The Journal of Appellate Practice and Process

Volume 14 | Issue 2 Article 5

2013

Whittling: Drafting Concise and Effective Appellate Briefs

Brian K. Keller

WHITTLING: DRAFTING CONCISE AND EFFECTIVE APPELLATE BRIEFS

Brian K. Keller*

Every appellate attorney's nightmare is realizing too late that inartful language in a brief fatally distracts from the core of the argument, sending one judge scurrying down dead-end rabbit holes or playing to another's jurisprudential eccentricities. Applying the simple three-step approach outlined below can help you avoid that experience, but be warned: Although the tools for avoiding such mistakes are simple, they often require years of practice and effort to apply with skill. Stealing a few tricks from military discipline can make this process easier.

I. INTRODUCTION: WHAT I DO AND WHY

Over the past eight years, I have become responsible for the appellate output of ten appellate litigators. I have trained and mooted some fifty attorneys to write and argue effectively, including shaping and editing over a thousand substantive briefs and extraordinary writs filed in the two-tier military appellate court system and in the Supreme Court. Our attorneys—military officers and judge advocates in the Navy and Marine Corps—arrive at my doorstep with some trial but no appellate experience, and serve only two-to-three-year terms as appellate litigators. My goal is to craft our attorneys into effective, hard-charging appellate advocates within six to twelve months of their arrival, so that I wrest two productive years from each attorney.

The training curve is steep, the hurdles facing us huge: Each counsel's caseload on any given day is upwards of ten appellate cases. There is no dedicated paralegal support staff to

* Supervisory Appellate Attorney and Civilian Deputy Director, Appellate Government Division, Office of the Judge Advocate General of the Navy.

cite-check, Shepardize, or perfect formatting. Three years is a short time in which to learn and excel at any area of law. And appellate law, one of the broadest and most complex areas of the law, poses a particular challenge for eager young attorneys fresh from law school.

Competence as an appellate advocate requires the most thorough research skills, quick but comprehensive understanding of new concepts and legal tests, and an ability to encapsulate an entire argument in only a few short sentences. This conceptual ability to draw useful analogies and comparisons bridging disparate doctrines and lines of cases is particularly necessary in appellate law. Appellate lawyers think laterally, analogize, bridge gaps in understanding.[1]

Despite these hurdles, by employing the system I describe below, within six to twelve months from setting their bags down in our office spaces, most if not all my attorneys have become competent appellate lawyers, able to verbally distill the development of precedent and circuit splits into terse, effective sentences. More impressively, when they leave after three years for new assignments, a full half—if not more—of my attorneys could aggressively and responsively argue in the highest court of every state, a federal court of appeals, or the United States Supreme Court, and craft briefs to match.

How is this possible? It's simple: I use the same common-sense, no-nonsense approach the best military units use to train combat and support troops in new skills. Marines call these "muscle memory" classes. Others call the technique "monkey see–monkey do." But to help these young attorneys reach the broad and deep understanding required for appellate briefing in less than a year, there is no other way: We engage in a rigorous course of on-the-job learning that is well suited to the men and women of action who comprise the military. It is learning by doing. In combination with the skills the best military officers bring to the practice and to my office—brashness, boldness, initiative, delegation, and trust in low-level leadership—this technique produces competent appellate practitioners quickly.

1. I call this appellate skill set "rhizomatic thinking," a nod to philosopher Gilles Deleuze. This way of thinking doesn't end at the first detour, but branches out, approaches and appropriates analogous ideas, and grows laterally, much like a tuber, or rhizome. *See e.g.* Gilles Deleuze & Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (U. Minn. Press 1983).

And given that hard-working attorneys everywhere share or learn these traits, this technique can work in any appellate practice.

For the fundamentals of good appellate writing are neither costly nor complex. It is no cliché, but it is entirely accurate, to say that good legal writing comes from within. The predicates for effective appellate writing—the skills that grease the skids—are reading lots and lots of good writing, including what good appellate writing you can find, and then practicing appellate writing. As Justice Brandeis is supposed to have said, "there is no such thing as good legal writing, only good legal rewriting."[2] That is, writing is hard work.

