

**WRITING A
GOOD SUPREME COURT
BRIEF ON THE MERITS**

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WRITING A GOOD SUPREME COURT BRIEF ON THE MERITS

Introduction

My assignment was to write a paper called “How To Write A Good Supreme Court Brief.” That title implies that there is a simple technique or formula that can be applied to every case so that a good supreme court brief pops out. Nothing could be further from the truth. What makes a good supreme court brief in any given case turns on so many variables—underlying facts, applicable substantive law, type of litigants, personalities and reputation of counsel, nature of the court of appeals’ disposition, to name a few—that there is no universally applicable method for writing a good supreme court brief.

However, there are some basic guidelines you should follow to both comply with the appellate rules and demonstrate minimal competence to the Court. There are some strategies that should guide your writing so that it is more likely to assist the court in reaching a result that is both beneficial to the jurisprudence of the state and favorable to your client. And there are some writing techniques that I can suggest for assembling all of this information into a comprehensive and comprehensible product.

Although my topic was broadly labeled as supreme court “briefs,” another speaker/author for this course, Doug Alexander, is doing his usual outstanding job of separately addressing petitions for review. Accordingly, this paper will focus solely on briefs on the merits.

I. Mechanics and Components of a Supreme Court Brief on the Merits

Before learning to run you must learn to walk, and before learning to walk you must learn how to crawl. Similarly, before entertaining important strategic considerations concerning writing style and analytical approaches, brief preparation must start with an awareness of how a brief should look and what must be included in it.

A. Mechanics and Formatting

1. Margins and spacing

The brief must have at least one-inch margins (top, bottom, and sides). TEX. R. APP. P. 9.4(c). Although the text of the brief must be double-spaced, “block quotations, short lists, and issues or points of error may be single-spaced.” TEX. R. APP. P. 9.4(d).

2. Font size

The rule regarding font size looks complicated, but it boils down to this: unless you use a manual typewriter, use 13-point type or larger. See TEX. R. APP. P. 9.4(e).

In recognition of the declining vision of most appellate justices, the Fifth Circuit requires 14-point font. Readers accustomed to having to reach for reading glasses—and that includes most justices—will appreciate 14-point font. If you have room, I recommend it.

3. Record Citations

The 1997 appellate rule changes eliminated the long-standing (but somewhat confusing) labels “transcript” and “statement of facts” in favor of the more straightforward and descriptive “clerk’s record” and “reporter’s record.” TEX. R. APP. P. 34.5, 34.6. The abbreviations “CR” for clerk’s record and “RR” for reporter’s record are recommended. Volume and page number citations to the reporter’s record are sufficient, e.g., “RR 3:181-82” or “3 RR 181-82.” (Line numbers are not required, and only add unnecessary length.) If the record is complicated (for example, if there are supplemental volumes of the clerk’s record or transcribed hearings in the reporter’s record that fall outside the consecutively numbered volumes of the reporter’s record from the trial), consider including an explanatory sentence or two at the beginning of the brief.

4. Footnotes

Limit the use of footnotes as much as possible. Many Justices admit that they do not always read them. If you have something that you want to be sure the Justices will read, put it in the text. If you do not care whether it is read, you should consider omitting it entirely. If footnotes are necessary, they may be single-spaced. TEX. R. APP. P. 9.4(d). Although the rules allow the use of 10-point font, at least 12-point font is recommended.

5. Page limitations

Briefs on the merits are limited to 50 pages, exclusive of the following sections: identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, certificate of service, and appendix. TEX. R. APP. P. 55.6. As Justices are always quick to point out, this page limit is a ceiling, not a floor. They do not think less of you or your position if you file a brief on the merits that is less than 50 pages. In fact, as you might understand if you were reading through a stack of briefs on the merits, shorter briefs are usually greatly appreciated.

B. Components of a Brief on the Merits

1. The Cover

The cover should be clean and simple. The required cover contents are the case style; the cause number; the title of the document being filed (“Petitioner’s Brief on the Merits” or, if there are multiple parties filing separate briefs on your side, “Brief on the Merits of Respondent []”); and the name, mailing address, telephone number, fax number, and State Bar number of the lead counsel for the filing party. TEX. R. APP. P. 9.4(g).

Although not required, it is traditional, and helpful to the Court, for the cover to reflect that the case is “On Petition for Review from the [No.] Court of Appeals at [City], Texas.”

The cover of a brief on the merits should not request oral argument. A request for oral argument is required to be included on the cover of a court of appeals brief, but not a brief on the merits in the Supreme Court. TEX. R. APP. P. 9.4(g).

The color of the cover has no particular significance, and is largely up to the attorney. Use discretion and good judgment, and avoid choosing a brief color that will be a distraction. Although using a light color for the cover has long been the preferred practice, the rules now specifically prohibit red, black or dark blue covers—a practical result of difficulty in reading file stamps on dark brief covers. TEX. R. APP. P. 9.4(f). The rule also expressly provides that the cover shall be “durable.” *Id.*

2. Identity of Parties and Counsel

The petitioner’s brief on the merits should include, on the first pages after the cover, a complete list of all parties to the trial court’s judgment and the names and addresses of their counsel. TEX. R. APP. P. 55.2(b). The purpose of this listing is so that the Justices can determine whether they have recusal issues before reading any of the body of the brief.

The respondent’s brief on the merits need not, and should not, include a list of parties and counsel, unless required to supplement or correct the list contained in the petitioner’s brief on the merits. *See* TEX. R. APP. P. 55.3(a).

3. Table of Contents

Briefs on the merits must include a table of contents. *See* TEX. R. APP. P. 55.2(b), 55.3. Properly crafted, the table of contents serves as an effective overview of the argument. For the Justices, the table of contents provides a useful roadmap and is used as a frequent point of reference.

