



2002

## Confidential Chat on the Craft of Briefing

Mortimer Levitan

Follow this and additional works at: <http://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the [Legal Writing and Research Commons](#)

---

### Recommended Citation

Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305 (2002).

Available at: <http://lawrepository.ualr.edu/appellatepracticeprocess/vol4/iss1/20>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## CONFIDENTIAL CHAT ON THE CRAFT OF BRIEFING\*

Mortimer Levitan\*\*

This chat on the craft of briefing is intended solely for discreet lawyers who invariably respect confidences. It was prepared for publication only after repeated assurances by the editors that judges never read law reviews. Whether this is good or bad, true or false, judges will benefit most from this article if they remain unaware of its contents.

What briefs need most in this world is readability.<sup>1</sup> Briefs should also be convincing, if possible, but unless they are read by somebody, they won't convince anybody of anything—except their writers, of course. Briefs have a knack of convincing their writers with the utmost of ease. Cases are not won by persuading one's self of the soundness of an argument; they are won by convincing judges—not courts, not benches, not institutions, but lawyers who have been elevated to the judiciary.

Courts cannot read. With perseverance human beings can acquire the art of reading, but institutions, organizations, divisions of government can never be endowed with that art—not even by an act of Congress. Judges, who are human beings by nature, lawyers by profession and judges by fortuity, can read and frequently do, but with all of the fascinating reading material on earth, why should they squander their reading time on briefs that are dull, obfuscated, verbose, and downright

---

\* Copyright 1957 by The Board of Regents of the University of Wisconsin System. This essay originally appeared at 1957 Wis. L. Rev. 59, and is reprinted here by permission of the Wisconsin Law Review.

\*\* A.B. 1912, University of Wisconsin; LL.B. 1915, Harvard University; Assistant Attorney General, State of Wisconsin since 1922.

1. When a lawyer persists in reading his brief to the judge, he admits in open court that his brief is unreadable, *i.e.*, so dull and uninteresting that no one would read it voluntarily. Reading the brief becomes permissible boorishness in only one situation—when the judge is sound asleep. It is probably because of brief-reading attorneys that some judges have succeeded in developing such marvelous facial dishonesty that they can appear intensely interested while hearing not a single word.

uninteresting besides? The fact that so many briefs get read is a tribute to pertinacious adherence to judicial sense of duty. When a brief is filed, it is not fed into a judicial machine, which comprehends, weighs, and evaluates automatically, and then after whirling of wheels and flashing of lights—and occasionally prolonged periods of inactivity—ejects the correct answer. When a brief is filed, it is for consideration by a man (or, possibly, a woman); which means that briefs must be addressed, not only to a human intelligence, but also to human nature.

No brief should ever be written without some definite purpose in mind. Neither convention nor addiction is justification for a brief: the conformist should rebel, and the brief-writing addict should seek psychiatric aid. There are a variety of purposes—some commendable, some reprehensible—for writing briefs. It is reprehensible, for instance, to write a brief primarily to express an uncomplimentary opinion of one's adversary; it is commendatory to write a brief for the purpose of advising the court; it is neither reprehensible nor commendatory to write a brief because the client insists—merely good business. The most exemplary purpose of a brief is to assist the court in deciding the controversy either for or against one's client, but preferably in the client's favor.

The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan. True, by persistently pounding away eventually a written argument might emerge, and a shelter might evolve, but the finished product would probably be bizarre rather than artistic. Briefs dictated without preliminary outlines tend to be garrulous monologues in which the lawyer strives to ascertain the determinative issues by the "talking" method, rather than the "thinking and investigating" method. The most meritorious aspect of these briefs is that they do come to an end eventually; their worst aspect is that they end where they should have started. While time spent in briefing may be wasted, time spent in outlining a brief is never wasted, for a skillfully prepared outline invariably engenders a shorter, clearer, better brief.

