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Andrew H. Baida

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

DEVELOPMENTS AND PRACTICE NOTES

WRITING A BETTER BRIEF: THE CIVIL APPEALS STYLE MANUAL OF THE OFFICE OF THE MARYLAND ATTORNEY GENERAL

Andrew H. Baida*

I. INTRODUCTION

Five years ago, the Office of the Attorney General of Maryland held its first Civil Appellate Brief Writing Program. This program was part of a concerted effort to improve the level of written appellate advocacy in the civil appeals handled by its attorneys. Since that time, approximately 350 Maryland Assistant Attorneys General have participated in this program, by listening to lectures about effective brief writing, speaking to appellate judges who sit on the courts before whom the Office most frequently litigates, and engaging in small group discussions in which they have dissected briefs written by them specifically for the program.[1] The centerpiece of the program is

* Solicitor General of the State of Maryland.

1. At the time this article was written, the program had recently been conducted for the eighth time. All attorneys within the Office of Attorney General must take part in the program as a condition of filing civil appellate briefs.

the Office's Civil Appeals Style Manual.

The Manual was created for the purpose of improving and standardizing the hundreds of civil appellate briefs that the Office files each year in state and federal courts. The Manual is premised on the beliefs that not only is a great brief better than a good brief, but that a great brief is more likely to result in good law and a positive outcome for our clients. An excellent brief also properly reflects the high professional standards expected of all attorneys when advancing the Office's role in the appellate process.

We share with others the substantive components set forth in our Civil Appeals Style Manual, slightly adapted to fit the law journal format. We are eager to share the Manual's principles because we have seen a marked improvement in our appellate briefs. We believe that others can also benefit from the writing principles that our attorneys consider when engaging in the brief-writing process.

II. GUIDELINES FOR THE STRUCTURE AND CONTENTS OF THE BRIEF

The Manual contains three parts: technical requirements, guidelines, and an appendix. The technical requirements, which are not reproduced in this article, are designed to assure that our civil appellate briefs look the same; they consist of stylistic rules that govern the format and appearance of all civil briefs that the Office files. The guidelines, set forth below, articulate principles that apply to the substantive components of the appellate brief, *e.g.*, the statement of the case, questions presented, statement of facts, summary of argument, argument, and conclusion. The appendix, which also is not reproduced here, contains examples of each of these components.

While the technical requirements leave the brief writer no discretion with respect to the brief's physical appearance, such compliance is not expected with respect to the Manual's guidelines. While the principles are intended to provide guidance on writing an effective brief, they may not apply in all circumstances. The Office's attorneys are accordingly told that the principles should not be followed if they do not work. The only request we make is that if the individual attorney decides to

deviate from the Manual, he or she simply needs to be sure that this decision is made purposefully *and* is supported by a good reason.

These guidelines track the structure and contents of briefs filed in the Maryland appellate courts. The rules governing those briefs, however, are similar in most respects to the rules regulating briefs in other appellate courts, and so they may be of assistance to brief writers elsewhere. Attorneys within the Maryland Attorney General's Office are told that these guidelines are not a substitute for the rules and that they are based on the assumption that the reader is familiar with all applicable rules.

A. *Beginning the Brief*

Principle 1: Develop your theme.

Regardless which part of the brief you choose to write first, you should identify the brief's "theme" and use the theme in writing virtually every part of the brief. Senior United States Circuit Judge Ruggero J. Aldisert defines the theme as "the unifying focus of your brief" that (1) "directs the court's attention . . . to where the heart of the matter lies" and to "the equitable heart of the appeal," and (2) answers the question, "What in the heck is the message?!"[2] As Judge Aldisert states, the theme does more:

> The theme not only sets the flavor of your argument but also sets the mood. It is both the focus and the thesis. It directs the judges' attention immediately to where the trial court's error took place and explains straightaway why the trial court was wrong or, when used by the appellee, why it was right. It tells the appellate court what relief you want.[3]

An appellate theme may be easy to identify, such as when you can articulate in one sentence what the case is about. In other cases, however, the theme may not emerge until you draft

2. Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 8.11, 141 (NITA rev. ed. 1996) (quoting Judge Myron Bright, attorney Jordan Cherrick, and Justice Walter Urbigkit, respectively).

3. *Id.* § 12.1, at 212.

an outline of the brief or just start to write the brief itself. If you develop the theme by resorting to the latter technique, you will need to revisit your work to make the brief fit the theme. Whatever method is used, you must have a theme that shapes your brief.