The table of contents should contain page references for every section of the brief and every argument heading and sub-heading. A thorough table of contents makes the brief easier for the Justices to use as a working document because they can turn directly to the section in which

they are interested rather than wasting time flipping through pages looking for their destination. Anything you can do to make it easier for the Justices to use your brief when writing their opinion is an obvious advantage.

The rules also require that the table of contents “indicate the subject matter of each issue or point, or group of issues or points.” TEX. R. APP. P. 55.2(b). The better practice is to reproduce in full the issues presented, as well as the headings and subheadings from the argument section.

4. Index of Authorities

Briefs on the merits must contain an index of authorities. *See* TEX. R. APP. P. 55.2(c), 55.3. The authorities should be listed alphabetically under headings such as: (1) Cases (without grouping by jurisdiction); (2) Constitutional and Statutory Provisions; and (3) Miscellaneous Sources. The better practice is to provide page references for every page in the respondent’s brief on which the authority is cited. Do not include pinpoint page references within the citations in the index of authorities. When citing opinions from the Supreme Court of the United States, be sure to include a parallel pinpoint citation to the L. Ed. or L. Ed. 2d. The Texas Supreme Court’s library has only the Lawyer’s Edition for opinions issued by the United States Supreme Court after 1981. Before that, the Court has United States Reports.

Follow Blue Book and Green Book citation form meticulously. Many staff attorneys and law clerks are former law review and journal editors whose assessment of a brief may be heavily influenced by the quality of its cite form. Be particularly mindful to provide accurate subsequent histories for Texas Court of Appeals cases.

5. Statement of the Case

The statement of the case should serve as a simple reference page that the Justices can turn to for basic information about the case. Although the rules do not provide much guidance for the format of a statement of the case, the Justices almost uniformly prefer that the statement of the case be presented in a tabular form that consists of short statements providing information in several categories. Those categories, and the information they should provide, are:

<i>Nature of the case:</i>	Brief statement of the general type of litigation (i.e., products liability, will contest, etc.)
<i>Trial court</i>	Trial court number and county, name of judge
<i>Trial court disposition</i>	State the act of the trial court that was originally appealed from, i.e., summary judgment granted, special appearance denied, judgment entered on jury verdict, etc.
<i>Court of appeals</i>	Number and city of court of appeals
<i>Court of appeals' disposition</i>	Affirmed, reversed, affirmed in part and reversed in part, affirmed as modified (be specific)
<i>Court of appeals' opinion</i>	Citation to Southwest Reports or Westlaw; identification of authors of all opinions and non-authoring justices joining in opinions.

The tabular format closely resembles the study memo that the Court's staff is currently required to use. That makes this format helpful to the law clerk or staff attorney assigned to the case, which is always your primary audience. Only if the petition is granted do the Justices read the briefs on the merits.

Rule 55.2(d) provides that the statement of the case "should seldom exceed one page." Following the tabular format should present no problem in keeping the statement of the case to one page. Providing the same information in a narrative format can make the one-page limit slightly more challenging.

Despite the advantages and the preferences of the Justices for the tabular format, some practitioners prefer to use a narrative format, which is certainly permitted by the rules. When doing so, remember that the purpose of the statement of the case is to provide the Court with basic information and orientation. This is not the place in the brief to argue the merits of the case, and the statement of the case "should not discuss the facts." TEX. R. APP. P. 55.2(d). Although good advocates will try to provide objective information in terms that favor their client's position, a statement of the case should never be overtly argumentative.

Technically, the respondent's brief on the merits need not include a statement of the case "unless the respondent is dissatisfied with that portion of the petitioner's brief." TEX. R. APP. P. 55.3(b). However, as

a practical matter, the respondent should rarely be satisfied with the petitioner's statement.

6. Statement of Jurisdiction

A petitioner's brief on the merits must "state, without argument, the basis for the court's jurisdiction."

TEX. R. APP. P. 55.2(e). In most cases, the basis for jurisdiction will be one of the sub-sections of section 22.001(a) of the Government Code. The statement of jurisdiction should seldom exceed one sentence. If the basis for jurisdiction is that the court of appeals decision conflicts with a prior decision of the supreme court or another court of appeals, the cases with which the opinion conflicts should be mentioned by name and citation. However, any discussion of the conflict should be reserved until the Argument.

The rule governing the statement of jurisdiction in respondent's brief on the merits provides that "a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction." TEX. R. APP. P. 55.3(d). Whether to include a jurisdictional statement presents a strategy decision on which there is a split of opinion.

One view is that including a jurisdictional statement in a respondent's brief on the merits should be reserved for that relatively rare case which is a bona fide candidate for dismissal for want of jurisdiction. Under this view, the jurisdictional statement is not the place to argue that review is inappropriate because the case does not involve error of substantial importance to the jurisprudence of the state—that point should be reserved for the Argument section of the brief. According to this view, arguing in the jurisdictional statement that the case is not important signals to the Court that you do not understand jurisdiction.

The opposing viewpoint is that the statement of jurisdiction should be used by the respondent as a means to dissuade the Court from granting review—even if the only ground asserted in support of jurisdiction is jurisprudential importance. According to this view, the core arguments asserted by the petitioner as grounds for jurisprudential importance should be rebutted by the respondent in a short—but pointed—statement of jurisdiction.

If the respondent elects to include a jurisdictional statement, it should seldom exceed one page. It is sufficient to set forth the core reasons that the Court should not exercise its discretionary jurisdiction to review the case, and to then develop those points in the argument section of the brief.