The effective production of a brief depends, not only on a knowledge of the law and facts involved, but also on familiarity with the background, disposition, and intellectual endowments of the judge. Different types of judges require different types of

briefs; which is merely another way of saying that a brief to be effective must be written with the reader in mind. A short story intended for readers of *True Confessions* must be written differently from one intended for readers of *Harper's Magazine*. In briefing, as in short story writing, effectiveness depends upon pleasing or impressing the selected audience.

There are certain mechanical features that should characterize all briefs, regardless of the identity of the judicial target. For instance, *black* black ribbons<sup>2</sup> should be used for typing, not ribbons that have been pounded into pearl gray. The days or even months spent in legal research, cogitation, and dictation can be wasted by one anemic typewriter ribbon. A brief may tax or insult a judge's intelligence, but when it impairs judicial optic nerves the sensible judge stops reading and says—well, just what do judges say when they vehemently conclude that something should be consigned to a place noted for its caloric climate?<sup>3</sup>

There are a number of other physical characteristics of briefs that decoy judges into reading. A weighty brief—one fattened beyond the capacity of a postal scale—might get hefted, might get opened, might even get a despairing leafing through, but it won't get word-by-word perusal. Slender briefs have infinitely more allure than the obese type, and especially if well-proportioned—svelte, with emphasis supplied in just the right places. Judges, like other human beings in this radio and television age, are more likely to peruse an article in *Readers Digest* than wade through *War and Peace*.

The paper chosen for the honor of being immortalized with the words of the brief should have sufficient opaqueness so that each typed page will not look like a double exposure. It is difficult for a judge to concentrate on the argument presented on one page when distracted by the argument peering through from the following page. There is, of course, little objection to using

---

2. Black ribbons should be instantly destroyed at the first appearance of telltale gray. Their retention might tempt some recipient of a letter written with the exhausted ribbon to sneak into the office and use the ribbon to strangle the secretary who used it. If this should happen—and it should!—it is hoped that the case comes up before a judge who received a brief written with the same ribbon.

3. This question should not be answered; it is posed only because of the editorial policy against the use of the word *hell* in articles. It is generally understood that the rule does not apply to faculty members of accredited law schools.

diaphanous paper for the copies to be presented to opposing counsel, because the chances of discovery are slight.<sup>4</sup>

The effectiveness of an argument may be accentuated or dissipated by the mode of presentation. An unshaved, dirty-collared, baggy-suited salesman handicaps himself in selling, no matter how superior the merchandise. A carelessly typed, poorly arranged page does the same thing, no matter how excellent the argument. A small gob of jam on a single page can destroy completely the effectiveness of the brief—even if the gob is genuine Bar-le-Duc! Misspelled, misplaced, and misused words create almost as much havoc with the selling of the argument as the gob of jam. True, a word is a word even when slightly misspelled; the difficulty is that the reader's attention lingers on the mangled word rather than on the thought intended to be conveyed. Misplaced and misused words distract attention and may suggest vagrant ideas far removed from the argument intended. As to misspelled and misused words, no remedy is 100 per cent effective, but one highly recommended is the purchase of two good desk dictionaries—each costing more than a quarter, that is<sup>5</sup>—to be used at least twice daily by the lawyer and as needed by the secretary.<sup>6</sup> As for the misplaced words—possibly the best preventative is a secretary who majored in English composition; and if that provocative helpmate is unavailable, the next best thing is the purchase of a grammar for adults and an elementary work on semantics.<sup>7</sup> Incidentally, semantics should be a required study in every law school, even

---

4. While judges read briefs from a coercive sense of duty, lawyers are not thus bedeviled. Incidentally, that may explain why some lawyers instruct their secretaries to save all battered carbon paper for the preparation of copies of briefs intended for opposing counsel. Or, could it be the secretaries' own idea?

5. THE AMERICAN COLLEGE DICTIONARY (Random House) qualifies easily and inexpensively. Really, two copies should be purchased, if the lawyer is to be spared the embarrassment of having his virtuous "dictionary habit" detected by his secretary.