Nothing about my philosophy or the techniques that I describe is novel. Too often theorists of appellate practice prescribe exhaustive circuit-, court-, or author-specific peculiarities and preferences. I reject that approach. Instead, I outline the stripped-down essentials: How to coach young appellate attorneys to excel in writing appellate briefs and litigating their own appellate cases within one year of their first day on the job. And I do so by revealing the secrets of why the appellate litigators of the Marine Corps and Navy learn appellate litigation so quickly, and why they favorably compare to—and could successfully compete with—far more seasoned appellate litigators in any court.[3]

II. THE METHOD: WHAT YOU SHOULD DO AND WHY

A. Form: Invisible When Correct, Ignored at Peril

In the Justice Department, legions of cite-checkers and copy editors assist action attorneys with the administrative side of brief-writing. There, and in larger firms, the task of ensuring that appellate briefs are letter perfect and look professional is more easily achieved. Here in my office, and also for solo

2. Alice Brandeis Popkin & Frank Brandeis Gilbert, *A Letter from Grandchildren of Justice Louis D. Brandeis*, 37 Brandeis L.J. 173 (1998–99).

3. Because I hope that you will tell young appellate advocates you know to find and read this article, I have addressed it directly to them, using "you" and referring to "your brief" throughout. But of course I am also addressing every experienced appellate lawyer who reads this article, and hope they will also find something here useful in their own practices.

practitioners and lawyers in smaller practices, this task is often left to the attorneys themselves. Ensuring that a brief is in proper form is among the easiest tasks to complete, yet it is also among the easiest to overlook. But make no mistake: Putting briefs in proper form is critical to a successful appellate practice.

1. Use the White-Glove Test

Marine Corps barracks inspections use the famous white-glove test—any dust or dirt that appears on the drill instructor's perfectly white glove spells automatic failure. You should apply the same test when copy-editing your briefs. Judges, law clerks, and supervising attorneys, the hard-nosed and jaded daily readers of hundreds of pages of densely written, citation-laden legalese, have a common refrain: Mistakes stand out like flashing neon signs. Page-numbering errors, misspellings, font irregularities, and trendy, unconventional, or simply incorrect grammar interrupt the reading experience. Instead, ensure that the final product is copy-edited to perfection.

2. Avoid Distracting Formatting and Creative Writing

An expert in rhetoric and composition once warned me that the practice of law kills your writing. Granted, the Chief Justice of the United States once wrote a compelling film-noir introduction to a dissent.[4] And I think that even legal-writing experts would agree that the law builds logic and argument skills. But the expert was right to suggest that brief-writing is not creative writing: Its goal is instead to excite curiosity about unknown or seemingly irrelevant precedent. Nor should the copy-editing be *avant garde*: It should not generate questions about word choice, cutting-edge fonts, new page-numbering systems, run-on paragraphs extending over multiple pages, or the decision to use left or full justification for the body of the text. Likewise, unusual Latin or foreign phrases that require dictionary pit stops, and over-ebullient use of "But" and "And" at the beginnings of sentences, merely distract from your goal of focusing on the argument.

4. *Penn. v. Dunlap*, 555 U.S. 964 (2008) (Roberts, C.J., and Kennedy, J., dissenting from denial of certiorari). When you don the robes, feel free to engage in creativity every now and then. Until that happens—no fancy stuff.

Instead, write non-colloquially, and aim for the golden mean, choosing words and grammar that are widely accepted, unless otherwise directed by your court. Aim for the milquetoast or beige: Excise anything unusual or snarky from the spelling, grammar, and layout of your legal writing. Your goal, in these matters of form, is not to stand out.

Until ascending to the bench, every appellate attorney should aim to produce briefs that are solid and workmanlike when it comes to form, which is to say when it comes to the look and feel of the font, type size, margins, spelling, and choice of words. Every form choice should minimize distraction and work instead to move the reader seamlessly through the argument from one proposition to the next.

