

BRIEFWRITING

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CHAPTER 1

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BRIEFWRITING

I. INTRODUCTION.

The average brief is generally the product of too little sleep, fractured focus, and tremendous deadline pressure. In combination, these elements conspire to push us towards the “throw it on the page, do a quick edit, and hope for the best” method. The briefwriting concepts discussed in this paper are designed to combat that tendency and increase the chance of having your natural brilliance shine on paper.

The ideas discussed below are not only based on double-digit years of briefwriting (yikes!) as a private practitioner, and now an AUSA, but also on my experience as a senior staff attorney to an intermediate appellate court. In that capacity I had the opportunity to read more briefs than a full-time practitioner will ever see. The characteristics that separated the good, the bad, and the ugly started to fit a pattern and formed the basis of my thinking on this issue.

To be clear—I myself aspire to these principles, and when I pay attention to them, produce a better brief. More importantly, although it is initially difficult to be conscious of all these elements, over time the “conscious” process of writing begins to become “unconscious” and therefore easier.

As with most things in life, briefwriting is a process, not an endpoint—except perhaps with retirement! This paper is designed to stimulate your thinking about briefwriting in general and to give you an easy “checklist” of things to keep in mind as you write. The principles apply to both Texas and federal practice, although specific variations are discussed.

II. GENERAL PRINCIPLES.

A. Never Forget The Standard Of Review.

You’ve heard it a thousand times but ne’er truer words have been said—the outcome of *most* cases is determined by the standard of review. This fact inextricably leads to one conclusion—the standard of review forms the analytic framework for the entire brief.

Standard Texas appellate practice requires the inclusion of the applicable standards of review, usually as the first subsection in each point of error. The federal and 5th Circuit Rules require a statement of the applicable appropriate standard of review for each point. FED. R. APP. P. 28(a)(9); 5TH CIR. LOC. R. 28(a)(9)(B). The standard of review can appear as a separate heading placed before a discussion of each issue, or can appear within the discussion of each issue. FED. R. APP. P. 28(a)(9)(B); 5th CIR. LOC. R. 28.2.6. Some federal circuits’ local appellate rules even require the standard of review to be stated after each issue in the statement of the issues. Whichever method you are required to, or choose to, use, simple inclusion

of the standard of review is not enough. Great and *effective* written appellate advocacy weaves the standard through the entire brief. This means, the standard of review should be integrated into the issue statements/headings, the summary of the argument, and the argument sections of the brief.

Do not under hide if the standard is against you, the Court will notice. If the standard is not in your favor, work the problem through as best you can to offset that disadvantage before you move on. Here’s the point—if the standard of review is against you, you can lose in silence, or you can put up a good fight. In those circumstances you have nothing to lose by engaging the Court. Intellectual honesty always gains you the appreciation of the Court—a “win” that has greater positive consequences than the loss of any particular case.

B. Never Miss A Chance To Advocate For Your Position.

1. Always Request Oral Argument.

Unless you are absolutely sure you are going to win your appeal, the appellant should always request oral argument. TEX. R. APP. P. 39.8 grants courts the discretion to deny oral argument, although many in the Texas system routinely grant such requests. The request should be placed on the cover of your brief with the words “ORAL ARGUMENT REQUESTED.” TEX. R. APP. P. 39.7. As appellee, carefully think through your decision to request oral argument. Stated another way, although the appellee generally opposes oral argument, there may be cases where oral argument helps you position. Although the Texas rules do not contemplate a separate section detailing reasons for or against oral argument, nothing stops either party from including a *short* statement on why oral argument should, or should not, be heard.

The 5th Circuit is another story altogether. Because of budget cuts the Circuit is reducing the number of oral arguments it will hear in the years to come. Before the cuts, on average, only one in three civil cases were called for oral argument. With the cuts we can expect the percentage to drop even further. Your request for oral argument, which in the federal system is a separate part of the brief, must now be even more targeted. FED. R. APP. P. 34 provides that oral argument “must” be granted unless the panel “unanimously” agrees it is not necessary because the appeal is “frivolous,” the “dispositive” issue[s] have already been “authoritatively” decided, or the facts and legal arguments are “adequately presented” in the briefs and the record. The 5th Circuit’s IOP for oral argument provides further insight into how the court chooses cases for oral argument. Your request for oral argument should be short, to the point, and should track the reasons delineated in the rules.