Principle 2: Know your audience.

Consider your reader in the overall approach, style, and tone that you use when you begin to write. As two commentators observe, "[W]e must understand our audience and purpose before we begin to write . . . ."[4] As they point out, however, this observation, standing alone, borders on being a cliché. It is not "enough to know, for example, that your audience is an appellate court and your purpose is to persuade it that a trial court misconstrued a statute."[5] Rather, you need to determine consciously what your audience knows.

Judges are very familiar, for example, with the principles of statutory construction or the substantial evidence test, and they do not need a multi-paragraph recitation of these maxims. Instead of spending time and energy telling the audience what it knows, and thus advancing no useful purpose, an effective brief devotes greater space to discussing why those familiar principles warrant the result that you seek. In a case involving a statutory construction issue, for instance, focus on the language of the statute and pertinent legislative history; in an administrative appeal raising a substantial evidence question, focus on the factual findings that warrant the appellate court's deference. You will need, of course, to discuss the controlling legal principles in each of these cases, but these principles should be used to advance, rather than to monopolize, that discussion. In other words, "[t]he goal is to find an approach that is informative without being condescending or wasting time."[6]

Being cognizant of what your audience knows also is important to the overall approach of the brief. While you may assume that judges are familiar with basic legal principles, do

4. Stephen V. Armstrong & Timothy P. Terrell, *Thinking Like A Writer: A Lawyer's Guide to Effective Writing and Editing* 2-1 (Clark Boardman Callaghan 1992).

5. *Id.*

6. *Id.* at 2-2.

not assume that the court is as knowledgeable as you are on the law surrounding the issues on appeal. All briefs (appellant and appellee) should be written so that regardless of the order in which the briefs are read, the judges will fully understand the issues raised and the context in which they are presented.

B. Statement of the Case

Principle 3: Advocate from the beginning, but do so without arguing.

The Maryland rules of court provide that a brief shall contain "[a] brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court."[7] This requirement contemplates a succinct recitation of material procedural facts that describe what the case is about and how it arrived at the appellate level. You need not, however, reproduce the docket sheet or set forth a sterile discussion of the case's procedural history. A brief's sole objective is to persuade the reader that the judicial decision below was either right or wrong. The brief writer should advance that purpose at the earliest opportunity, *i.e.*, at the beginning of the statement of the case. Just make sure that this recitation is done with absolute accuracy and no argument. Consider the following examples introducing a statement of the case:

Example 1

Appellant Department of Public of Safety and Correctional Services filed charges of removal against appellees Walter Howard and Brandon Taylor in June of 1992, seeking to discharge them from their positions as correctional officers at the Eastern Correctional Institution.

Example 2

This case arises out of charges of removal that Appellant Department of Public Safety and Correctional Services

7. Md. R. 8-504(a)(2) (LEXIS Publg. Supp. 2001).

filed in June of 1992 against Appellees Walter Howard and Brandon Taylor, seeking to discharge them from their positions as correctional officers at the Eastern Correctional Institution because: (1) one of the officers assaulted an inmate; and (2) both officers made false statements and reports in an attempt to cover up that assault.

Each example complies with Rule 8-504(a)(2), yet the second example is more effective, because it tells the reader so much more: It provides information that is very favorable toward one side (the Department) and very unfavorable toward the other (Howard and Taylor); and it delivers a much more complete context with respect to what the case is generally about. A brief that begins like the second example will be more interesting to a judge who reads hundreds of briefs each year.

Advocacy has its limits, however, and the writer must tailor the statement of the case accordingly. *While all argument is advocacy, not all advocacy is argument.* Effective advocacy in the early sections of a brief often consists of selecting information and packaging it advantageously. As the following examples illustrate, the statement of the case should advocate; it should not argue:

Example 1

This case presents a jurisdictional issue triggered by a jury trial request that Petitioner Autos, Inc. filed in a district court action in which its landlord, Respondent Department of General Services, sought to terminate its lease. The district court erroneously entered an order striking Autos, Inc.'s demand for a jury trial, even though the jury trial request by operation of law divested the district court of jurisdiction over the action. Autos, Inc. immediately appealed that decision to the Circuit Court for Frederick County, which improperly ignored Autos, Inc.'s assertion that the court had original jurisdiction over the case due to the jury trial request. The court compounded that error by incorrectly dismissing the appeal as an impermissible interlocutory appeal. Autos, Inc. subsequently filed a petition for a writ of certiorari that this Court granted.