7. Issues Presented

A petitioner's brief on the merits must "state concisely all issues or points presented for review." TEX. R. APP. P. 55.2(f). The current rule and the current practice is flexible and tolerant—not nearly as rigid as the "point of error" practice that existed in Texas before 1997. In fact, in a clear effort to avoid the waiver problems created by the point of error practice, the current rule states, "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." *Id.* The statement of points or issues need not be identical to the points or issues stated in the petition for review, *id.*, but the brief on the merits cannot raise entirely new points or issues that were not mentioned in the petition for review.

Appellate practitioners are divided over the most effective way to state the issues presented. Some prefer to state the issue as a 2–3 sentence paragraph, which first establishes a factual and/or legal predicate, and then poses a question based on that predicate. Others prefer a short, general question. Still others prefer a question that includes enough facts to make the issue unique to the particular case before the Court. Although points or issues can be expressed as a question or as a sentence stating the holding that the advocate wants the court to make, a majority of practitioners seem to use the question format.

For a respondent's brief on the merits, the rules provide that a statement of the issues presented need not be made unless:

- (1) the respondent is dissatisfied with the statement made in the petitioner's brief;
- (2) the respondent is asserting independent grounds for affirmance of the court of appeals' judgment; or
- (3) the respondent is asserting grounds that establish the respondent's right to a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals but more favorable to the respondent than the judgment that might be awarded to the petitioner (e.g., a remand for a new trial rather than a rendition of judgment in favor of the petitioner).

TEX. R. APP. P. 55.3(c).

8. Statement of Facts

The rules provide that a petitioner's brief on the merits "must affirm that the court of appeals' correctly stated the nature of the case, except in any particulars pointed out." TEX. R. APP. P. 55.2(g). It is not clear from the rule whether this statement is intended to take the place of the brief's own rendition of the facts. In

practice it rarely does. Most practitioners conclude, correctly, that they can state the fact in a manner more favorable to their position than the court of appeals did. However, the rule cautions that the statement of facts must provide the relevant information "concisely and without argument." *Id.* The art here is to state the facts in a light that is favorable to your client, while avoiding the appearance of being overtly argumentative.

The rules also require that statements in this section be supported by record references. *Id.* This is not only required by the rules, but is essential to establish credibility with the Court. It also provides a healthy check on an advocates temptation to stray from the record; if you do not have a record reference to support a statement, do not make the statement.

Counsel also should be cautioned against hiding unfavorable evidence in the statement of facts. In an adversary system, if you fail to disclose a fact that is bad for your side you can be assured that opposing counsel will bring it up in their brief. Rather than have the Court be surprised by the fact then, and have it feel like you were trying to hide the ball, you are much better off disclosing the bad fact in your brief, stealing your opponent's thunder, and trying to put the best possible spin on the bad fact to neutralize the damage before the Court ever reads the other side's version. Moreover, nothing places the credibility of a practitioner more at risk in future proceedings than playing fast and loose with the facts in the present one. The Justices do remember.

For respondent's brief on the merits, the rule provides that "a statement of the facts need not be made unless the respondent is dissatisfied with that portion of the petitioner's brief." TEX. R. APP. P. 55.3(b). Rarely should the respondent be satisfied with the petitioner's statement of facts. Because this section is so critically important, the respondent's brief should almost invariably include a newly crafted statement of facts to properly frame the issues from the respondent's perspective. Virtually the only exception is when the governing standard of review compels the Court to review the record facts in the light most favorable to the petitioner. In such a case, it can be strategically powerful to expressly accept the petitioner's statement of facts (assuming it fairly characterizes the record) and argue that the petitioner loses as a matter of law in any event.

On the other hand, if the standard of review precludes the petitioner's reliance on contested or contradicted facts, the respondent should use the statement of facts to establish that the petitioner's statement did not meet that standard, by pointing out the disputed facts on which the petitioner relies.

Although every portion of the respondent's brief on the merits should be designed to dissuade the Court from granting review, the statement of facts should not include

any argument, and should disclose all key facts, even the important facts favorable to the petitioner. Like the petitioner, the respondent should avoid exaggerating or inaccurately describing any facts. Any misrepresentation of the record by the respondent—which can readily be exposed by the petitioner in the reply brief—may cause the Court to more carefully scrutinize a case that might otherwise be a candidate for a routine denial.

9. Summary of the Argument

Briefs on the merits must include a summary of the argument. *See* TEX. R. APP. P. 55.2(h), 55.3. The summary should not just regurgitate the headings in the argument section, but should be independently crafted. It should not raise arguments that are not found at all in the Argument section—after all, this is supposed to be a *summary* of the Argument—but it can offer a slightly different twist, or present arguments out of order, or provide a creative overview of what follows. Because the study memo, on which the Justices primarily will rely in deciding whether to grant review, will include a summary of the parties' respective positions, carefully crafting the summary of the argument in such a way that it can be readily incorporated into the study memo will best serve the advocate's purpose. To be most effective, the summary should rarely exceed two pages—longer summaries tend to lose their punch.

10. Argument

Though the Argument is almost invariably the longest section of the brief, it has one of the shortest descriptions in Rule 55.2: "The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 55.2(i). Thus, as long as the argument is clear and concise (rules frequently violated and never enforced) and supported by citations to the law and the record, almost anything complies with the requirements of the rule.

As described elsewhere in this paper, a respondent has the challenge of writing to convince the Court to grant the petition, and to issue a favorable opinion on the merits if the petition is granted. To reflect this dual purpose, many advocates divide the Argument section of the brief into two sections: (1) a section arguing that this is the kind of case that the Court needs to take because of a need to fill in a gap, correct a mistake, or clarify an ambiguity in the jurisprudence of the state; and (2) a section arguing that the petitioner should prevail on the merits.