2. File A Reply or Sur-Reply Brief.

Some appellate practitioners hold that, as a matter of strategy, the appellant should not file a reply brief and should instead respond to appellee's arguments only at oral argument. This makes sense if you are absolutely sure you will get oral argument and the points on appeal are so limited you know which issues will be discussed at oral argument. However, as oral argument becomes more limited, and even though reply briefs should not be routinely filed, a reply brief is the best way to get the last word with the court.

Under all circumstances, a reply or sur-reply brief should be to the point and only address arguments made by the appellee. Any advantage you gain from filing the brief will be lost if you repeat arguments already made in your opening brief.

Reply Briefs: Under Texas rules, the reply brief must be filed within 20 days after the appellee's brief is filed. TEX. R. APP. P. 38.3. Under the federal rules, the rule brief *must* be filed no later than 3 days before oral argument. FED. R. APP. P. 31(a)(1).

Consider filing a reply brief under the following circumstances. First, file if the appellee raises a failure to preserve, jurisdictional, or waiver defense to any of the appellant's arguments. A reply brief that addresses and disposes of any of these issues is quite valuable to the court. It also short circuits the loss of any oral argument time on irrelevant issues and keeps the court focused on the substance of your appeal. Remember, the court must always address these issues before reaching the merits. A short reply brief that explains why there defenses do not apply to you appeal is therefore extremely helpful.

Second, if the appellee's brief contains *significant* errors of law or fact. Note the emphasis here on significant. Erroneous statements of immaterial fact, while annoying, are not dispositive. *Consistent* misstatement of material facts is another issue. The same holds true for errors of law—unless the other side truly misinterprets or applies the law in such a way that you feel duty bound to reply, don't bother with a reply brief.

Lastly, consider filing a reply brief where the appellant has used legislative history for the first time in a case that involves statutory construction.

Sur-Reply Briefs: Neither the Texas or federal rules contemplate sur-replies. The 5th Circuit will not let appellee file a sur-reply brief without leave of court and that is *rarely* granted. 5TH CIR. LOC. R. 28.5. Texas courts adopt a more relaxed attitude, but check your local rules--several Texas circuits require leave of court before a sure-reply can be filed. The only other constraint on filing a sur-reply is that the aggregate number pages for briefing cannot exceed 90 pages without leave of court in a civil case. TEX .R. APP. P. 38.4.

Sur-replies should be filed in very limited circumstances. Here are some examples: when a new outcome determinative argument is made in a reply brief, or when an effective argument is made in a reply brief that concerns a case of first impression, or when in a case involving statutory construction where the appellant has used legislative history for the first time.

3. File A Supplemental Brief, Letter Of Authorities, Or 28(j) Letter.

If new or other relevant precedents issue after the close of briefing or after submission of the case—that is after oral argument has been held—consider filing a supplemental brief or letter of authorities with the court.

Supplemental Briefs: TEX. R. APP. P. 38.7 permits the filing of an amended or supplemental brief “whenever justice requires” with leave of court. A supplemental brief allows you more room for argument than a letter of authorities. It will however still count towards the 90-page aggregate briefing limit. TEX. R. APP. P. 38.4.

Letters of Authorities: The TRAPs do not specifically authorize letters of authorities but courts routinely accept them without leave of court. Remember, a letter of authorities is just that, a *short* letter that offers new precedent to the court to support your position with little or no argument. The more argumentative you become, the more likely it is that your submission will be interpreted as a supplemental brief that requires leave of court for filing.

If you feel the need to file a letter of authorities after oral argument, try to get permission from the court before you leave the courtroom following oral argument. If you do receive permission, include that fact at the beginning of your letter of authorities.