Example 2

This case presents a jurisdictional issue triggered by a jury

> trial request that Petitioner Autos, Inc. filed in a district court action brought by its landlord, Respondent Department of General Services, to terminate its lease. The district court entered an order striking Autos, Inc.'s demand for a jury trial, rejecting its claim that the jury trial request divested the district court of jurisdiction by operation of law. Autos, Inc. immediately appealed that decision to the Circuit Court for Frederick County, which disregarded Autos, Inc.'s assertion that the court had original jurisdiction over the case due to the jury trial request. The court instead dismissed the appeal as an impermissible interlocutory appeal. Autos, Inc. subsequently filed a petition for a writ of certiorari that this Court granted.

These examples contrast the difference between advocacy that is argumentative and advocacy that is not. While each conveys the same procedural information, the first example crosses the line in a manner that is both unnecessary and likely to draw the ire of a judge who believes that the statement of the case should be "neutral." No useful purpose is served by including words such as "erroneously," "improperly," and "incorrectly." The first example also assumes the legal conclusion in stating that "the jury trial request by operation of law divested the district court of jurisdiction over the action." That is precisely what is at issue in this case; it should not be treated as an undisputed proposition. This is nevertheless meaningful information that the statement of the case, as an advocacy tool, should include. As the second example shows, this same information can be communicated just as effectively—and without the risk of alienating the judge—by packaging it in terms of what the petitioner argued to the district court.

Principle 4: Paint a picture that persuades the reader to the writer's point of view.

The following examples contrast the ways a statement of the case can give the reader a good sense of the context of the case and the brief's theme:

> **Example 1 (from Comptroller's brief)**
>
> This case involves an appeal from an administrative decision upholding the right of the Comptroller of the

Treasury to freeze the reclassification applications of three of his employees.

Example 2 (from Comptroller's brief)

This case involves an appeal from an administrative decision upholding the right of the Comptroller of the Treasury to freeze the reclassification applications of three of his employees. The Comptroller imposed the freeze because of a lack of funding and in response to the Governor's September 4, 1990 directive to all state agencies to contain costs to make up a $150 million shortfall in revenues.

Each example states what the case is about, but the second goes much further: It tells the reader the central reason underlying the action that the appellate court has been asked to review.

Principle 5: Continue to articulate the theme long after the introductory sentence.

As the following examples show, a statement of the case is more effective if it advances the theme or theory of the case throughout:

Example 1 (from the Appellee's brief)

On January 25, 1995, Appellant moved to intervene as a matter of right in the proceeding below pursuant to Maryland Rule 2-214(a). (E.50.) All parties filed responses opposing the intervention motion. (E.61; 79.) On April 4, 1995, the Circuit Court for Baltimore City (Kaplan, J.) held a hearing at which it denied the motion. (E.193.) Nevertheless, the court stated that Appellant could participate as *amicus curiae* in order to present its views. (E.193-94.) This appeal arises out of the circuit court's order denying Appellant's motion to intervene in this case.

Example 2 (from the Appellee's brief)

This is an appeal by Montgomery County from an April 11, 1995 order of the Circuit Court for Baltimore City (Kaplan, J.) denying its motion to intervene in a case brought by parents and children of Baltimore City against the State

> alleging that the State has failed to provide the "at risk" children of Baltimore with a constitutionally adequate education. Montgomery County sought to intervene as a matter of right, arguing that the resolution of the case would cause it to "devote still more revenues from local tax sources for the support of its public schools." (E.52.) Montgomery County's position was based on the following contingencies: that "there would be a finding of a violation" in the Baltimore City case; that the remedy for such a violation "would be a vast increase in the commitment of State financial resources to the Baltimore City Public Schools System"; and that there would be a corresponding "diversion of . . . additional State resources to Baltimore City [that] would cause a diminution in the resources to other jurisdictions." (E.52-53.) The court denied the motion, concluding that the case presents "a basically straightforward issue and that is, are the children of Baltimore City getting an appropriate education or are they being denied an appropriate education." (E.186.) This appeal followed.

The second example is a better piece of advocacy—it contains significantly more meaningful information, and it communicates that information in a punchier and more interesting style.

A stylistic observation should also be made. Although both examples include record extract references in the statement of the case, the Maryland rules impose such a requirement only for the statement of facts. Nevertheless, the preferred practice is to include extract citations whenever possible, because they direct the reader to parts of the extract that you rely on.