6. 'Intelligent and conscientious secretaries will naturally need the dictionary more frequently than the other kind—assuming, dangerously, that there is any other kind of secretary.

7. Any grammar, whether used or not, is much better than none; ENGLISH GRAMMAR, by George O. Curme, in the COLLEGE OUTLINE SERIES (Barnes & Noble, Inc.) is infinitely better than none—especially if used. And as for semantics don't buy LANGUAGE IN ACTION, by S. I. Hayakawa (Harcourt, Brace and Company), merely for the prestige of possession; its value is dependent not upon owning but upon reading.

though it would result in precise and concise legal documents and hence curtailed fees and less litigation. The only students excused should be those who intend to enter the legislative field.

A brief should be brisk but not breezy; it should neither dart nor dawdle. Arguments should not be delayed by patter, and goldbricking words should be eliminated. The literary style used in a brief should be influenced, rather than dictated, by the judge who is the objective of the brief. If the judge feels apprehensive in the presence of polysyllables, only monosyllables should be used—although it may be permissible to slip in a few of the simpler two-syllable words. If the judge reaches for an aspirin after every complex sentence, use only simple sentences—although an occasional compound sentence may be tolerated. However, even if the judge enjoys splashing around in Henry James sentences, the literary style of the brief should be simple, accurate, concise. A style that steals the show from the argument does a disservice to the brief. Ornateness, languidness, verbosity, circuitousness—these do more than steal the show; they ruin it. A brief is not a pasture for the practice of literary gymnastics by frustrated journalists; indeed, it should not be considered a pasture of any kind but rather a cubbyhole just large enough to hold the essentials, compactly and neatly arranged, of a sound legal argument.

Most ideas when sufficiently understood can be expressed in simple language. When a brief is peppered with Latin, leavened with bombast, and frosted with sententiousness, the writer unwittingly discloses his befuddlement. The test of a lawyer's comprehension of a legal argument is his ability to express it in language that can be understood by a layman. If an intelligent secretary understands, the chances are that the judge will also understand. Her failure to understand is the cue for revision or redictation. Incidentally, if the secretary volunteers the opinion that an argument is balderdash, she may be officious, she may be impertinent, she may even be slightly vulgar, but the chances are that she is also right.

The absence of paragraphs has undoubted value as a non-habit-forming hypnotic. Briefs, however, strive to keep judges awake and even alert! Lawyers, then, should develop the art of paragraphing: it may not attract as much business as developing the art of putting, for instance, but it certainly will lead to better

briefs. There is always the danger that a non-paragrapher may degenerate into a single-spacer—those sadistic knaves who gloat over ruined eyes and mangled dispositions.

The secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical. Not that judges are incapable of performing mental or physical work; most of them can perform one or the other, and many of them can do both—although somewhat reluctantly, at times. But judges, like all cultured members of the human race, enjoy being waited on. When, for example, a case is cited in support of a proposition, the judge should not be required to read page after page of dreary dissertation in order to disinter the one or two important sentences. The brief should always disclose, not only the page on which the opinion begins, but also the exact page on which the pertinent discussion occurs. Indeed, a brief truly solicitous about the judge's mental and physical welfare will, by the simple expedient of stating tersely what was involved, what the court did, and then quoting the one important sentence in the opinion, spare the judge the effort involved in reaching for, opening, and reading the report. If, perchance, there are actually two important sentences, both may be quoted; but whole pages should not be quoted even if they have the semblance of importance: pages seem more important when printed than when typed, hence the judge should be lured into reading the original.

The destruction of judicial equanimity by making it as difficult as possible to find the authorities referred to in a brief is a vicious sport that fascinates some lawyers. They place great weight on a certain case, and then use heinous ingenuity to prevent the judge from finding it. For example, if the case is from a foreign jurisdiction they will give the state report citation—which is unavailable to the judge—and refrain from disclosing the Reporter System citation, which is available. They may even give only the Reporter System citation for local cases, apparently on the assumption that judges are required by law to know the correct citation of all cases in the official reports. If an English case, for instance, is reported in A.L.R., they omit the domestic citation and use the foreign one.