28(j) Letters: The federal rules do not explicitly authorize supplemental briefs, but does authorize supplemental letters of authorities or “28(j) letters.” Here's the rule in its entirety:

If pertinent and significant authorities come to a party's attention after the party's brief has been filed -- or after oral argument but before decision -- a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

FED. R. APP. P. 28(j). Note well that you are limited to 350 words. The limit is strictly enforced.

The 5th Circuit’s attitude to supplemental briefing of any kind is much stricter than that in the state system, but oddly more liberal than the federal rules in that the circuit contemplates that supplemental briefing may be required. 5TH CIR. LOC R. 28.5 (“The rules do not permit the filing of supplemental briefs without leave of court, but there are some occasions, particularly after a case is orally argued or submitted on the summary calendar, *where the court will call for supplemental briefs* on particular issues.”).

C. Adherence To Form Highlights Substance.

Appellate rules are a pain. However, a brief that does not conform with the rules makes the physical act of reading difficult and detracts attention from your substantive arguments. Under deadline pressure it is easy to forget essential parts of the brief or to forget the rules. To prevent this from happening two checklists are appended to this paper—one for federal briefs and one for Texas briefs. The charts synopses the rules governing the constituent parts of the brief.

Remember, both the federal and Texas systems subject you to sanction and permit briefs to be stricken if they do not conform to the rules. 5TH CIR. LOC R. 32.6; TEX. R. APP. P. 38.9. Here’s a list of the top five problems frequently seen in briefs—while they probably don’t result in sanction, they are very annoying to judges and staff attorneys.

1. Always Provide Record Cites.

Always provide *precise* records cites for each statement of fact irregardless of where they appear in the brief. FED. R. APP. P. 28(e); 5TH CIR. LOC R. 28.2.3. Restated, there should be a record cite at the end of every sentence that contains a statement of fact from the record. Do not use “bunch” cites, that is, putting a collective cite at the end of a paragraph.

Most judges, and all staff attorneys, read the record. Incorrect record cites, or worse still no record cites, significantly delay the court’s preparation of the case. It also makes the reader suspicious of whether your statement of the record is correct. There is no reason to lose your credibility with the court for this reason.

Always provide pinpoint or “jump” cites in citations. Example: *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1982). If you do use a string cite, provide jumps cites for each case.

2. Always Provide Proper Writ/Petition Histories.

Although this is really a Texas issue, both the federal and Texas rules require proper case cites. FED. R. APP. P. 28(9)(a); TEX. R. APP. P. 38.1(c). You will not lose your case by making the court hunt for petition history, but it does add to the court’s preparation time and annoyance. Why undercut your credibility with the court when it’s so easy to make the cites right in

the first place? And remember, the failure to cite precedent can result in your brief or a particular point being struck by the court.

3. Always Use Party Names.

The federal rules disapprove the use of “appellant” and “appellee.” Nevertheless, parties routinely continue to use these terms. FED. R. APP. P. 28 (d). Rules aside, most judges prefer the parties to be identified with proper names. As an advocate you want to distinguish your client from all other, proper names do that.

4. Always Provide Page Numbers For All Sub-Issue Headings.

The Table of Contents becomes an advocacy tool when you include all headings and sub-issue headings in it. In large briefs it also eliminates the frustration of finding a particular sub-point quickly. Here’s an example of a “complete” table of contents:

I. The Trial Court Erred By Granting Defendant’s Summary Judgment.....1-10

- A. The Standard of Review.....1-2
- B. The Trial Court Ignored Genuine Issues of Material Fact Concerning Causation.....2-10

D. Remember Your Audience.

Your audience is a judge or staff attorney who reads scores of briefs. It is extremely tiring to read an entire page of text. Strive to keep your paragraphs short. Look at sentence order within a paragraph for logical coherence. Try to include an opening topic sentence and a concluding sentence to state and reinforce your ultimate point.

E. Be Honest With The Court..

You must reveal the significant relevant problems to the court, but leave out the *mea culpa*. Honesty wins you credibility.