Principle 6: The statement of the case should be short, but long enough so that the reader understands the issues that the case involves.

The typical statement of the case should be set forth in one or two paragraphs, such as in Principle 5, Example 2 above. In some situations, however, a short statement of the case may be ineffective due to the nature of the issues involved. Care should be exercised in determining whether it is necessary to provide a fuller and more detailed discussion of the case to communicate to the judge what the case is about.

Principle 7: The statement of the case should make clear that the appellate court has jurisdiction over the appeal.

In explaining how the case made its way to the appellate court, set forth the necessary facts establishing the court's jurisdiction over the appeal. In most cases, this can be done fairly easily by stating that the judgment was entered in the circuit court on a certain date and that the notice of appeal was filed within thirty days of that date. As the following example illustrates, however, this is not always so simple:

> The sole issue that this appeal presents is whether the Circuit Court for Baltimore County (Kahl, J.) properly held that suit against Appellant Stuart O. Simms, formerly the State's Attorney for Baltimore City, and Appellant Haven Kodeck, an Assistant State's Attorney, is not barred by absolute prosecutorial immunity. The appellees are three Baltimore City police officers who filed suit seeking monetary relief against the prosecutors and other individuals. . . . The prosecutors filed a motion to dismiss, asserting that all claims against them are barred by absolute immunity. Without holding a hearing as the prosecutors requested, the circuit court denied their motion. The prosecutors then noted immediate appeals under the collateral order doctrine from the lower court's denial of their immunity claim. *See e.g. Mandel v. O'Hara*, 320 Md. 103, 134 (1990); *Rice v. Dunn*, 81 Md. App. 510, 511-13, *cert. denied*, 319 Md. 581 (1990).

The bottom line: If a potential doubt exists with respect to the appellate court's jurisdiction, include enough information to remove that doubt.

Principle 8: As a general rule, all appellee's and respondent's briefs should include a statement of the case.

A Maryland rule of court provides that "the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief."[8] This rule gives considerable discretion to the brief writer, particularly as sub-section (a)(4) of that rule provides that "the appellee's brief

8. Md. R. 8-504(a)(2) (LEXIS Pblg. Supp. 2001).

shall contain a statement of only those additional facts necessary to correct or to amplify the statement in the appellant's brief."[9] We have suggested to our attorneys that, as a general matter, they exercise their discretion to include a statement of the case in their appellee's or respondent's brief. In most cases, the opponent's brief will not characterize the nature of the case in a manner that favors our client. Nor, in most cases, will the opponent describe the course of the proceedings or the disposition of the case in the lower court to our agency's advantage, at least not as well as we can. In other words, unless the case is one in which no amount of advocacy can be used in the statement of the case, our attorneys are encouraged to write their own statement because our opponents are most likely not going to be advocates for our clients.

C. Question Presented

After setting out the statement of the case, the brief is required to state "the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail."[10]

Principle 9: The question presented should be a brief argument summary, one that is (a) adversarial and designed to elicit a favorable response, and (b) developed with enough law and facts to give the reader a sufficient understanding of the case.

Writers should draft questions that slant most favorably, but fairly, to the position they are advancing, while also comprehensibly informing the court of the brief's central arguments. When you write a brief in support of a judicial or administrative decision, consider whether to incorporate language in the question such as "Did the circuit court/administrative agency correctly decide . . . ?" It may also be effective to include information that pertains to the applicable standard of review. Consider the following examples from an appellee's brief:

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9. *Id.* 8-504(a)(4).
10. *Id.* 8-504(a)(3).

Example 1

Did the juvenile court correctly exercise its discretion in revoking a newspaper's access to a confidential juvenile court proceeding?

Example 2

Did the juvenile court abuse its discretion in revoking a newspaper's limited access to a confidential juvenile court proceeding, which was otherwise closed to the public, after the newspaper (1) violated the court's prior order prohibiting the disclosure of the identity of the child who is the subject of this proceeding, and (2) refused to agree to conditions designed to ensure that the child's identity would not be divulged?

The first question is short and comprehensible; it is effective to the extent it focuses the reader on the circuit court's discretion, which appellate courts are reluctant to second-guess. Certainly, it is more effective than a question stating, "Did the juvenile court commit reversible error?" But it tells the reader virtually nothing about the case.