Perhaps it may be permissible to give an example of the inexplicable antics of an “inadequate citation” enthusiast when he really tries. An attorney in his brief quoted three sentences

from what was presumably a case decided by a court—at least, he gave the name of a case, but he did not reveal the page on which the sentences occurred, nor did he give any clue as to the issue involved, the date of decision, or the geographical location of the court. The only clue—a false clue, it developed—was a certain volume and page of “Ann. Cas.” Opposing counsel, carelessly assuming that at least one case in the brief must be in point, examined the indicated volume of *Annotated Cases*, but the case wasn’t there, nor was it in any other volume of *Annotated Cases*. Had the attorney really succeeded in referring to a case that couldn’t be found? Opposing counsel followed several false leads before deducing that the case—if it really was a case—might be an English compensation case. The deduction proved correct! Butterworth (B.W.C.C.) reported the English House of Lords case—it was also reported in a least ten other British sources, including *Appeal Cases*. The next deduction also proved correct: the case was important enough to warrant reporting in A.L.R.! Counsel had jerked three *chatter* sentences—not *crux* sentences—from a paragraph in the opinion of one of the Lords, as reported in A.L.R.; however, instead of giving the volume and page of the A.L.R. citation (as any considerate lawyer would instinctively do) he malevolently (or was it inspired carelessness?) had copied the volume and page used for the “A.C.” citation (but without the year) as given in A.L.R., but had substituted “Ann. Cas.” for “A.C.” The court did not decide against the attorney because of the three untagged, displaced sentences—there was, as might be surmised, no logical basis upon which he could have been upheld—and the court refrained from commenting that desperate cases do not suspend the decencies of law practice.

Give a judge a citation he can use—one that requires the minimum of exertion! If he is required to expend his energy looking for the case, he may not have sufficient energy left to appreciate the case when he finds it. Also, the citation should be comprehensive enough for use in his opinion. The title of the case should always be given exactly as in the report, notwithstanding the occasional secretarial urge to introduce inexplicable variations. That does not mean, of course, that if the case is referred to ten times on one page, the full title must be given ten times; once on a page is sufficient, provided the



nickname selected for the case is incapable of producing confusion. However, it is an imposition on the judge to require him to turn the page in order to learn the exact name and citation of the case. The fact that courts in writing for lawyers use *infra* and *supra* does not justify retaliation by lawyers when writing for judges.

Sometimes lawyers produce the illusion of erudition and industry by presenting notes and annotations without the benefit of quotation marks, without anything to suggest the source or the actual author. Now, the products of skilled annotators are of superlative value in briefing, but there is a difference between *using* an annotation and *plagiarizing* an annotation. Discovered plagiarism invariably causes diminished confidence in the offending writer; and although pretending to be the author of an outstanding piece of legal research does not necessarily mean the loss of the case, any deceit seems to give a brief an unpleasant odor—and smelly briefs are not usually convincing. Incidentally, these comments also apply to long overdue briefs.<sup>8</sup>

What is kept out of a brief is almost, but not quite, as important as what goes into a brief. Success in the act of omission depends upon (1) the intelligence and courage of the writer, and (2) the intelligence, experience, and personality of the judge. Profound knowledge of the subject is a prerequisite to differentiation between the important and unimportant; however, while the trivial and inconsequential should be suppressed, they cannot always safely be eliminated unless the judge's valuations can be predicted. For example, a judge who has had experience with a number of somewhat similar controversies does not require as comprehensive a brief as a judge struggling with the problem for the first time. Judges really do learn by experience, no matter what a few disappointed lawyers may say. In general, the brief should contain nothing that does not serve a useful purpose in the presentation of the argument—which includes, of course, the creation of a propitious atmosphere for the argument.