F. Take The Ethical And Moral High Road.

We have all had cases where the other side chooses to fight by slinging mud at the parties or their attorneys. The temptation to start slinging back is always great. Judges are not fools. They know bull when they see it, they also can recognize a class act. Staying above the fray will always stand you in better stead than your opponent.

By the same token, don’t argue with the court’s integrity. Whether or not you are right, or are more brilliant than those sitting on the bench, is an opinion best kept to yourself. Fawning is equally counter-productive.

Courts only expect you to be as good a lawyer as you can be. Live up to that expectation—you won’t

win every case, but you will always be viewed as a winner.

III. ISSUE STATEMENTS, HEADINGS AND TABLE OF CONTENTS.

The subject of how to write an issue statement and heading “correctly” provokes heated debate amongst appellate nerds. Generally there are two methods—error based formulation or issue-based formulation.

Error-based formulation focuses on the action of the trial court and the appellate court’s error correction power. Here’s an example: The trial court erred in denying Company’s j.n.o.v motion by holding that Company owed a duty to protect plaintiff against third party criminal acts.

Issue-based formulation synthesizes the legal issue before the court in light of the facts. For example, the same issue in “issue formulation” speak would look like this: Whether a premise owner owes a duty to provide uniformed security guards to protect its invitees from a car jacking murder when the only prior criminal activity on the premises included non-violent at auto thefts and burglaries which were largely resolved by the break-up of an auto theft ring.

Ironically, both the federal and Texas rules contemplate issue-based formulations. TEX. R. APP. P. 38.1(e). Indeed, you may remember that many years ago when the federal rules changed, appellate pundits advised that issue statements be written something like this: John was killed in a car-jacking in a department store parking lot. There was no history of violent crime on the premises, although store managers knew an auto theft ring, broken up before John’s death, had been stealing cars from the lot. The store did not provide uniformed security in the parking lot. Was the store liable for John’s death? Over time, however, most advocates still formulate the issue as a complete question.

A. Basic Principles.

Whichever method you use, some basic principles apply. First, issue statements and argument headings are declarative statements of affirmative advocacy. When appellee, headings and statements also respond to appellant’s contentions. Second, statements and headings must be written with other parts of the brief in mind. Indeed, the federal rules concerning the summary of the argument specifically state that the summary “must not merely repeat the argument headings.” FED. R. APP. P. 28(a)(8) and (b).

B. A Method.

There are three simple rules I find indispensable in helping me formulate effective issue statements and headings. The issue statement or heading should:

1. **Be directed at court decision challenged** because it squarely presents the appellate court with a concrete, rather than hypothetical, act to correct and aids and buttresses your selection of the standard of review.
2. **Track the standard of review** because it guarantees the court’s focus and the first step towards structuring the argument on the standard of review.
3. **Be short and readily comprehensible** because it immediately allows the Court to understand the issue and contains the argument in a nutshell when converted to argument heading.

The rules are simple, but conforming each issue statement to them can be quite complicated and takes time. It should also be noted that, under certain circumstances, I may not ultimately include the standard of review. Nevertheless, I always start with that because it keeps me focused. If the standard of review helps me I will *always* include that in issue statement and first argument heading.

When using this method, I initially write one set of issue statements when I begin the brief. As I write the argument, I keep checking back on the issues and edit accordingly. I then do one final edit at the end after I’ve written the Summary of the Argument. When the issue statements, summary of the arguments, arguments, and argument headings are consistent, you will have a seamless brief that incorporates the standard of review, the relevant facts, and the law.

C. Accentuate The Positive.

Another “raging” debate in the appellate world is whether the standard of review must always be stated in the negative. For example, let’s say the appellant’s issue is “Did the trial court abuse its discretion by refusing to admit evidence of the plaintiff’s prior bad acts?” Should the appellee’s issue read, “Did the trial court not abuse its discretion by refusing to admit evidence of the plaintiff’s prior bad acts?” Consider that positive phrasing builds more advocacy into the issue statement and psychologically sets the stage for a “yes” answer from the court. As appellee I would therefore phrase the issue as follows: “Did the trial court correctly exercise its discretion by refusing to admit evidence of the plaintiff’s prior bad acts?” Again, it’s always easier to answer a question with a “yes” than a “no.”