3. March in Lockstep with Your Colleagues

My admonitions about form should extend to the attorneys you practice with as well. The format of every brief that leaves your office bound for a particular court should be consistent, from day to day, week to week, and year to year. This consistency should apply to (1) the placement of the constituent parts of your brief, including the jurisdictional statement, statement of facts, assignments of error, and so on; (2) headers, footers, and whether you use footnotes; and (3) statements of law, if you have developed an accurate and effective rule section in a previous brief on the same issue and in the same court. Unless the law has substantially changed, you should use an accurate and fully Shepardized boilerplate version of the applicable law, updated with newer cases but maintaining the same flow and appearance that you have used in the past.

Judges are creatures of habit. They expect change to happen for a reason. If there is no apparent reason for a change that you have made, and your work is familiar to them, then they will either notice the change, or they may be tempted to spend time trying to determine why you made it. Either way, you will have scored a self-inflicted wound, detracting from your argument by distracting the judge from your ultimate goal—which was to guide the judge through an uninterrupted sequence of propositions that lead inevitably to your conclusion.

Remember too that judges read inhuman numbers of pages daily; your goal should be to facilitate the most pleasant reading

experience possible. Think Walt Disney Resorts, Ritz-Carlton Hotels, or All Nippon Airlines as the bar for the level of quality you need to achieve. The judge reading your brief, particularly if you and your colleagues have briefed the same issues before, should never be distracted from your argument by the notion that your terms of service have changed, or that customer service is under-staffed, or that you have any motive other than the workaday presentation of clear legal principles leading to a predictable solution. Customers are smart. And judges are especially smart customers.

4. Use Footnotes Sparingly

Most appellate practitioners avoid footnotes. Most judges prefer that citations appear within the text, paired with the sentences they support. Indeed, most judges write opinions that way. Technically, the citation is part of the sentence: It justifies the proposition, giving it appropriate weight. If a sentence cites an unpublished or trial court opinion, the reader can instantly give it proper weight without leaving the text. If the case is a Supreme Court case, the reader immediately knows which surrounding propositions to discount, or wonders why the author buried the sentence deep in the middle of the paragraph. Cites give immediate context and weight to the argument.

In contrast, footnotes require the reader to triangulate competing sentences with their footnotes. Justice Scalia, Judge Posner, and a broad swath of the judiciary have pointedly related, in articles and interviews, that reading large volumes of footnoted legal writing is a needlessly difficult experience.[5] And some judges hand-annotate these footnoted sentences with cite or jurisdiction to tie the broken citations back together.[6] In sum, if your jurisdiction requires footnotes, use them. And, if lengthy string cites are unavoidable, footnotes may be necessary. Otherwise, avoid them. Appellate briefs are not creative writing, and there's no reason to shy away from the key role precedent plays in making a persuasive legal argument. Appellate briefs

5. *See e.g.* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 129–35 (Thomson/West 2008); Richard A. Posner, *Against Footnotes*, Court Review 24 (Summer 2001).

6. I have heard a number of judges mention this annotating process.

are beautiful precisely because of their precedent-based math and logic: It's the logic and precedent that persuade.

5. Remember the Golden Mean

The aims of the appellate lawyer vis-à-vis the form of any brief are to be grammatically correct, to be letter-perfect in matters of structure, and to be pleasing and easy on the eye. This requires attention to what I call "the golden mean," that is, what the reasonable judge would want. This further requires an assessment of who sits on your court and what they have indicated they want. If your court has expressed no opinion, you must look to the prevailing practices in the wider appellate community, looking to a hypothetical "reasonable" appellate judge who shares the attributes of your court.

B. Substance: Using the Issue-Rule-Analysis-Conclusion Method and Deploying Your Troops to the Right Battlefield

Unlike form, substance is always foremost in the writer's mind and its importance is seldom overlooked. But substance is not the opposite of form. It has more in common with form than most appellate lawyers would care to admit, thinking as they do that substance is what is put on paper and the depth of the thoughts behind it, not how those arguments are put to paper. That's mostly wrong.

Of course substance requires depth and breadth of thought to arrive at the correct argument. But the task of conveying the substance of that argument in logical fashion—leading the reader through the steps that you have taken in a way that makes your conclusion seem inevitable—has its own form-like requirements. In sum, following three rules guarantees a substantively sound appellate brief:

- Your brief must be candid: Your statement of facts and statement of law must be so accurate and unobjectionable as to set the heads of every judge, and even your opponent's head, nodding in agreement.