---

8. Most lawyers can be relied upon to keep every promise they make, big or small—except a promise to submit a brief by a stated time, possibly because they consider such promises a result of coercion and hence against public policy. It is suggested that if lawyers spent as much time *writing* their briefs as they do in *talking* about them, there would be very few late briefs.

Regardless of provocation or opportunity, ridicule and humor should invariably be eliminated before the brief is submitted to the judge. In ridiculing an opponent's argument a lawyer may be ridiculing one of the pet notions of the judge—and judges resent ridicule. Who doesn't? Besides, there is the horrible possibility that the argument only *seems* ridiculous because of inability to penetrate the recondite. As to humor, the danger lies in the unfortunate fact that its success depends upon the receiver as well as the sender. Ascension to the bench frequently atrophies a normal, robust sense of humor, and after a period of service—say, two or three days—a juridical sense of humor begins to show: a mysterious, inscrutable, capricious variety which turns into wrath too easily for comfort.

A brief needs something more than readability; it needs a complement of arguments. The arguments suitable for briefs are of two kinds: (1) persuasive, and (2) supportive. Persuasive arguments are those which seek to induce a judge to decide a controversy in a certain way; supportive arguments are those furnished as a courtesy to the judge for use in the opinion filed in justification of his decision. Persuasive arguments must be sound in order to be effective; supportive arguments may be spurious, for their use in the judge's opinion confers the illusion of legitimacy. Supportive arguments really supply the decor for the opinion, which usually is a skillful interplay between intellect and unconscious motivation. Judicial opinions, while belonging to a much higher caste, are closely related to the written explanations which congressmen frank home to their constituents in defense of their votes on highly political measures: the decisions and the votes are not the results of the opinions and the explanations, but vice versa.

Whether a brief accomplishes its objective of inducing a judge to decide in one's favor depends upon many factors, one of which is the persuasiveness of the arguments presented. The difficulty is that there are no precautionary mechanical, chemical, or psychiatric tests which can be applied to an argument to determine its soundness or persuasive quality. It is not sufficient to say pragmatically that any argument which persuades a certain judge is sound in his court, although possibly nowhere else; the problem is to determine *prior* to decision the reaction of a specified judge to the available types of argument,

a reaction that is necessarily dependent upon his social and economic background, his education, experience, personality, and ambitions. The personality factors, incidentally, are the explanation of split decisions: when a court splits four to five, for example, that does not mean that the court is composed of five jurists and four mules, nor does it mean that the court is composed of four jurists and five mules; it means, rather, that honest, sincere, intelligent judges are impelled to different conclusions by their diverse personalities. And it means, also, that few legal problems come equipped with only one possible answer. To aggravate the difficulties, there is nothing static about a judge's sensitivity to various arguments. There really are fashions and fads in the legal reasoning: a brief compacted with cogent arguments may be considered almost chic today and dowdy tomorrow or, more likely, next month—judicial lag, you know.

The most persuasive arguments are factual rather than legal. Possibly that is because Law has borrowed infinitely more from Equity than Law has the courage to admit—which pleases rather than annoys Equity. If facts can be clarified to the degree that the barber, the grocer, and the shoemaker would consider that a certain result should follow as a matter of common sense, the probabilities are that the judge will arrive at the same conclusion. True, the judge will listen attentively to protracted oral arguments, will diligently read monumental briefs, will spend precious hours in making personal investigations of the evidence and the law—and notwithstanding all that, his carefully considered judgment will concur with that pronounced by the barber, the grocer, and the shoemaker. There is this difference, however: the judge, because of his specialized training, can express the rationale of the decision in profound language that fits into the juristic scheme. An unfair analogy would be the witch doctor who may produce cures without knowing why, and the highly skilled medical expert who cures, but can also give a scientific explanation—or, at least, something that sounds like one. A plausible theory is that every human being considers himself an amateur judge; when a judge turns professional, his judgments acquire sanctions, but his thinking habits fortunately remain those of the amateur. That may be why judges are seldom priggish enough to carry judicial

integrity to the point of national catastrophe. Moreover, if a judge violates the commonly accepted concepts of justice in the community, the legislature or successor judges will ultimately restore judicial thought into harmony with community thought.