Similarly, a respondent's brief can be divided into (1) a section setting forth the grounds for the Supreme Court to deny review, and (2) a section addressing the merits of the petitioner's arguments as well as the merits

of any issues raised independently by the respondent. Whether to include a separate section setting forth the reasons for the Supreme Court to deny review presents a strategy decision. If the respondent can legitimately argue that this is not the kind of case that merits review by the Supreme Court, the Argument section should probably include a separate section on why the Court should deny review. If, on the other hand, the respondent is relegated to arguing that the court of appeals correctly resolved the legal issue and there is no sound reason for the Supreme Court to disturb its decision, the respondent probably should not include a separate section addressing why the court should deny review. In those instances, the respondent should simply devote its Argument to demonstrating that the court of appeals "got it right," because an attempt to explain in a separate section why the Court should deny review risks highlighting, by unfavorable comparison to the petitioner's brief, the reasons that the case is appropriate for review by the Supreme Court.

11. Prayer

Briefs on the merits "must contain a short conclusion that clearly states the nature of the relief sought." TEX. R. APP. P. 55.2(j), 55.3. The petitioner should request that the petition for review be granted, and that the Court then provide specific relief: reversal and rendition; reversal and remand to the court of appeals; reversal and remand to the trial court; affirmed as modified, etc. When appropriate, alternative requests for relief are acceptable and encouraged. In most cases, the respondent's prayer will simply request the Court to deny the petition for review. Where, however, the respondent is asserting grounds that establish the respondent's right to a judgment less favorable than that rendered by the court of appeals but more favorable than the disposition sought by the petitioner, the prayer should include an appropriate alternative request for relief. *See* TEX. R. App. P. 55.3(c)(3).

12. Signature

Briefs on the merits should be signed by the "lead counsel," as defined by Rule 6. *See* TEX. R. APP. P. 6.1. The Clerk's office strongly encourages signing documents in blue ink so that they can distinguish the original from copies.

13. Certificate of Service

The certificate must be signed by the person who made the service and must state (1) the date and manner of service, (2) the name and address of each person served, and (3) if the person served is a party's attorney, the name of the party represented by that attorney. *See* TEX. R. APP. P. 9.5(e).

14. Appendix

The rules governing the petition for review and response to the petition contain a relatively lengthy section concerning the appendix. *See* TEX. R. APP. P. 53.2(k), 53.3(f). In contrast, the rules governing the petitioner's and respondent's briefs on the merits contain no provision whatsoever concerning an appendix. *See* TEX. R. APP. P. 55.2, 55.3.

There is a reason for this discrepancy. The appendix to the petition and response to the petition serve as a substitute for the record which is not before the Court when it initially reviews the petition. By the time the Court receives the briefs on the merits, however, it not only will have the appendix to the petition, but it also will have the record itself. Thus, counsel ordinarily should not include an appendix as part of the filing of the brief on the merits. This is something of a pet peeve of the Justices—anything that logically might be attached as an appendix to the brief on the merits should already appear in the appendix to the petition or response, or otherwise be a part of the record now before the Court.

However, there may be occasions when advocates will want to include one or more matters in an appendix. If, for example, the petitioner failed to preserve error on a core legal issue being presented to the Supreme Court and that lack of preservation can be demonstrated by pointing to an excerpt from a document, it may be useful to include that document in the appendix. Similarly, if the merits of the case turn on critical language in a document, it may be useful to include an excerpt of that document in the appendix. The bottom line is that including any matters in an appendix to a brief on the merits should be viewed as the exception rather than the rule.

II. Giving Your Audience What It Needs: A Strategy That Enhances Your Chances

Any writing task should begin with a conscious awareness of the audience for which you are writing and the purpose for which you are addressing that audience. Only then can you craft a document that is calculated to communicate with that audience, which is an absolute prerequisite to the task for which appellate counsel are engaged: to persuade the appellate court. So we begin with the all-important tasks of identifying the audience and the purpose of a brief on the merits, and then progress to understanding that audience and giving that audience what it needs to do its job, so that you increase the likelihood of being able to do your job.

A. Identifying your audience.

The first step in understanding your audience is to identify who your audience is. Although you may sometimes feel like you are writing to please several different people, there are only two audiences that matter

for a brief on the merits: the Supreme Court Justices, and court attorneys (first-year law clerks or permanent staff attorneys).

A brief on the merits should not be written to give voice to the pain or frustration of your client. It should not be written to convince opposing counsel that you are right and they are wrong. It should not be written to attempt to whip the opposing party into a settlement frenzy. It should not be written to impress other attorneys in your firm, or co-counsel. And most of all, it should not be written to amuse yourself.

However, saying that the only audience that matters for a brief on the merits is the Supreme Court only partially resolves the question. Within the Supreme Court there are two distinct audiences, with different tasks, and the optimal writing style for each may be distinctly different as well.

When the brief on the merits is first filed, it is read only by law clerks, who, for the most part, are recent law school graduates in their first year of practice. They read the briefs on the merits and prepare study memos for the Justices. The Justices rely on the study memos when voting on whether to grant the petition. Only if the Court votes to take the case do the Justices have occasion to read the briefs on the merits. But in that event, those same briefs become what the Court relies on to prepare for oral argument, to decide how to vote, and, hopefully, to provide assistance when writing the opinion.

This creates an obvious conflict. If the brief were written only for law clerks, particularly knowing that their task is to reduce the brief to a study memo that seldom exceeds 2-3 pages, I would keep the briefs simple, spell out basic concepts that more experienced attorneys would not need to have explained, and concentrate on spoonfeeding the reader with the core concepts that you want to be sure come through in the study memo. At the same time, I would be cognizant that a Texas Supreme Court law clerk job is a coveted and competitive position, always filled by young lawyers who are extremely bright, and frequently by students with law-review experience who have been trained to pay a lot of attention to cite form and grammar. They also tend to be proud and confident young people who don't like to be talked down to, but no amount of intelligence can make up for their undeniable lack of experience. So, even if the brief on the merits were written only for law clerks, that task alone would carry certain conflicts and challenges.