In contrast, the second question is much more effective for the appellee because it includes additional information more likely to persuade the reader to answer the question in a favorable manner. Adding the word "limited" before the word "access" and stating that the juvenile proceeding "was otherwise closed to the public" qualify the nature of the newspaper's right. The remaining information adds an entirely new dimension to the question that is designed to lead the reader to conclude that there is no abuse of discretion in this case. Consider also using commas and bracketed numbers to break the question into shorter subparts, thus relieving readers of the obligation of storing too much information as they digest the question.

Principle 10: Provide a complete explanation of the issue on appeal.

It is easy to fall into the trap of writing a question that avoids being abstract but at the same time fails to convey a full sense of the issue before the court. One trick that often works is

to use the word "when" in writing the question. As the following examples from a respondent's brief show, this technique forces the writer to provide a fuller description of the issue on appeal.

Example 1

> Did Petitioner's demand for a jury trial divest the district court of jurisdiction to strike that demand *when* Petitioner entered into a lease that expressly waived the right to a jury trial?

Example 2

> Was the district court's decision striking Petitioner's jury trial demand immediately appealable under the collateral order doctrine *when* the jury demand could be effectively reviewed on appeal and was inextricably intertwined with construction of the lease?

Had each of these questions ended before the word "when," it certainly would not have been abstract, and it might even have been adequate. But it would not have been a particularly informative question. Using "when," however, makes the writer give a more complete description of the issue that the court is to decide, and the question is markedly improved.

Principle 11: The question presented should emphasize the proper focus.

Ensure that the question presented asks the right question and has the proper focus. Consider the following question from a petitioner's brief:

> Does a district court, which is automatically divested of jurisdiction when a party has made a proper jury demand, have authority to find a waiver of the jury trial right based on a lease?

This question would be effective if, as the question leads the reader to believe, the jury demand automatically divested the district court of jurisdiction. But if that is a central issue, as it was in the case in which this question was presented, the question is off the mark because it fails to properly direct the

reader's focus. That focus is better stated as follows:

> Is a district court automatically divested of jurisdiction when a party has made a proper jury demand, such that the court lacks authority to find a waiver of the jury trial right based on a lease?

Principle 12: Minimize the number of questions presented.

When you are determining the number of questions that are to be presented, the general rule is "the fewer the better." As Judge Diana Motz of the United States Court of Appeals for the Fourth Circuit writes, "Generally, there should be no more than four questions; do not repeat the same question in different ways. Often, a case presents only one or two questions. Very occasionally a case presents many questions. It is, however, almost impossible to treat adequately more than four issues in a thirty-five to fifty page brief."[11] Or, as another federal judge observes, "When faced with a brief that raises no more than three points, I breathe a sigh of satisfaction and conclude that the brief writer really may have something to say."[12]

Circumstances may exist, of course, when deviation from this rule is appropriate. Just make sure that such a deviation is necessary. For example, an appeal may involve a number of evidentiary rulings. Instead of a separate question for each ruling, consider setting forth separate questions for the two most serious issues, followed by a general question that subsumes the remaining issues, such as "Did the circuit court properly allow testimony on subsequent remedial measures that the defendants implemented, or did it commit any error in deciding the other evidentiary issues raised below?"

Principle 13: Consider whether to condense your opponent's questions.

The same principles also apply when you are determining the nature and quantity of questions to include in an appellee's

11. Diana Gribbon Motz, *Brief Writing And Oral Argument: View From The Bench*, in *Appellate Practice for the Maryland Lawyer: State and Federal* 311 (Paul Mark Sandler & Andrew D. Levy, eds., Md. Inst. for Continuing Prof. Educ. of Lawyers, Inc. 1994).

12. Aldisert, *supra* n. 2, § 8.6, at 119.

or respondent's brief. Resist the temptation to parrot the number of questions set forth in the other side's brief. It is not uncommon for an appellate court to rephrase the questions in a party's brief (and in the process reduce their number) before embarking on a legal analysis. If the courts can do it, so can we.

D. Statement of Facts

Maryland rules of court mandate that a brief contain "[a] clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief."[13] Consider the following guidelines when drafting this portion of the brief.

Principle 14: Tell a story.