Facts have an innate faculty of looking different in different lights. It is the function of a brief to present the facts in the most favorable light, but that does not sanction distortion, suppression, or expansion. Skillful lighting requires intimate knowledge of every detail of the subject, plus some aptitude for appraising relative values and creating harmonious arrangements. The difference between the unflattering likeness produced by a snap shooting amateur and the artistic personality study produced by a renowned portrait photographer is largely a matter of posing, lighting, and finishing. The brief writer, to be sure, must use words while the photographer uses light, but the basic objective is the same: selling a picture.

The presentation of facts in a brief must of necessity be quite different from the presentation in the opinion. In a brief absolute honesty is mandatory; judicial license permits such variations in the facts as are essential to a well-considered, sagacious opinion. *Richard III* would have been poor drama if Shakespeare had adhered to history; and many outstanding judicial opinions owe their status to artistic factual modifications. Lawyers sometimes are disappointed at their inability to recognize the facts as they appear in the opinion; but they should realize that the *decision* would have been precisely the same even if the facts as stated in the *opinion* had retained their old familiar looks.

Adroitness in the presentation of facts has one objective: to facilitate perception of the imperative dictates of justice for a favorable decision. To stimulate the judge's perceptivity, invocation must be made to common sense, ideals, predelictions, and vanity. The appeal to common sense is ordinarily the most efficacious, for presumably both judge and lawyer have unlimited supplies of that rare treasure, and both have the variety indigenous to the community. The good judge, of course, is the one most generously endowed with the highest grade of common sense; and the difference between a good judge and an outstanding judge is literary rather than juristic. The appeal to ideals has an element of danger, for most people have internal as

well as external ideals, and obeisance to the external ideal may infuriate the internal ideal. All people have those unexplainable, unintentional, illogical likes and dislikes that qualify as prejudices—all people, that is, except judges, and they have predilections. It is wise, therefore, not to use arguments that might bounce against some of the judge's petrified notions; better stick to morality, patriotism, humanitarianism, and the public weal. Vanity, that essential of human happiness, has been the victim of undeserved deprecation. In judges, particularly, vanity is a truly precious quality, for vanity is the most effective preventative of judicial tyranny. No matter how overdeveloped his urge toward absolutism may become, a judge still retains his positional vanity: he craves universal recognition as a great jurist—the *greatest* jurist, in fact—and this craving fortunately imposes some degree of self-restraint. If a judge's vanity has a voracious appetite for flattery, the type that needs a double shot of flattery before breakfast, and double shots at frequent intervals throughout the day, the brief should be drenched with flattery; if, on the other hand, only small quantities are appreciated, and then only if highly diluted, the brief should be only faintly perfumed with thoroughly disguised flattery.

There are some types of flattery that add a pleasant glow to a brief, and they are deference, thoughtfulness, and consideration. Every judge is entitled to these, not always because of his character, or erudition, or diligence, or amiability, but always, *always* because of his position. The judge should be treated like visiting royalty, not like a recalcitrant elephant. His attention should be *invited*, not *called* or *directed*. And judges should never be *admonished* to read this or that *carefully*, or to pay *particular attention* to something or other. Judges always read carefully and always pay particular attention to everything—and for a lawyer to intimate otherwise is a downright uncouth. Besides, in most cases where the intimation is justified, it won't do any good. While courtesy is not generally a satisfactory substitute for a valid argument, sometimes it seems to come amazingly close; flattery comes even closer.

It must be disconcerting for a judge to read a brief which consists primarily of the lawyer's *pendente lite credo*. After all, it really doesn't matter what the lawyer believes the law to be;

the important thing is what the judge believes. Still, briefs are frequently littered with “We believe so and so,” “We are of the opinion,” and “It seems to us.” A brief should *submit, contend,* or *urge* various arguments for the judge’s consideration; and the gratuitous, personal views of the writer should not be volunteered without an express invitation—preferably engraved—from the judge.

