particular parties, the particular legal issue, and the result. Even if the header is only the first step of a complete argument, the header explains how the legal rule directly relates to why the other side should lose the issue.

Third, headers are usually more effective if they are

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limited to one thought or argument. The human mind usually processes each sentence as a single thought. It is harder for the mind to process multiple thoughts in a single sentence. For instance, the following header contains multiple arguments:

The Tanner Report was properly excluded because it is irrelevant hearsay.

Although this header is short, it contains two separate arguments – (1) that the report was irrelevant, and (2) that the report was hearsay. It is easier for a judge to recognize that the advocate is making two independent arguments when the argument is broken into two headers:

The Tanner Report was properly excluded because it is irrelevant.

The Tanner Report was properly excluded because it is inadmissible hearsay.

With two headers, it is easier for the judges to understand that the advocate is making two separate arguments because there are two separate argument headers.

### b. Logical outline structure

An outline structure contains argument headers, ordered by letters and numbers that demonstrate the role of each header in the overall argument structure. An outline is not only an organizational tool, but a method to convey the logic of the argument.

The outline structure also provides additional advantages. First, effective outlines convey a visible logic. With an effective outline, the structure of the argument becomes clear to the reader very quickly. The reader can easily see which points are the main points, and which points are support for the main points.

Second, the argument header outline can be a persuasive summary of the argument. With an effective outline structure, a judge should be able to read only the header outline of the argument and conclude, “if the advocate can prove each of these points, the advocate should win.” Thus, the conclusion that the advocate should win should follow from the logic of the structure, so long as the individual points are proven.

An effective outline has several specific characteristics. First, each header in an outline should directly support the header under which it falls in the outline structure. For instance, when headers A, B, and C fall under a main point I, then the A, B, and C headers

should be logical support for the main argument in I. In the following example, because subpoints A and B support a different point than the point in I, the outline is not effective:

I. A content based statute is one with the impermissible purpose of restricting the content of speech.

A. The Billboard Act is content neutral because it is justified by a desire to control the secondary effects of billboards on the landscape.

B. The Billboard Act is content neutral because both the sign restriction and election exception apply to a broad range of subject matter.

In the above example, it may be difficult for readers to immediately see the relationship between the point in I and subpoints A and B. In the following example, point I has been redrafted so that the subpoints support it, which results in an effective outline:

I. Although the Billboard Act has subject matter-based exceptions, the Act remains content neutral.

A. The Billboard Act is content neutral because it is justified by a desire to control the secondary effects of billboards on the landscape.

B. The Billboard Act is content neutral because both the sign restriction and election exception apply to a broad range of subject matter.

The above example uses the outline format to demonstrate to the reader that subpoints A and B are independent arguments that support the main point in I. As rewritten, the outline conveys an easily understood logic.

Second, an outline should be ordered in a logical, progressive sequence, not randomly ordered. The brief writer should take care to keep related points together and unrelated points separate.

Third, an outline should provide enough layers of detail so that the judicial reader can fully appreciate the

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argument from the outline alone. If an outline gives enough detail, the judge should be able to use it as an additional tool for a quick summary of the argument. In this respect, an outline is another tool of summarization, like the summary of argument. It is not redundant with a summary of the argument, however, because it is in a different format – a format that conveys the logical structure of the argument. Some judges prefer to read a summary in paragraph form, and others prefer to read a summary by looking at the visible structure of the argument, conveyed by the outline. Some judges find both summarization tools useful.

### 6. Lead with conclusions.

It is helpful to think of each paragraph in an argument section as making its own argument. Each paragraph is a building block for the overall argument. It is a common tendency of writers to place the argument, or conclusion, of the paragraph at the end of the paragraph. For many types of professional writing, this approach makes sense because one place readers expect to find the point or conclusion of a paragraph is at the end. *See Gopen*, at 117-21.

But in writing a legal argument, it is important to begin with the conclusion and follow with support. *See Stark* at 128-30. Judges need to know the paragraph's conclusion before they can evaluate its support. If the judge reads all of the support before first understanding the conclusion of the argument, the judge may not know how to evaluate the support.

It is particularly important for a brief to lead with a conclusion when it provides a long discussion about case authority. In most instances, it is not necessary to write more than one or two sentences about a case. Most case citations in a motion or response are offered to support a particular legal rule. It is usually sufficient to state the rule, cite the case, and perhaps provide a short quote from the case. But in some instances, the details of a particular case are very important and need to be developed in depth. For instance, at times, it is persuasive for a brief to develop a cited case in depth because its facts are highly similar. The brief may need to explain why that similar case should be followed or distinguished. At other times, a cited case should be discussed in depth because the scope of the legal rule announced in that case is not clear, and the details of the case help explain the proper scope of the legal rule.