As one judge notes, "[E]xperienced appellate judges may form their first, and probably their most lasting, impression of your side of the case from your statement of facts."[14] Because the statement of facts immediately precedes the argument, it should attempt to "set up" the reader to begin the argument section favorably disposed to the brief's ultimate position. Accordingly, the statement of facts "should be an accurate, interesting narrative of the facts relevant to the underlying legal dispute."[15]

According to two experts, facts may be organized "according to chronology, actor, issue, witness, or geography."[16] Although Messrs. Armstrong and Terrell caution against mixing these approaches (claiming it can be "fatal"), they offer the following example as a way to do so "in complicated situations" without creating "chaos."

By chronology:

J. entered first grade . . . .

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13. Md. R. 8-504(a)(4).

14. Aldisert, *supra* n. 2, § 9.3, at 152.

15. Motz, *supra* n. 11, at 311.

16. Armstrong & Terrell, *supra* n. 4, at 3-22.

In 1981, she was placed in . . . .

Two years later, she was moved to . . . .

Then by issue:

Starting in 1980, J. began to exhibit behavior that . . . .

As a result of this behavior, school authorities concluded that . . . .

Then by witness:

On the question of whether her present nonresidential program has resulted in significant educational progress, Dr. Jones stated that . . . .

Ms. Smith, on the other hand, said that . . . .[17]

Even with a chronological approach to organizing facts, however, it may sometimes be necessary to begin elsewhere than at the historical beginning. For example, many of our cases involve complex statutes and regulations. These cases lend themselves well to a compartmentalized discussion of the statutory and regulatory scheme, followed by the facts giving rise to the appeal. Engaging in this type of approach, after an introductory statement about the case, accomplishes several objectives. It tells the reader what to expect, and it avoids the temptation to jam too much information into the brief at one time. It also provides a more appropriate "home" for this type of information than a generic "Introduction" section used by many writers to describe applicable statutes and regulations at issue in the appeal.

Use the witness approach to organizing facts with care. As Judge Motz comments, "[A]void simply recounting 'he testified, she testified'. . . ."[18] A witness-by-witness summary of testimony rarely accomplishes the goal of setting out an engaging account of facts that the reader will want to follow. Instead, it is more likely to be repetitive and unfocused. Further, by forcing the reader to figure out the relevance of the summarized testimony, you may lose rather than capture the

17. *Id.* at 3-22 to 3-23.

18. Motz, *supra* n. 11, at 312.

judge's interest. Your goal should be, as Judge Motz suggests, to "tell a story."[19]

Principle 15: Establish and maintain your credibility with accuracy and fairness.

The story you tell in the statement of facts is a road map to the record. Every statement must be accurate and supported by material in the record. A good way to ensure this level of accuracy is to follow every sentence with a citation to the record. An occasional sentence of summary or orientation may not need a record citation, but be sure the facts contributing to such a sentence are stated nearby with citations. Judges check the record. If you stretch facts or distort the record, you will lose credibility; one error often casts into doubt your entire effort.

A first cousin of accuracy is fairness, but do not confuse fairness with neutrality. If a witness at trial testified clearly to facts establishing your case, it is perfectly fair to state those facts in your brief forcefully and as an advocate. Neutralizing that favorable fact into a sterile statement to which your opponent would not object surrenders an opportunity to lay the foundation for your position. Effective advocacy occurs when you marshal favorable facts and state them accurately and fairly, with detailed citations to the record. Fair advocacy often gives way to inappropriate (and weak) argument, however, when buzzwords like "obviously" and "clearly" creep into a statement of facts. These adverbs are telltale signals of weak or non-existent record support.

Effective advocacy of facts also includes dealing directly with facts unfavorable to your position. Doing this eliminates the risk of unpleasant accusations from your opponent (or worse, from the court) that you are attempting to mislead the court, and it enables you to cast lousy facts in the best light possible from your perspective. Giving the complete picture bolsters your credibility by enhancing the sense that you are handling facts fairly.

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19. *Id.*

Principle 16: Use the statement of facts to advance the theme of the brief.