With some standards of review, however, the positive phrasing can become stilted or cumbersome. For example, as appellee with the clearly erroneous standard which phrasing is better, “Whether the trial court was clearly correct...” or “Whether the trial court did not clearly err...”. The jury is still out on this one.

D. Issue Headings Become Your Table Of Contents.

What is the first part of the brief read by a judge? It's a dead heat, but every one of them will say it's the Summary of the Arguments, the Statement of the Issues, or the Table Of Contents. The Table of Contents through your issue headings therefore becomes an "advocacy" section of the brief—and you don't have to put any extra work into it except to make sure you include all headings and sub headings in the table. Putting page cites to all the headings and subheadings takes a bit more time but it is *very* helpful to the Court and staff attorneys.

IV. THE STATEMENT OF FACTS.

A. Be True To The Record.

Playing fast and loose with the record is a quick way to lose credibility with the court. Everyone acknowledges the truth of this statement, but the problem recurs with surprising repetition. The Texas rules specifically state the statement of facts "*must* state concisely and *without argument* the facts pertinent to the issues of points presented." TEX. R. APP. P. 38.1(f). The spirit of the federal rules is the same—facts are to be stated without argument. It is certainly true that, because quotes are disfavored in the statement of facts, a certain amount of editorial comment via paraphrasing is permitted. However, it is inappropriate to state logical inferences and ultimate conclusions in the Statement of Facts. Why risk the court's disfavor by doing so?

The struggle to respect the record further sharpens when you try to demonstrate the *absence* of evidence. However, unless there really is *no* evidence of a particular dispositive fact, do not use the words "no," "never," "any," or "all" as in, "The plaintiff did not produce any evidence that DDT was the cause of her headaches." The fact that the case is on appeal means at least a judge and a jury thought there was sufficient evidence to sustain a verdict. Save those arguments for other parts of the brief where full argument is permitted.

B. Always Write Your Own Statement Of Facts.

Finally, although both the Texas and federal rules permit the appellee to rely on the appellant's statement of facts, I would strongly advise against it. FED. R. APP. P. 28(b); TEX. R. APP. P. 38.2(a)(1)(B). The Texas rules provide that, "[i]n a civil case, the court will accept as true facts stated unless another party contradicts them." TEX. R. APP. P. 38.1(f). Although there is no such "rule" in the federal system, the court will, at the least, find uncontested facts dispositive.

C. Do Not Comment On Your Adversary.

While not a frequent occurrence, some advocates use the Statement of Facts to comment on their

adversary's brief. If you feel you *must* let the court know there has been a misstatement of fact in the other side's brief, drop a footnote. For example, if appellant wrote, There was no light in the parking lot on the night plaintiff was murdered. (2 R. 5), but the testimony was "there was no light on in the store," put the correct statement in your Statement of Facts and insert a footnote after you cite the correct testimony. The footnote should be non-argumentative. Here's an example--In its Statement of Facts, Appellant cites this statement to stand for the proposition that the parking lot was unlit the night of plaintiff's murder. *See Appellant's Brief* at 3. If your statement of the record is correct the court will note the other side's mistake. Don't beat the horse to death with rhetoric about how the other side lied about, concealed, or otherwise misstated the record.

V. SUMMARY OF THE ARGUMENT.

A. Headline Your Arguments.

Imagine the Summary Of The Argument as a series of headlines from a daily newspaper. You want to capture the reader's attention. Concise, punchy writing is a real asset in this section. Remember, the Rules provide that the Summary should be "succinct." FED. R. APP. PRO. 28(a)(8).

B. Be An Advocate—Summarize But Do Not Repeat.

You are allowed to advocate in the Summary, but the rules specifically prohibit the restatement of the argument headings contained in the brief. FED. R. APP. PRO. 28(a)(8) and (b); TEX. R. APP. P. 38.1(f).. With that caution in mind, keep the Summary to one page whenever possible, although in multiple issue or complex cases this clearly will not be possible.