- Your brief must be definitive: As to the issues you must win for your argument to prevail—what I call the "battlefield issues"—you must understand and concisely explain the entire lay of the land, including not only binding but also persuasive authority, and also the historical context.

- Third, your brief must be logical: An appellate brief is an exercise in logic, and is at its core a logic proof. Lead the reader directly and sequentially to your conclusion, skipping no steps.

These rules serve one purpose: they move your audience—the judge—unerringly through each of your propositions directly to the main battlefield, and from there to your conclusion. Your substantive goal is to avoid the reader's entanglement in skirmishes that distract from the battles that you must win. Because these rules may require suppressing traits characteristic of the advocate's personality—prone to argue every point, excessively self-assured, accustomed to using flowery prose, reliant on glibness—following them may be the hardest lesson for some appellate lawyers to learn.

1. Be Candid

The statement of facts and any recitation of the law (what IRAC characterizes as the Rule) in your brief must be unassailable and indisputable.[7] The judge (and any reasonable opponent) must be able to read the statement of facts and the statement of the existing state of the law and be hard-pressed to disagree with it.

This requires you to restrain the instinct to spin the facts in order to sway or convince. Appellate judges immediately sniff out—and are allergic to—"characterization" of the facts or the law. By spinning the facts or the law even once, you discount the value of your brief to the judge, and risk the judge's

7. If your law school did not teach the IRAC method, here's a quick summary: It requires the author (1) to place up front the issue being talked about; (2) to follow the statement of the issue with the rule applicable to analysis of the issue; (3) to analyze the application of the rule to the issue and the facts; and only then (4) to announce the conclusion. (I discuss IRAC further in section II.B.3 below.)

presuming spin in every factual sentence and every legal statement. You also risk the possibility that the judge will check your citations for the sole purpose of determining whether you have accurately represented the facts or the law in each. Lack of candor is, in short, the simplest route to a loss of credibility in an appellate judge's eyes.

To avoid this result, excise every word in your brief, including in the statement of facts and the enunciation of the legal rule in your IRAC recitation, that spins the facts or the law. Read those parts of your brief aloud to identify even the most subtle suggestion of spin. Read your facts and recitation of the law through the eyes of your opponent: Unless a particular fact or point of law is a battlefield issue—which in appellate law most are not—then you want to ensure that your opponent can agree with most of your factual and legal statements.

Your goal is to increase your chance of winning by narrowing the battlefield to the small discrete issue or series of small discrete issues that your case is about. Why? Because uncertainty in appellate law favors the status quo: There are so many doctrines, hurdles, and burdens in appellate law permitting courts to reject arguments that any failure to narrowly identify the legal issues enlarges the chance that the court will resort to the application of prudential doctrines that enable it to reject the relief you seek. You must recognize, then, that the fact and rule sections of your brief are generally prefatory to your focus on the battlefield issues. You do not want to spark a dispute over these preliminary matters on which everyone in the case could otherwise agree. You want the disputes in the case to be over matters of substance—the battlefield issues. And so you will want all parties nodding their heads to as many of the facts and as much of the relevant law as possible.

2. Be Definitive

As to the disputed battlefield issues on which you must prevail, the statements of law and facts, and the analysis of binding and persuasive precedent, must be thorough to a fault. Because the rule section should be indisputable, it can be concise and need not be exhaustive except where the rule or case law is so new as to bleed into the battlefield issues.

But in every case, you must be the expert expert—the pundit, talking head, professor emeritus, and head of the department—as to the battlefield issues. Successful appellate advocacy is not an exercise in which each party throws a half-baked analysis of its side of an issue at the judges in hopes that the court can work it out. Rather, the best brief narrows the battlefield to a specific issue or issues where the battle must be fought, and the advocate "unleashes hell" on that small battlefield. A successful advocate knows everything there is to know about the cases and rules pertinent to that battlefield issue.

Likewise, the advocate should understand the how and why of the seminal and most recent cases, the applicable statutes, and any relevant regulations. Before writing, you should be able to explain the historical development of law into its current state. And because the facts of a case do not typically fit neatly into extant precedent, your research must be deep, broad, and thorough enough to identify the closest binding and persuasive cases.