Solicitude for a judge’s welfare should be shown, not expressed. If, for example, guiding signs placed at strategic spots throughout the brief would facilitate reading and comprehension, signs should be installed. Not exactly the same kind of signs used on highways, to be sure, although some of those signs have possibilities of adaptation, *viz.*, “Winding argument ahead,” or “Muddy when wet or dry,” or “Unreadable until repaired.” Much more dignified, and probably better, than the highway type of signs are synopsis-of-synopsis headings—headings that trenchantly state the essentials of the argument, both factual and legal. Headings that simply enumerate, or vaguely refer to some fact or argument, or just mumble in type, should be eschewed; the headings should actually *tell* something to the judge. By way of illustration, a heading like “Accident occurred,” is neither as impressive nor as tragically revealing as “Piano fell on Joe’s head.”<sup>9</sup> And arguments and authorities clustered under the heading “Law involved,” are certainly not as effectively heralded into the judge’s consciousness as the same law arguments and authorities introduced with the heading “Contracts must have mutuality.” If a headline-reading judge reads nothing but the headings, he should acquire a conversational knowledge of the case; the judge who habitually skips headlines will get the full story in the body of the brief; and for the judge who reads everything in the brief—and there are such judges, it is said—the headings will differentiate the highly important portions of the brief from the mildly important. The headings also magnanimously drop hints as to what portions of the brief may be skipped. After all, if a judge is already convinced of the soundness of an argument, why waste time reading pages and pages of brief seeking to

---

9. Note omission of interesting details, like piano was a Steinway, Joe’s head formerly was curly, etc.

convince him? Besides, there is always the danger that reading might unconvince him.

Authorities and precedents frequently are very persuasive in briefs, but only when they have been carefully selected and properly distributed. Before precedents can be selected, they must be discovered. Sometimes lawyers, failing to appreciate the coyness of precedents, expect them to flutter into sight at the opening of a book without any necessity for flushing out of their hiding place. Search should start in the digests—especially the local digests—for no matter what some impatient lawyers may proclaim, digests attempt to make the finding of law easy, not difficult or impossible. A hunter does not look only in one spot for the hypothetical pheasant; he looks in many likely spots, sometimes hour after hour, until he finds a real pheasant. Precedent hunters should follow the tactics of the pheasant hunters.<sup>10</sup>

Precedents should not be selected for inclusion in briefs solely on their intrinsic worth; the judge must also be considered in making the choice. Naturally every judge considers his former opinions the most persuasive, the most perspicacious, the most authoritative, and these opinions have top priority. Secondary precedents should include the opinion which most accurately expresses the principle sought to be established (for clarity), the opinion in which the principle was first enunciated (for venerability) and the opinion which last announced the doctrine (for up-to-dateness). One precedent which should be included, if at all possible, is the one with the greatest vulnerability to discovery by the judge on a research expedition: judge-discovered precedents acquire exaggerated importance, notwithstanding their prior careful appraisal and rejection by the attorney preparing the brief;<sup>11</sup> and the only way to hold those cases down to their appropriately humble position is to cite them.

The selection of supportive arguments is infinitely less important than the selection of persuasive arguments; still, judges appraise the merit of the brief almost entirely upon the

---

10. The gun, of course, should be omitted; however, since excellent briefs usually result from "working like a dog," possibly the dog should be retained.

11. The same phenomenon, undoubtedly, that makes the fish we catch at least twice as large as fish of the same size caught by somebody else.

supportive arguments presented. And this is entirely proper, for a truly skillful brief never lets the judge suspect that any persuasive arguments in the brief had the slightest influence on his decision. As to the supportive arguments—well, we all recognize instantaneously the supreme sagacity of the person who expresses ideas identical with ours. When the judge reaches a determination, why shouldn't he think highly of the brief which furnishes ready-to-use precedents and arguments that can be incorporated into his opinion?