On the other hand, if the author of a brief on the merits knew that the petition had been granted, and that he was writing a brief that would be read by the Justices, an entirely different approach might be warranted. All of the Justices are experienced lawyers, and many of them are experienced appellate judges. Basic concepts do not

need to be spelled out for them, and they are prepared for much more sophisticated and subtle levels of legal analysis.

Thus, what may be essential briefing for law clerks may well be wasted time and space for a Supreme Court Justice. And what is appropriate argumentation and analysis for a Supreme Court Justice may be beyond the grasp of a law clerk, and, therefore, may not make it into the study memo, and may never be read by the Justices for whom it was intended.

I wish I had an easy answer for this conundrum, but I do not. An effective briefwriter should at least be aware of the tension created by these potential conflicts. They may not always be completely avoidable, but an awareness of them makes an author better equipped to navigate the narrow path between these sometimes competing considerations.

B. Identifying your purpose.

The only acceptable purposes of a brief on the merits are (1) to assist the Court in deciding whether to accept a case for review, and, if so, to assist the Court to write an opinion that is either consistent with existing law, or makes new law that advances the jurisprudence of the state; and (2) to persuade the Court that your client's position best serves the development of the jurisprudence. Accordingly, the brief should be written as if the only people who ever will read it are the Supreme Court Justices and court attorneys. Any temptation to pander to one of the other purposes mentioned previously (impressing other attorneys, giving voice to your client's outrage, self-amusement) should be banished from your consciousness. Your sole obligations are to further the interests of your client and help develop the jurisprudence of the state, and anything calculated to further your interests, your career, or your ego is likely to be counter-productive to the paramount goal of serving your client.

However, narrowing the acceptable purpose of a brief on the merits to the task of assisting the Supreme Court in doing its job does not fully resolve the inquiry. Just as a brief on the merits has dual audiences that sometimes require a different approach, it also has dual purposes, which can sometimes be in conflict.

Unlike the U.S. Supreme Court practice, in which briefs on the merits are only requested *after* the Court has decided to grant the petition, the Texas Supreme Court requests briefs on the merits before deciding whether to grant the petition. In fact, statistics indicate that in approximately 2/3 of the cases in which the Court calls for briefs on the merits, the petition for review is not granted. That means that the author of the brief on the merits still needs to be acutely concerned with persuading the court to make this one of the 10-12% of the cases in which the Court grants the petition. At the

same time, the brief on the merits needs to be written in such a way that if the Court does grant the petition, that brief will convince the court to decide the case in your favor.

These dual purposes can often turn out to be at cross-purposes. For example, when a petitioner is trying to convince the court to take the case, one of the most common approaches is to explain that the case presents an important question of jurisprudence that needs to be resolved by the court one way or the other. There is no question that the current Supreme Court views itself as a court dedicated to molding the jurisprudence of the State, rather than being an error correction court. Accordingly, advocates are well-served to at least give the appearance of not complaining about the result that their client received, but of being concerned that the jurisprudence of the State requires that the highest court in the State either fill in a gap in the law, or clarify an ambiguity in the existing law, or correct a wayward court of appeals opinion that distorts the law, and if left undisturbed, will create bad precedent. It is not uncommon for skilled advocates to write petitions for review that do not even take a strong position on which side should prevail, but merely argue that the legal issue raised by the case is something the Court should write on. Those kinds of briefs have more credibility than the briefs that stridently argue that a particular litigant has been the victim of a grave injustice. Since getting the case granted is still an uncertainty when briefs on the merits are written, a certain amount of that seemingly objective concern about the state of the jurisprudence of the State is still a valuable weapon.

On the other hand, if you knew that your case already had been granted, you would be likely to place more emphasis on convincing the court that your client should prevail. At that point the emphasis would not be on simply getting your foot in the door, but upon slamming the door shut on the other side. But since the advocate does not know whether the case will be granted when writing the brief on the merits, but knows that if it is this is the brief that the Court will rely on when preparing for oral argument and deciding the outcome of the case, the advocate is caught between two potentially conflicting advocacy styles.

The respondent also has to deal with two competing strategies. When trying to keep the Court from granting the petition, the respondent often wants to fly below the radar, and portray the case as uninteresting, unexceptional, and having no impact on the jurisprudence of the State. On the other hand, after the respondent knows the case has been granted, a common theme is to tell the Court that adopting the petitioner's position will have dire consequences, not just for the parties, but for the jurisprudence of the state. But if deciding the case one way will have a dramatic impact on the jurisprudence

of the State, that significantly undermines the argument that the case is so unimportant that the Court should not even grant the petition. But when the brief on the merits is written before a decision on granting the petition, the author is torn between the competing concerns of trying to keep the Court from taking the case, and from trying to win the case if it is taken.

The writer's task would certainly be simplified if the Court used a system like the U.S. Supreme court and did not call for briefs on the merits until it had decided whether to grant the petition. But the Justices say that they want to have more information about the cases before they make the important decision about whether to grant, and there is an argument to be made that the system should be designed for the Court to most effectively and efficiently select and process the best cases in a way that makes best use of the Court's limited resources, rather than being a slave to the convenience of the lawyers who practice before the Court. But, again, an effective briefwriter should at least be aware of the tension created by these potential conflicts in order to be better equipped to navigate the narrow path between these sometimes competing considerations.