If a brief discusses a cited case for a paragraph or more, the judge needs to know as quickly as possible why the case is being discussed. The first or second sentence

of that discussion should explain how the advocate is using the cited case.

If the judge sees only a detailed summary of the facts of the cited case, without first seeing any explanation about why those facts are relevant, the judge probably will fail to understand why those facts are relevant, or the judge may even ignore that factual discussion altogether. For instance, in the following example, the judge is given no explanation for how the cited case might even be relevant:

In *White*, the informant not only described the suspect in significant detail, but also described the suspect's itinerary, which police were able to corroborate with independent investigation. *White*, 496 U.S. at 332. The officers went to the apartment complex where the informant said the suspect was located, observed a car exactly matching the description given, saw the defendant leave the building, get in the car, and leave. *Id.* Police did not stop the defendant until they verified that she was en route to the exact destination the informant predicted. *Id.* Because the informant accurately predicted the suspect's behavior, the Court held that it was reasonable for the police to rely on the informant's knowledge of the suspect's illegal activity. *Id.*

This paragraph would be far more helpful to the court if it began with an explanation for why the advocate is citing *White*:

The *White* case is distinguishable from this case because, unlike this case, the informant in *White* had given detailed information that the police were able to corroborate before making the custodial stop.

If the explanation of how the advocate is using the *White* case appears first, at the beginning of the paragraph, then it is easier for the Court to apply the relevant details of that case to the brief writer's position.

### 7. Weave facts and law: discuss legal rules in the context of the relevant facts and discuss the facts in the context of relevant law.

Judges often find it easier to read an argument that argues law and facts together, rather than separately. For instance, it is more difficult to read a summary of the

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relevant legal rules without first knowing how those rules will be relevant to the facts of the brief writer's case. Similarly, it is more difficult to read a long factual argument, without first knowing the relevant legal rules to which that factual argument will be applied.

Consider the following example where legal rules are discussed without any explanation of how those rules bear on the brief writer's case:

A party can de-designate a testifying expert and re-designate the expert as a "consulting only" expert as long as they do not do so for an improper purpose. *Castellanos v. Littlejohn*, 945 S.W.2d 236, 239 (Tex. App.—San Antonio 1997, no pet.). Re-designating a witness as "consulting only" in order to suppress testimony or to conceal facts is considered an improper purpose. *In re State Farm Mut. Automobile Ins. Co.*, 100 S. W.3d 338 (Tex. App.—San Antonio 2002, no pet.).

This statement of the legal rules can be much more effective if it is framed in terms of the parties and the facts of the particular case.

Federated can de-designate its testifying expert and re-designate her as a "consulting only" expert only if it does not do so for an improper purpose. *Castellanos v. Littlejohn*, 945 S.W.2d 236, 239 (Tex. App.—San Antonio 1997, no pet.). Federated, however, re-designated the witness as "consulting only" in order to suppress testimony or to conceal facts, which Texas courts have held is an improper purpose. *In re State Farm Mut. Automobile Ins. Co.*, 100 S. W.3d 338 (Tex. App.—San Antonio 2002, no pet.).

If the legal rule is presented in the context of the particular facts of the brief writer's case, then it is easier for the court to see immediately how the rule should be applied.

### 8. Instead of using synonyms, repeat important words and phrases.

Judges often find it difficult to follow a written argument when that argument uses different terms to describe the same thing or concept. Consider the following poorly written example:

The insurer tendered a defense with a reservation of rights. Then the defendant insisted that the defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion Insurance instructed its retained counsel to stop work on the case.

This paragraph is very difficult to follow because it uses different words for the same parties. The words "insurer," "defendant" and "Dominion Insurance" each refer to a single entity, as do the words "defense counsel" and "retained counsel." It is easy to edit the paragraph to make it easier for the court to read, as follows:

Dominion Insurance tendered a defense with a reservation of rights. Then Dominion Insurance insisted that its retained defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion Insurance instructed its retained defense counsel to stop work on the case.

Although both paragraphs are equally simple, the second paragraph is much easier to follow because it repeats the important words rather than using synonyms.

Particularly in brief writing, precision is very important. When a brief uses different words, the legal reader typically assumes that the writer is referring to a distinct thing or concept. For this reason, brief writers should avoid using synonyms.

### 9. Omit unnecessary arguments, law, facts, and words.

Judges often complain about legal writing that includes too much information – too many arguments, citations or facts. For instance, judges frequently complain about string cites. String cites are only useful in a few circumstances, such as when it is important to demonstrate that a legal rule is a majority rule or to demonstrate a trend. But string cites are never useful to demonstrate that you found more than one case. Worse, unnecessary string cites are a waste of space and a waste of the reader's time when a single citation is sufficient to state the law. As Steven Stark explained, "I've yet to meet the judge who looks at the fifth case cited in a long string cite and exclaims, 'I love that case! You win!'" Stark at 132.