Supportive arguments and precedents should have versatility, flexibility, tensibility—in short, capacity for being fitted into place for the production of a scholarly opinion. Precedents rich in generalizations are especially prized, as are those in which flickering ideas are expressed in putty words. And dicta—juridical small talk about questions not presented—should never be overlooked! While fluent judges sometimes seem to pad their opinions with discourses on divers interesting but irrelevant subjects,<sup>12</sup> their dicta are really useful because of availability as synthetic substitutes for authentic precedents. Of course, if the controversy involved requires an opinion different from that previously gratuitously expressed, no harm will be done, because the court can always say, “That was mere dictum!”

The character of the supportive precedential material to be placed in any brief is dependent upon the nature and type—not to mention vagaries—of the judge who is supposed to read the brief. The general principles involved are illustrated by considering a few types of judges not picked at random: If the judge is the treatise-writing type, supply him with a superabundance of cases, plus references to notes, annotations, law review articles, and texts where he can find additional cases. Cases should not be analyzed or collated, for that would constitute usurpation of the judge's prerogatives; and infinite care must be taken not to suggest that for hundreds, probably thousands, of years, judges have been writing definitive opinions—with obsolescence starting before the writing of the long last paragraph. If, by way of contrast, the judge is the

---

12. If every judge were required to pay out of his own pocket the cost of typing, printing and distributing his opinions, it is doubtful that there would be any substantial decrease in the total volume of opinions.



overworked type,<sup>13</sup> present him with a few sentences and paragraphs that he can stick together with a few of his own adhesive words to create his opinion before he dashes out in search of needed recreation, such as eating, drinking, fishing, or golfing. If the judge is the juristic type, simply use discrimination in selecting terse, meaty quotations—with all of the fat carefully trimmed away—from a few of the best reasoned cases on the subject.

One essential ingredient of all good briefs eludes accurate denomination—*craftmanship* comes close, so does *artistry*, and even *class* or *finish* might do. It approximates the ingredient which sets apart the amazingly expensive tailored suit from the amazingly cheap hand-me-down. Now, while handmade buttonholes are unnecessary to indicate superior workmanship in a brief, some equivalent details of distinction are: all quotations compared with the originals, with paragraphing and omissions indicated; all cases thoroughly Shepardized; all references to cases and testimony checked for accuracy; correct citations supplied for all cases which in the process of quotations have been denuded of all identifying marks except the exasperating *supra*; the year of decision always given; the same style of citing cases used throughout the brief; all repetitious, useless, or obstructive material deleted. If the rules require printed briefs but tolerate sham printing, submit genuine printing—not because of the shaggy, unkempt appearance of the crudely imitative printing processes, but because sham printing processes do not permit the scrutinizing of galley or page proof,<sup>14</sup> with the result that errors which escape detection in the typewritten page appear vulgarly conspicuous in the printed page.

Possibly a client cannot afford to pay for the time and effort essential to a workmanlike brief, but this much is certain: no lawyer can afford to present a cut-rate brief to any court! The shoddiness of a cut-rate brief insults the court, degrades the lawyer. Briefs are essential expedients of our judicial system;

---

13. Judges are never lazy; if occasionally they have that appearance, they are merely exhibiting some of the atypical symptoms of overwork.

14. Failure of a lawyer to check the galley or page proof with painstaking care should not be made a prison offense; two hours in stocks (if available) should be adequate, especially since the dereliction usually inflicts its own punishment.

they are submitted by attorneys, not only as lawyers for litigants, but also as officers of the court. Just as a reputable surgeon will not perform any operation in a hurried, slipshod manner merely because of the patient's inability to pay, a reputable lawyer will not submit a brief that is below his highest professional standards, regardless of the prospect of inadequate remuneration. In neither case is justifiable pride of profession the fundamental motivating force; in both cases the impulsion is a profound sense of obligation to humanity.