C. Understanding your audience's working conditions and mindset.

Aware that the only audience that matters consists of Supreme Court Justices and court attorneys (including law clerks and staff attorneys), consider some of the things you know, or should know, about the Justices and court attorneys:

- They almost universally feel overworked, underpaid, over-extended, understaffed, and unappreciated.
- In most cases, they do not stand to make nearly as much money from your case as you do.
- They have much, much less time to spend on your case than you have spent on it. More importantly, they have much less time to spend on your case than you would like for them to spend on it.
- They almost always read your brief as part of a stack of other briefs.
- They know much less about the facts of your case than you do.
- They often know considerably less about the particular area of the law you are writing about when they start reading your brief than you knew when you finished writing it.
- Although they care deeply about choosing the right cases and shaping the jurisprudence of the state, they unavoidably care much less about

your case coming out the way you want than you do.

- They are much less likely to be impressed with your clever or impassioned writing than you are. They are not reading your brief to be entertained.
- If the petition is granted, a court attorney will check your brief thoroughly, verifying record cites, reading the law that is cited, and conducting independent legal research.
- Despite what you have heard or imagined about personal prejudices and agendas, the Justices care about choosing the right cases and deciding those cases in a way that benefits the jurisprudence of the state. They make those decisions within the framework of whatever personal biases or prejudices any human being brings to any decision-making process, but, given those unavoidable human limitations, they make every effort to decide and apply the law in a manner that they consider to be fair and objective.

In short, you are writing for an audience that is always pressed for time, and that is fundamentally concerned with getting the law right. Accordingly, it becomes particularly important to write briefs that are short enough that they do not waste the reader's precious time; that are clear and simple enough that they can be understood in one continuous read-through; that at least give the appearance of objectivity; that provide thoughtful reasons for reaching a desired result, rather than a shallow presentation of words lifted out of context from cases, rules or statutes; and that reflect a sense of fairness and justice. Those realities should have a profound impact on how you write your briefs.

D. Give Your Audience What It Needs.

1. Assist the Court in doing its job.

When a Justice or court attorney reads brief on the merits, they are probably either preparing a study memo (the court attorney), preparing for oral argument (the Justices), or preparing to write an opinion. In order to do any of those things, there is certain information that they need from your brief. To give the court what it needs, a brief should fulfill several minimum requirements:

- It should tell the court everything it needs to know about the underlying facts and procedural developments with precise citations to the Reporter's Record or the Clerk's Record to support every factual statement. In particular, it should identify for the Court where in the Record any alleged error was presented to the trial court and preserved for

review. The reader should not have additional questions that are unanswered by the brief.

- It should attach copies of critical documents not previously provided to the Court in an Appendix. This not only includes the documents required by the rules (judgment, jury charge, etc.), but also things like contracts, real estate documents, expert reports, or selected pages from the Reporter’s Record. The reader should not have to go pull the record to make sense out of an argument.
- It should provide citations and analysis of the applicable law, with particular emphasis on case law from the Texas Supreme Court, closely analogous cases from other state supreme courts or federal courts, and national trends as indicated by secondary sources, particularly Restatements. The brief also should disclose the scope and standard of review for each issue, and then make sure that the argument is consistent with the appropriate scope and standard of review. Authorities that do not appear to support your position should be disclosed and distinguished, not disregarded. Although the court will confirm your research, your brief should leave no doubt about where to start the research, and there should be no major surprises as the research progresses.
- It should contain arguments that make sense, that sound fair and reasonable, and that the court would be proud to express in an opinion as its own.
It should address every argument raised by the opposing party.

In short, a helpful brief should provide everything that the court needs to make a decision about whether to grant the petition, and, if so, to write a thorough and well-reasoned opinion without having to start the process from scratch.

2. Assist the Court in doing its job justly.

An appellate lawyer should write a brief with two goals in mind, and *most importantly*, those goals should be in this order: (1) to assist the Court to choose the right case and mold the jurisprudence of the state in a beneficial manner, and (2) assist the Court in reaching a result that favors your client. All too often, writers blow past the first goal in their haste to reach the second goal. What they do not realize is that adherence to the first goal makes the realization of the second goal much more likely.

If the reader of the brief begins to believe that the writer is willing to say anything in order to advance their perception of what it takes to “win”—whether or not it is supported by the record, whether or not it is supported by the applicable law, whether or not it makes any sense—then the writer loses all credibility, and the reader ceases to believe, or to be persuaded by, anything the writer has to say.

On the other hand, if the writer of the brief rigorously adheres to the record and the applicable law, even when they do not support his position; if the writer makes candid admissions and concedes some points; if the writer acknowledges his opponent’s best arguments and turns them to his advantage rather than ignoring them; then the reader begins to get the feeling that the writer is not an obstructionist adversary trying to hide the truth, but, instead, is the court’s ally in trying to reach the right result. A writer who achieves that status has a much greater chance of being an effective and persuasive advocate.

One of the worst mistakes you can make in appellate argumentation is to ignore facts or legal arguments that may hurt. Just because they are not mentioned in your brief does not mean that your adversary will not mention them, or, even if they do not, that Court attorneys will not uncover those matters on their own, without any guidance from you about how to put them in context. You are much better off addressing unfavorable arguments and coming to grips with them.

Sometimes an opposing argument is simply wrong, and you need to say so. But other times you know an opponent’s argument rings true, and you will only lose credibility by resorting to the knee-jerk reaction of saying that everything the other side says is wrong. In those situations it is extremely effective to admit the point, embrace it, and try to find a way to turn your opponent’s own argument to your advantage.

By now most readers are probably wondering what happens when reaching the correct result and reaching the result that favors your client are at odds with one another. This question is understandable, but it naively assumes that every case has only one issue, only one right result, and only one way to get there. Your challenge as an advocate is to find a way to make the result favoring your client be *a* right result in the case, even if not the only right result. If that challenge cannot be met, you should seriously consider your willingness to undertake your client’s representation in the appeal, and you should counsel with your client about whether the appeal is worth pursuing.