This doesn't mean paragraphs on the battlefield issues should include fifty-case string citations. Rather, you should have so exhaustively researched binding and relevant precedent that you could include string cites, even though you will in fact cite only the binding and most persuasive authorities in the brief.[8] A wise advocate looks outside the jurisdiction at, for example, courts in other states or circuits that have resolved similar issues. If the issue is too novel and no binding precedent exists, well-reasoned but persuasive treatments of the issue often provide a welcome latticework on which the judges can construct their own binding precedent.

Too often, appellate advocates give up before searching far afield in the decisions of geographically distant federal courts of appeals or state courts, where the perfect case may be waiting. You know that case: It jumps through every hoop I describe here—it exhaustively surveys every jurisdiction; it examines the historical development of precedent; it considers reasons for the circuit splits or disagreements among state supreme courts; and

8. A possible exception is the case in which a circuit split might help resolution of the issue. Although the split should ideally be described in the text of the brief, if lengthy it can be footnoted and accompanied there with the necessary string citation.

finally, it decides the case in circumspect fashion. You should find and cite that case . . . if it exists.

To be definitive, your brief must accomplish what those perfect opinions do: be so definitive that it helps your court to engage in the same analysis with a minimum of effort. Rest assured that if you don't look to the historical development of case law, and don't understand how other circuits and states are approaching the battlefield issues in your case, then the judges will put aside your brief and go looking for the information that you should have provided. Your brief will have been diminished by the court's having to undertake the work for itself. So ensure that your brief gives judges what they are looking for: a definitive analysis of the battlefield issues.

3. Be Logical

Organize your brief as the logic proof that it is: It should state the propositions in logical order, and apply rules of inference in logical order, before stating the conclusion. Remember that you must earn your conclusion. Repetition and reminders of an upcoming conclusion add nothing to logical argument. Nor should the conclusion be used as a mantra or rallying cry—appellate judges already know which party you represent; they are interested in the logic proof. Rather the conclusion is the Q.E.D. earned only once the logic proof is complete.[9] Announcing the conclusion prematurely, or using the conclusion stylistically or persuasively, detracts from your credibility and distracts the judge.

To encourage this sort of logical argument, the IRAC method is widely taught in law schools. IRAC traces its roots from propositional logic directly back to Aristotelian logic. Notably, IRAC is a mnemonic reminder of how to simply organize legal argument consistent with propositional logic. In any of its many but substantially similar variations, IRAC enables concise and elegant persuasion.

If this sounds mathematical, it should. Appellate advocacy is a process of logic proofs. Indeed, as Lord Coke put it, "reason

9. Q.E.D. is from the Latin "quod erat demonstrandum," or "the thing is proved." You see it at the end of old-fashioned logic proofs because that's where it belongs—on the final step of the path that leads to the result you favor.

is the life of the law."[10] To present reasonable and logical argument, a method like IRAC is essential: It helps you overcome disorganized and turgid writing by requiring you to prioritize. In contrast, abandoning IRAC in favor of creative organization or effusive writing can quickly lead to unreadable and illogical briefs.

a. The IRAC Method: How to Construct Your Brief

The issue in an IRAC brief appears at the very beginning of the brief, and then again at the start of the argument section. If well-phrased, the IRAC issue is identical to the battlefield issue that must be won if you are to prevail. If the stated issue is identical to the battlefield issue, the brief typically can be concise and directed. If it is ill-phrased, you will waste much space reconciling the granted or court-specified issue with the real issue that you want addressed. And, if you disagree that the granted or court-specified issue is the battlefield issue, you must disagree openly, succinctly, and early in your brief.

After the initial statement of the issue, the brief should list only the facts necessary to decide the issue, those that you will need later in the analysis section to support the propositions of your argument.

After the facts come what IRAC calls the rules, which are the propositions needed for the analysis section's proof.

Next, the analysis section of IRAC looks to gaps between the rules and facts and argues by analogy, using precedent to bridge those gaps. The analysis section often applies logical rules of inference including syllogisms.

Finally, once the logic proof has been solved in the analysis section of the brief, the conclusion announces summarily what has been proven. If steps are missing from your analysis, then announcement of the conclusion is premature. But, if all steps are present—from facts and rules through application of the facts to the rules in the analysis section—then the logic proof should one-to-one respond to the issue posed.