If you have multiple issues, try keeping the paragraphs to no more than several sentences with one paragraph per issue. Address each issue in descending order as it appears in your brief to introduce the reader to the structure of your brief. Try to keep minor issues to a few, if not one, sentence.

C. Use Standards Of Review And Appellate Defects To Your Advantage.

The Summary is just that, a summary. Strive to fuse the standard of review to applicable law and facts. This is especially important if a particular standard of review, i.e. plain error or abuse of discretion, helps your position as appellee, or a relaxed standard helps your position as appellant.

If there are jurisdictional, waiver, or preservation problems with regard to a particular point of error point those out immediately before addressing the substance of the opposing side's argument.

D. Make Time For The Summary.

Many judges read the Summary of the Argument first, so put your best arguments forward. It's worth taking the time to write it after entire brief is complete or ideally when you've had an evening to let the brief rest.

Another school of thought holds that the summary of argument should be written before the argument as a means of focusing, organizing, and mapping out your arguments. Whichever method you choose, the key is to give yourself enough time to polish the final product.

If you don't have the luxury of an extra few hours, try highlighting two or three key sentences from each section of your Argument, then write. This will help keep you focused if you are on deadline pressure.

VI. ARGUMENT.**A. Maximize Non-Merits Weaknesses And Mistakes.**

Always check for waiver, preservation, and jurisdictional problems for every issue you, or your opponent, raise. The court's first priority is to check whether these non-merits issues can dispose of the case. With specific regard to jurisdictional defenses, if you have a good one, file a motion to dismiss for want of jurisdiction prior to briefing. In the Texas system, but *not* in the federal, it only takes one judge to grant a motion to dismiss. Even if the motion is denied, raise it again in your briefing. By filing the motion you've given yourself a crack at another chance to get the appeal dismissed on jurisdictional grounds.

More importantly, if you receive an inquiry letter from the court questioning its jurisdiction, respond! Appellants should not expect the court to protect an appeal if jurisdiction is in question. If there's a good argument that the appellate court lacks jurisdiction, appellee should consider telling the court why is a short response to the inquiry letter.

B. Attack Incomplete Arguments.

Look for what the other side's argument is missing. Two classic examples are an incomplete harm analysis and self-justifying sufficiency arguments.

With regard to harmful error, many advocates spend an inordinate amount of time "proving" the error was committed, but fail to demonstrate it was harmful, and therefore reversible. The Texas rules provide that the error (1) probably caused the rendition of an improper judgment, or (2) probably prevented the appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1. There is no coordinate to this rule in the federal system, but most issues subject to the abuse of discretion standard, for example all evidentiary and charge error issues, incorporate a harm analysis.

If you are appellee, the appellant's failure to demonstrate harmful error is your best and last refuge. If the appellant failed to address the issue at all, point that out to the court and then demonstrate why harmful error could not have occurred.

The self-justifying sufficiency argument occurs when appellee writes an exhaustive recitation of the record facts and concludes with a single sentence such as, "Therefore, there was legally and factually sufficient evidence to sustain the verdict." The same mistake is often repeated on oral argument when the advocate gives a closing argument that would bring a jury to tears. Restated, just because there is a lot of evidence, doesn't mean it is *material* to the legal issue before the court. Appellate courts do not find facts, they are only concerned with facts that have legal effect. Successful defendants of verdicts achieve their wins by fusing material facts to the law.

C. Use The Statement of Facts To Influence The Argument.

Don't be afraid to write and rely on an extensive statement of facts, especially if you are dealing with a sufficiency challenge. A good Statement of Facts influences the judges' reaction to the facts in your favor before they read your argument. That predisposition makes it easier to tighten up the Argument and argue only truly dispositive facts.

Consider using a chart to summarize facts in body of brief if there's a very specific issue. A well-placed chart saves the court time and convinces the court you are in command of the record.