3. Assist the Court in doing its job efficiently.

Justices and court attorneys have limited time and energy to devote to reading your brief. If you want them to read it, get something out of it, use it while writing the

opinion, and have a favorable opinion of you and your client while going through the experience of reading your brief, you should do everything you can to make that experience as easy and pleasant as possible. Among other things, try to:

- Structure the argument so that it can be easily followed and understood. The human mind cannot process and retain unstructured information. Even brilliant thoughts, if spilled out onto the page in a rambling stream of consciousness, will be lost on the reader. Structure your thoughts, present them in a logical order, and give the reader signals to make your structure clear through the use of headings and subheadings.
- Write with simplicity and clarity. Those two qualities are not the same—it is possible for an argument to be simple, but still unclear, and it is possible (though quite difficult) to make a complex argument clear. But simplicity and clarity often go hand in hand, and the writer should strive for both. It is virtually impossible for a writer to accurately judge the clarity of their own work. When they read it they are reminded of the thought they had when writing it, and that connection is clear in the mind of the person who conceived it. Having others read what you have written is the only reliable way to determine whether the meaning is clear and whether misunderstanding is possible. If one reader reads something the wrong way it is possible that a reader on the court will have the same response. Try to write and re-write with the goal of minimizing all possibilities of misunderstanding.
- Write prose that flows, analytically and lyrically. The goal should be a product that the reader can read from beginning to end without stopping, without having to re-read a sentence because the meaning is unclear, without having to go back and re-read prior portions of the prose to make sense of the current sentence, and without having the feeling that something is jarringly out of context. An entire brief that flows is easy to read; but it is extremely difficult to write. A product of that sort requires a lot of work.
- Strive for brevity. Most readers of briefs would rather be doing something other than reading briefs. Even when reading a good brief, there is exultation in completion, and unnecessary length delays that feeling. In choosing words, constructing a sense, crafting

a paragraph, or drafting an argument, remember that shorter is often better. It may not satisfy your ego as much, but it will be appreciated by your reader.

- Create a product that is easy on the eyes. Make sure there is ample whitespace on the page. Make liberal use of spacing. Choose fonts that are comfortable to look at, and large enough to be read by readers with declining vision. Make sure the document filed with the court is clean, and free of distracting errors.

In short, create a product that is easy to read and easy to understand, that flows smoothly from one thought to the next, and that does not create too much of an imposition on the reader.

4. Assist the Court in doing its job in a manner that it may find persuasive.

There are no tricks to persuading the supreme court. You simply need to present the most logical, compelling argument, and do so in a credible and professional manner. It is a wonderful thing for a lawyer to be passionate about the plight of his client. But if you are truly passionate about obtaining a favorable result for your client, you will rein in the passionate prose in your briefwriting. If the reader is already inclined to agree with you, they may be entertained by vigorous attacks on the other side or emotional wailing about the end of the world as we know it. But if they already agreed with you, then you have not advanced the ball with them in any kind of meaningful way. If someone is leaning against you and sympathetic to the other side, they will be offended by your strong language—they certainly will not be persuaded to change their mind. And if the reader is undecided, they probably will wonder why you have to resort to histrionics rather than calm rational reasoning, and become concerned that there must be something wanting in your argument.

On the other hand, there is something to be said for writing with conviction and confidence. If you don't sound like you are convinced by an argument, the Court is not likely to be. Courts expect lawyers to be advocates to a certain extent, and if you write as if you are afraid to take a position, the reader will believe that there is no position to take. So you need to write with both reason and passion.

Legal writing is much more persuasive when the writer writes with wisdom rather than with cleverness. Cleverness is shallow, insubstantial, and trivializing. It often results in failed attempts at humor, or annoyingly technical “gotcha” arguments that the reader is likely to perceive as something you resort to because you don't have any good arguments. Wisdom is deeper, more honorable, and makes the reader feel like they are a part

of something good and noble. A wise argument is not only substantively sound, but it also explains why it is the right thing to do.

Another important element in persuasion is credibility. If the reader believes you are credible, they will be receptive to believing what you say and being persuaded by your position. If you lose credibility with that reader, everything you say will be viewed with skepticism, and must be verified before being accepted as true. An appellate lawyer's reputation for credibility may take years to cultivate. It can be lost in a single sentence. The only way to avoid that consequence is to be meticulously accurate and scrupulously honest in everything you write.

III. A Technique for Building the Perfect Beast

Several years I ago wrote a paper that contained a step-by-step process for writing briefs in general. I had almost forgotten about that formula until last year when David Keltner wrote a paper for this course that adopted it verbatim (with proper attribution, I hasten to add; thank you, David). Upon further examination, I realized that the process was designed for the first appellate brief in a case, and needed to be adjusted slightly for a supreme court brief on the merits, which is often the last appellate brief written in a case. I also realized that my own procedure for writing briefs has evolved and changed slightly over the years, so I have made further adjustments to reflect my current practice.

This is what I try to do in almost every brief that I write. It seems to work for me. It is *not* the only method that works. It is geared toward outlining the argument thoroughly before starting to write. I know outstanding appellate advocates who work in the other direction, starting to write first, and allowing the outline to develop organically from the prose. Experiment and see what works best for you. But having an identifiable technique is probably preferable to flailing about and reinventing the wheel every time you take on a new writing task. There is comfort in familiarity. Appellate advocates often tackle an entirely new field of law with each brief, and at least a whole new set of facts, so being able to return to a familiar process may provide some degree of comfort.

Here's the process I go through for preparing a brief on the merits.