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10. J.H. Thomas, *Systematic Arrangement of Lord Coke's First Institute of the Laws of England* vol. 1, book 1, at 1 (2d Am. ed., Alexander Towar 1836).

b. The IRAC Method: How to Frame Your Analysis

The analysis section is where most of the fight occurs, because it involves plugging the facts into existing law. Of course it's not that simple. In most cases, simple application of the rules of inference is impossible because the facts don't neatly fit into existing precedent. Thus argument by analogy is usually necessary, using precedent that has in the past enlarged or narrowed precedent, and arguing for further extension or narrowing. Whether a court is willing to further alter precedent can depend on how convincing you are in crafting the argument by analogy. Your argument to extend or narrow precedent must be a definitive argument that first appears in the analysis section, and appears there only after you have candidly provided the facts and law, and clearly expressed in your brief that the battle to be fought is enlarging, or narrowing, precedent.

c. The IRAC Method: Why and How Logical Analysis Works

To understand why IRAC is so essential to appellate writing, you need only examine what appellate writing is supposed to accomplish: What should the judge be saying, in his or her mind, after reading the brief? That's easy: The judge ideally ought to be thinking one thing:

> Eureka! Of course! Your brief has led me to an utterly obvious Q.E.D.! You have been so honest and fair, so thorough, and haven't missed a beat leading me through the facts, through the relevant law, and to the inescapable conclusion that you win! I'll read the other side's brief, but I've got a good feeling already that I know what it's going to say—it's already been rebutted by this brief!

A pipe-dream, say you? Hardly. Although appellate law is frequently about close cases, opportunities abound for home runs. Distended and disorganized writing can obscure those opportunities. When you encounter a close case, proper application of the principles in this article will get the judge thinking:

> Of course that's right. This advocate identifies the correct battlefield of precedents. While I may disagree with which precedent is closer, and may disagree about how to apply

> the precedent, the advocate has done a bang-up job directing me straight to the real battlefield of binding and persuasive precedent. Bring on the oral argument, where we can talk about the history and principles behind the battlefield of laws and precedents!

And that, of course, is where the most celebrated oral arguments, and opinions, make their home. It's also prime ground for an appellate advocate to gain quick recognition for mastery of the art.

Thus, the battles of your brief should be fought in the analysis section. That is, you must choose to fight your battle there. But some advocates choose to fight their battles in other places: They may choose to fight facts, rules, or the issue. And I am here to tell you that in most cases, if you choose to fight those three battles, you've already struck a blow against your case. Space and time limitations applicable to your brief argue against wasting time on non-essential battles. Logic in analysis is the only way to win.

C. Substance: Adding Whittling to the IRAC Method

Finally, after you have applied all three of the traditional parts of the IRAC method to your brief, you must "whittle" it. But before whittling your brief, you should read and absorb the lessons of John Stone's poem *Whittling: The Last Class*. If your brief's form is correct, applying this fourth rule of substance will produce some of the best legal writing that your judges will ever read.

The poem is facially about whittling wood. But even on my first read of *Whittling*, its words reminded me of my long love affair with appellate law, and the recurring thoughts that I have when editing and reading briefs.

In the first few lines, Stone talks of the spirit of curiosity required in a good whittler, which is identical to the spirit required of a good appellate attorney: "It is the discovery that keeps the fingers moving not the idleness," he points out, and "the knife looking for the right plane that will let the secret out."[11] Curiosity makes all the difference in appellate law too,

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11. *See Whittling, The Last Class*, in John Stone, *Music from Apartment 8: New and Selected Poems* 81 (La. St. U. Press 2004).

just as it does in any profession: You must be curious, must want to discover, must be eager to uncover how and why things work or don't work.