D. Fuse Law To Facts.

Strive to apply the law to the facts. Don't just reargue the facts, argue their legal implications and inferences. Break it down paragraph by paragraph. Although you can be more argumentative with the facts in the Argument than in the Statement of the Facts, don't turn the Argument into a re-hashed version of a closing argument. Anchor the facts to the law that best supports your argument.

E. Avoid Meaningless String Cites.

Stay away from string cites, unless you have a new issue of law that requires a survey of all circuits. If you want to make the point that a legal proposition is "well-established" or "axiomatic" consider using a few cites with each one from a different decade.

F. As Appellee Don't Just React.

Obviously you need to refute the appellant's arguments, but consider how you can affirmatively win your case. Waiver, preservation, and jurisdictional defects are good examples. Just bear in mind that an affirmative argument may require you to take appellant's points out of order or to reword an issue.

G. Get A Reader.

If you can, get another person with appellate expertise to read the brief before you file. The less they know about the case, the better, because that's the position in which judges and staff attorneys are placed when they first review the case. Having someone else read the brief also gives you perspective on the case—especially if you were the trial lawyer.

Good legal arguments are anchored to generally accepted legal principles and logically proceed step by step to the writer's conclusion. We naturally read more meaning into our words than they actually express. When the argument is clear in your head, it's therefore easy to miss one of those steps when writing. Having someone look over your final draft helps ensure you've hit each point necessary to the logical conclusion.

H. Edit, Edit, Edit, The Proofread Your brief.

Don't file a brief without editing at least twice. Good appellate advocacy is not about "just getting something onto the page"—although that's a great way to start. Take a walk around the office, and come back with fresh eyes before you do your final proof.

With regard to proofreading, spell check is helpful, but is not foolproof. For example, "trial" when mistyped as "trail" will not show up. After you've proofed your sentences to make sure they make sense, try this old proofreader's trick—read the brief from back to front and from right to left at the same time. Typos really stick out that way.

VII. THE CONCLUSION OR PRAYER.

The Conclusion or Prayer is the last portion of the brief where you get to tell the court the "precise" relief you seek. FED. R. APP. P. 2828(a)(10); TEX. R. APP. P. 38.1(i). Structuring the conclusion as a decisional tree is valuable to the court, especially if there are multiple rendition/reversal or remand points or cross-points.

The argument about whether to brief your strongest points first, even if they are remand as opposed to rendition points rages on. The fact remains that courts consider rendition/reversal points before remand issues. If you organize the conclusion in that fashion, that is rendition points, then remand points, then points for affirmance, you directly address the court's view of the case. This kind of briefing helps the court keep everything straight and demonstrates you understand the interaction between the issues in the case.

APPELLATE BRIEF CHECKLIST (TEXAS)

(☺)=Non-mandatory parts of Appellee’s Brief

YES NO

38.4 Page length is 50 pages or less _____

APPELLANT’S BRIEF

38.1 Appropriate Headings _____
 In correct order _____

IDENTITY OF PARTIES AND COUNSEL ☺

38.1(a) List of all parties _____
 Names/addresses of Trial counsel _____
 Names/addresses of Appellate counsel _____
 Trial Court Judge (LOCAL RULE) _____

TABLE OF CONTENTS

38.1(b) References to pages of the brief _____
 Indicates the subject matter of each issue/point _____

INDEX OF AUTHORITIES

38.1(c) Authorities are arranged alphabetically _____
 Indicates the pages where authorities are cited _____

STATEMENT OF THE CASE ☺

38.1(d) States concisely the nature of the case _____
 States course of proceedings _____
 States trial court’s disposition _____
 Supported by record references _____
 No discussion of the facts _____

ISSUES PRESENTED ☺

38.1(e) States concisely all issues/points _____

STATEMENT OF FACTS ☺

38.1(f) States the facts concisely and without argument _____
 Must be supported by record references _____

SUMMARY OF THE ARGUMENT

38.1(g) Contains succinct, clear, accurate statement of _____
 the arguments _____
 Does not merely repeat issues/points _____