A. Re-analyze the issues.

Review the issues (briefed and unbriefed) in the petition for review. Review the court of appeals' opinion. Discuss the case again with the client or the trial lawyer to be sure that you understand exactly what the desired outcome is. If respondent, read the brief on the merits prepared by the other side. Do everything possible to get a firm grip on what you want the Court to

do, what you want the Court to write on, and how you want the opinion to look.

B. Review the substantive law.

After briefing in the court of appeals, a court of appeals' opinion, and briefing at the petition for review stage, the substantive law should be pretty well-developed by now. Review that law and reacquaint yourself with it so that you will have an accurate context for revisiting the record.

C. Thoroughly read the Clerk's Record and Reporter's Record.

Even if you already have reviewed the record as appellate counsel in the court of appeals, you need to review key parts of it again. Even a great lawyer and reader can miss things the first time through. Plus, if you have had the experience of briefing the case in the court of appeals, going through oral argument, and reading the court of appeals' opinion, you should have a much better understanding of what the case is really about than when you read the record the first time. That understanding should inform your reading and give you a clearer understanding of what to look for.

Take notes during this reading, either to supplement the notes you previously made when reading the record in the court of appeals, or create thorough notes if reading for the first time. Do not fail to make written notes of helpful tidbits that you find under the mistaken impression that you will come back to it later — you may not be able to find it again, or at least may not be able to find it again without considerable time and effort.

D. Do more legal research.

After re-reading the record, and after your thoughts about the case have had a chance to become refined and distilled through the court of appeals experience, you need to do additional research, or at least to fine tune and update the research done previously. Again, make notes when you find helpful authority, and do not trust yourself to be able to come back to it without having a written citation.

E. Prepare a detailed outline.

For me, this is the most important step in the creation of a good brief. Collecting my loose thoughts and random ideas and organizing and compartmentalizing them into logical patterns and an understandable structure is not only an aid to clear writing but an exercise in clarifying my thinking and crystalizing my analysis. When I do it right, I spend almost as much time crafting an outline as I then spend converting that outline into a first draft. The outline should include major points, sub-points, and sub-sub-points, to whatever sub-level of specificity is required to capture your argument. It

should be rigorously disciplined so that each sub-point directly supports the point that it falls under, yet goes no further than the point under which it falls. The wording of each point and sub-point should be meticulously crafted so that the argument flows logically, makes sense, and seems undeniable. Each point or sub-point should be an affirmative statement of your position, not a neutral heading. A reader should be persuaded by reading your outline alone.

F. Integrate the record notes and research notes into the outline.

Re-read the notes made when reading the record and doing legal research, and plug the legal authorities and record references into the outline you have written. If you discover great record references or legal authorities that have no place in your outline, you may need to tweak the outline to embrace additional arguments. If you finish this process and find statements in your outline that have no support in the record or the applicable law, you may need to go back and do additional legal research or record searches.

G. Write a prose version of the outline.

If you have done a thorough and effective job of step E (drafting a comprehensive and compelling outline) and step F (integrating research and record review into the outline), it is no exaggeration to say that the brief practically will write itself. At least that's what it feels like. In truth, the brief is not writing itself, but is coming together effortlessly because you have assembled the building blocks of the brief in such a methodical fashion. The execution seems easy because you feel as if you are merely guiding pre-assembled building blocks into pre-designated places, rather than haphazardly trying to create the blocks, decide where they go, and then put them in place, all at the same time.

H. Set aside this first draft for several days.

Being objective about your own writing immediately after completing it is virtually impossible. The best way to develop a fresh perspective that comes even remotely close to the experience of the judge reading your brief is with the passage of time. I realize that deadline pressure often renders this step impossible, but deadline pressure can be avoided by good planning and time management on the front end. If you can build in time for this step, it is well worth it.

I. Return to the first draft and edit it ruthlessly.

Examine every paragraph, sentence, and word to determine whether each is necessary, whether the meaning is unmistakable to the reader, whether there is a clearer or more succinct way to articulate the message, and whether the prose flows so effortlessly that the

reader remains engaged and wants to keep reading. Very few people write brilliantly in a first draft. Unless you are one of those gifted few, the difference between acceptable, workmanlike writing and writing that is technically flawless, easy to read, compelling, and persuasive comes through vigorous and repeated editing.

J. Get other people to read the next draft.

The best way to determine how writing is perceived by readers, rather than by the writer, is to let other people—especially those not familiar with the case—read the brief and give their input. The writer is inherently incapable of being an objective reader of his or her own work. Having one person review and edit the brief is the minimum that is acceptable. Having several people review and edit the brief is even better. Even with multiple readers, it is amazing how each reader brings a slightly different perspective, and one person can spot mistakes that several other readers overlook.

L. Have someone other than the writer check every legal citation and record reference in the brief for accuracy.

Ask a law clerk to look up every authority and every citation to the statement of facts or transcript to verify that every citation is accurate and every authority really stands for the proposition for which it is cited. Even a writer who is scrupulously honest with the record and the applicable law can make good-faith mistakes in transcribing information from the original sources to notes to outlines to a draft of the brief. Every time I do this I discover some mistakes that would have been part of the filed brief had I not gone through this process. Inaccuracies undermine credibility, whether they are the result of attempts to stretch the record or the law to mislead the court or good-faith mistakes. One is unethical, the other merely sloppy. Neither is an impression you want to leave with your reader.

M. File a perfect brief.

Easily said, but not so easily done. However, if all these steps are followed rigorously, an almost perfect brief is an attainable goal. When that goal is attained, the result is wondrous to behold. More importantly, the product of this kind of efforts is much more likely to communicate its message to the reader and to facilitate the persuasive process rather than impeding it.

IV. Acknowledgments

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Kevin Dubose, The Hon. Sarah B. Duncan, and Elizabeth A. Crabb, *in* TEXAS BAR CLE, ADVANCED CIVIL APPELLATE COURSE 16 (2003).