Similarly, a good argument can be lost in a sea of

mediocre arguments. When ten arguments are listed in a legal motion or brief and the third and fourth arguments are weak, many readers will assume that the later arguments are also weak. Thus, the poor arguments can detract from the credibility of the better arguments.

When writing or editing a written argument, decide what information the court needs to decide the issue. When information is not necessary, consider deleting it.

### 10. Maintain the Court's attention.

Legal writing is often dull. Judges often find it difficult to focus for hours at a time on dry legal issues, such as contract construction and evidentiary rules. Judges can become much more attentive, however, when a case involves a new and exciting legal issue, or interesting facts.

The philosopher and psychologist Williams James said, "What holds attention determines action." Aldisert at 20. When one side's brief holds the court's attention better than the other, the court is likely to be more receptive to its arguments.

There are many techniques to catch and maintain a judge's attention. These techniques cannot be explained with a simple formula because attention-grabbing writing is, by definition, not formulaic. Nonetheless, it is possible to identify some successful techniques for grabbing and maintaining attention.

First, legal writing is more likely to inspire excitement when the advocate is excited. The advocate should ask about an issue, "What aspect of this issue is exciting?" Excitement can sometimes be found in some aspect of the facts of the case: a simple contract dispute that involved a heated exchange of correspondence with colorful language; a discovery dispute in which the other side's conduct was not only obstructionist, but bizarre; or a business disparagement case where one competitor accused the other of participating in the occult. Excitement also can be found in some aspects of the legal issue: a legal issue that has never been resolved in Texas, but is the subject of debate among courts in other states; an issue about which Texas courts are in conflict; or an issue about which the Texas Supreme Court has signaled that it may change the relevant legal rule in a later case.

Brief writers far too often run from the exciting aspect of the case by arguing that the issue is not unusual, the law is not in conflict, and the answer is clear. In some instances, however, the brief writer may actually have a better chance of persuading the judge by starting from the proposition that the issue is exciting and unresolved and should be resolved in the brief writer's favor.

Second, even if a set of facts or a legal issue is not exciting, it may be helpful to make an analogy to other facts or legal issues that are exciting. For instance, a dull business disparagement case involving false assertions by one chemical company about the other company's manufacturing processes may be made more interesting if the brief writer makes an analogy to another type of alleged disparagement that is more interesting, such as an analogy to a case involving accusations by vegetarian celebrities about the Texas meat industry.

Third, legal writing should not ignore visual aids. Although most trial lawyers are well aware of the importance of visual aids with juries, appellate advocates often ignore the role of visual aids in legal briefs. With computer programs, it is now not only possible, but easy, to create charts or graphs to explain complex legal rules, case law holdings, facts, and data. It is also possible to insert relevant diagrams and even photos within the text of a legal brief. For most judges, a visual aid is not only a welcome break in the steady stream of text, but in many cases a visual aid may be far more persuasive than pages of textual argument.

### **I. Prayer: consider carefully the relief you request.**

"The brief must contain a short conclusion that clearly states the nature of the relief sought." Tex. R. App. P. 38.1(i), Tex. R. App. P. 55.2(j). It is important for the prayer to specify the relief requested. In a brief of an appellant or petitioner, the prayer should be for reversal and rendition, reversal and affirmance, reversal and remittitur, or reversal and modification. In the brief of an appellee or respondent, the prayer should be that the judgment below be affirmed, unless that party has urged cross-points. When a party fails to request the correct relief, the court may hold that the relief was waived because it was not requested.

### **J. Appendix: use an appendix only for documents that are required or very important.**

Rule 38.1(j) requires that an appellant's brief in a civil case contain an appendix that includes: the trial court's judgment or other appealable order; the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based and any contract or other document that is central to the argument. Tex. R. App. P. 38.1(j). The appendix may include optional contents such as excerpts from relevant court opinions, and documents from the record. *Id.*

## **Brief Writing**

The purpose of an appendix is to attach the key documents that the judges are likely to need to review, without having to review the entire record. An appendix should not be so large that it makes it impracticable for the judge to carry the brief home in a brief case. Thus, the appendix should include the required items, plus only the additional items that the court is likely to need to review.

## **IV. CONCLUSION**

Although this paper describes a number of different tools for organization and emphasis, it only scratches the surface of what a brief can do to help appellate judges. The goal of helping judges is an attitude about advocacy. It requires advocates to adopt a court-centered or audience-centered approach to advocacy, rather than an advocate-centered approach. It requires understanding that we do not write for ourselves, but for the judge. Brief writers who embrace this goal and view their case from the point of view of the judge will discover many different techniques that are useful in helping courts understand arguments more quickly and in persuading courts to rule in their favor.