The poet then gives the three rules of whittling that, applied to an appellate brief, perfectly encapsulate the way a successful appellate writer puts finishing touches on a candid, definitive, and logical argument to make it even better:

1. Make Small Cuts

This is as true in logical argument as in whittling wood. The issue statement, the analysis, the summary of argument—every statement in an appellate brief should serve as a small, incremental, and sequential step towards the conclusion. Avoid the temptation to resolve all issues in one unbroken string of argument paragraphs. Rather, subdivide your argument into its constituent parts. Create descriptively named sub-headers for each grouping of relevant facts and for each proposition of law. Permit the judge to deal with one discrete sub-issue at a time. Maximize the possibility that your judge will agree with ninety percent of your sub-propositions, rather than hoping and leaving it to chance that the judge will successfully spot, identify by name and relevant law, and later remember the one issue that he or she agreed with, but that was buried deep in your prose and without any signposts or sub-headings.

As with reading the bare record or transcript, your job is to make method out of madness. After reading the record, you doubtless have organized it and determined, for each assignment of error, which parts of the record are relevant to a given issue in your case. So too, your goal in the brief should be to present the issues with as much clarity as possible, even if they are difficult and complex, breaking your argument into simple, individual, sequentially ordered propositions. Each successive subsection should lead your reader one step closer to your conclusion on that issue.

2. Always Whittle Away from Yourself and toward Something

Go through the entire brief and cut away the dead wood. Trim away every word that either restates the other side's argument, or fails to directly move the reader toward your

conclusion. This is onerous work, for every writer grows comfortable with favorite figures of speech and padding phrases. Many restate the opposing view verbatim, as if hoping to use it as a leaping-off point for further writing. And even experienced appellate attorneys sometimes over-explain incontrovertible areas of law with lengthy boilerplate or string citations, or devote entire sections to examining unrelated, but similar, areas of law that caught their attention while they were researching the relevant precedents. All these habits must be abandoned. Whittle away anything that does not move the reader directly toward a conclusion that can win your case.

Make your brief a model of efficiency. Rather than writing a defensive full-paragraph rebuttal, go on the offensive: Turn that summary of your opponent's argument into a simple segue or transition sentence that introduces a new subsection of your argument, such as "Appellant incorrectly asserts that new cases like *Jagrafess v. Raxacoricofallapatorius* demonstrate that the error here was plain and obvious." Likewise, a multi-page discussion of cases from other circuits or other states must be cut if there is a case on point that is binding on your court. Those irrelevant cases do not cut toward the conclusion that you want the court to reach.

3. Know When to Stop

If your brief is sub-divided into discrete issues that you must prove to prevail, you are done after every required point is proven. This stopping point is easier to find at oral argument, arriving after you make all of your important points and the judges have no more questions. In brief-writing, you can only triangulate this stopping point indirectly, and only once you develop a big-picture understanding of where your legal issues fit, both currently and historically, into the court's other cases and how the judges are predicted to respond to your arguments.

For example, your argument might benefit from greater depth and length when yours is the first case the court has heard on a complex or sensitive issue. On the other hand, if your case is just the latest in a long line of cases involving the same issue and the judges have worn thin the list of new questions to be asked, you may benefit from shortening, or even super-compressing, your argument.

Similarly, to secure a majority vote, known holdout judges may benefit from a more thorough discussion of the law than your past briefs have provided. But if you know that some judges will oppose your position no matter how persuasive your argument, remember that adding arguments constructed solely for their benefit may not only alienate them, but also antagonize judges more likely to see the case your way. This is so because your arguments may provoke those favorable judges, in chambers or during oral argument, to needlessly engage the holdout judges over a predictably hopeless rift in views.

Knowing when to stop is the hardest of all the lessons in this article. It requires the attorney to be an astute student of each judge's position and views, a careful listener to a broad array of oral arguments in other cases, and a master of both the gradual development of precedent in the appellate court at hand and from other courts whose decisions are binding, but also a master of persuasive precedent from other jurisdictions.

III. CONCLUSION

Carefully honing the form of a brief and then attending to the four rules of substance—ensuring that the brief is candid, definitive, and logical, and then whittling it towards excellence—will help a new lawyer become a competent appellate advocate and will also help seasoned appellate advocates refine their work.

That said, I can think of no better way to close than with Stone's final prayer, which aptly describes what we all should attempt to do daily as we strive within our storied and noble system of appellate justice:

May you find
in the waiting wood
rough unspoken

what is true

or
nearly true
or

true enough.[12]

12. *Id.* at 82.