ARGUMENT

38.1(h) Contain clear, concise argument _____
 Cites to authorities and the record _____

PRAAYER

38.1(i) Clearly states nature of relief sought _____

APPENDIX IN CIVIL CASES ☺

38.1(j) Trial court’s judgment or order _____
 Jury Charge and verdict OR Findings of fact and conclusions of law _____
 Text of any law on which argument is based _____
 Text of any document central to the argument _____

APPELLEE'S BRIEF

38.2(a)(1) Appellee's brief need not (but may) include these sections ☺

38.2(a)(2) Brief should respond to appellant's issues/points in order

ORAL ARGUMENT

39.7 Properly requested on cover?

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APPELLATE BRIEF CHECKLIST (FEDERAL) (5th Cir. Local Rules=LR)

(☺)=Non-mandatory parts of Appellee’s Brief

		YES	NO
32(a)(7)(A)	No more than 30 pages (principal) or 15 pages (reply)	_____	_____
32(a)(7)(B)	No more than 14,000 words (principal) or 7,000 words (reply)	_____	_____
LR 32.4	Motion For Extra-Length Briefs		

APPELLANT’S BRIEF

28 (a)	Appropriate Headings	_____	_____
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CERTIFICATE OF INTERESTED PARTIES (Signed Separately)

LR 28.2.1	List of <i>all</i> persons on either side of case known to counsel to have interest in outcome of case.	_____	_____
	Names/addresses of Trial counsel	_____	_____
	Names/addresses of Appellate counsel	_____	_____
	Requirements for corporate disclosure in FRAP 26.1		

TABLE OF CONTENTS

LR 28.3(c)	With references to pages of the brief	_____	_____
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TABLE OF AUTHORITIES

28(a) &	Authorities are arranged alphabetically	_____	_____
LR 28.3(d)	Indicates the pages where authorities are cited	_____	_____

JURISDICTIONAL STATEMENT (☺)

28(a)(4)	Basis for D/C subject matter jurisdiction with statutory cites and relevant facts	_____	_____
(A)-(D)	Basis for C/A subject matter jurisdiction with statutory cites and relevant facts	_____	_____
	Filing dates establishing timeliness of appeal	_____	_____
	Assertion appeal is from final order or judgment that disposes of all claims, or information establishing C/A jurisdiction on other basis	_____	_____

STATEMENT OF ISSUES (☺)

28(a)(5)	States concisely all issues/points	_____	_____
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STATEMENT OF CASE (☺)

28(a)(6)	Brief statement nature of case, course of proceedings and disposition below	_____	_____
----------	---	-------	-------

STATEMENT OF FACTS (☺)

28(a)(7)	Statement of “relevant” facts supported by record references	_____	_____
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SUMMARY OF THE ARGUMENT

28(a)(8) &	Contains succinct, clear, accurate statement of the arguments	_____	_____
LR28.2.2	Does not merely repeat issues/points, “never” more than 5 pages	_____	_____

ARGUMENT

28(a)(9)	Appellant’s contentions and reasons for them	_____	_____
&	Cites to authorities and the record	_____	_____
LR28.2.6	Separate heading before each issue with concise statement of standard of review (☺)	_____	_____
LR28.2.3	Every assertion in brief regarding record matter “must” have record cite.	_____	_____

CONCLUSION

LR28.3(k)	Short” stating “precise relief sought”	_____	_____
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APPENDIX/RECORD EXCERPTS IN CIVIL CASES

30; LR 30.1.4	Mandatory Contents i.e., docket sheet, D/C judgment or order, jury verdict, relevant magistrate report, findings of fact/conclusions of law, certificate of service	_____	_____
LR 30.1.5 & 6	Optional Contents (check rule, no more than 40 pages)	_____	_____

APPELLEE’S BRIEF

28(b)1-5 Appellee’s brief need not, but may, include these sections (©)

38.2(a)(2) Brief should respond to appellant’s issues/points in order

ORAL ARGUMENT

34, LR 34.2, 28.2.4

Properly requested?

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