Because facts are not neutral, the writer should view this portion of the brief as yet another opportunity to be an advocate. The relevance and significance of facts are largely determined by the manner and order in which they are organized and presented. The presentation of facts will likely have a greater impact if the facts are structured in a way that sets up and furthers the theme of the brief. Consider the following example:

> On December 2, 1993, the Board of Physician Quality Assurance charged respondent Lester H. Banks, M.D., with "immoral or unprofessional conduct in the practice of medicine" under § 14-404(a)(3) of the Health Occupations Article. Those charges were based on his sexual harassment of female staff while working at Carroll County General Hospital as a house physician. As the Court of Special Appeals noted, "Dr. Banks does not dispute that any of the incidents of harassment took place," (App. 2 n.1), nor does he dispute "that his conduct was immoral and unprofessional." (App. 10.)
>
> "Witness #1," a unit secretary on the hospital's East Wing, testified that Dr. Banks often stopped by the nurses' station, ran his hands through her hair, caressed her head and neck, and made sexual comments. (App. 2-3.) She testified that, on one occasion, she was in the kitchen with him when he got up and closed the door, causing her to become very frightened and to leave the room. (App. 3.) On another occasion, Dr. Banks approached her from behind and put his arms around her waist. (*Id.*) She testified that this conduct was unwelcome, that it embarrassed her and made her uncomfortable, and that she asked Dr. Banks to stay away from her. (*Id.*) She also testified that he was "dressed in green scrubs at the time of the offensive touching . . . ." (E. 6 & 16.) In a report that this witness subsequently filed describing Dr. Banks's repeated touching and rude sexual comments, she stated that his "offensive conduct often occurred in areas where patients, visitors, and other staff could observe the advances." (App. 3.)

The first paragraph in this example states the brief's theme—that Dr. Banks engaged in immoral or unprofessional

conduct in the practice of medicine. The sentences that follow then advance that theme by highlighting those facts that build on and develop that assertion.

Principle 17: It is usually necessary to include a complete statement of facts in an appellee's or respondent's brief.

Maryland's appellate court rules limit an appellee's brief to setting out "only those additional facts necessary to correct or amplify the statement in the appellant's brief."[20] With few exceptions, "additional facts" will almost always be "necessary to correct or amplify" the statement of facts in the appellant's brief. Because the appellant's counsel is an advocate, the appellant's selection and arrangement of facts will rarely be sufficient, without correction or amplification, to tell the story of the case from your client's perspective. The difficulty, however, arises in presenting *only* the additional facts needed to augment or correct the appellant's statement. Because facts exist in context, a disjointed presentation that isolates corrections and amplifications is almost certain to be awkward, ineffective, and maybe even unfair. For example, the isolated correction of the appellant's inaccurate statement of a relatively minor fact will give that fact undue emphasis. Similarly, the need to amplify a handful of points may direct unwarranted attention to those points, to the detriment of facts that both parties acknowledge to be more important. Indeed, the cumbersome process of orienting the reader to a particular correction or amplification—"Appellant states A, B, and C, but the evidence actually establishes A+X and B–Y and Z, not C"—often takes as much space as simply restating the facts, and runs the risk of introducing blatant argument into the statement of facts.

In most cases where there is a need to correct or amplify facts, the most efficient, fair, and effective way to accomplish that goal is to provide a complete statement of facts incorporating the necessary corrections and amplifications. It is the most efficient means because it permits the judge reading your brief to read it continuously and coherently, without turning repeatedly to the appellant's brief to understand the

20. Md. R. 8-504(a)(4).

points on which the facts are disputed. (This is particularly true because some appellate judges have told us that they read briefs from our Office first, even if we represent the appellee.) It is the most fair approach because it gives all facts in appropriate context, without the distortion that is inevitable in a piecemeal supplementation of facts, and because it avoids the argumentativeness inherent in pointing out deficiencies in the appellant's brief. It is by far the most effective technique because it tells your client's story and advances the theme of your brief.

Because your statement of facts will be a complete statement, avoid using introductory sentences such as, "The appellee agrees generally with the appellant's statement of facts, subject to the following additions," or "The appellee submits this statement of facts because of material omissions from the appellant's statement of facts."

Principle 18: State only those facts that are necessary to understanding the legal issues that the case involves.

Include in the statement of facts all *material* facts, *i.e.*, those facts that the reader needs to know to appreciate the context surrounding the legal controversy at the heart of the appeal. Unless the issue on appeal warrants it, you should not need to provide an exhaustive list of every procedural event that occurred and the date of its occurrence. In the ordinary case, these kinds of facts add nothing to your brief. Refrain from inundating the court with similarly unnecessary detail or facts that relate to issues that were significant at the trial court level but that are no longer important at the appellate stage.

Principle 19: Provide record extract citations for each of the facts that you discuss.

The statement of facts should contain citations to the record extract for each factual contention made, not just to ensure the accuracy of the statement, but also because judges often will want to know the source of the facts that you have asserted. That source should be the original source, *i.e.*, a witness's testimony or a document, not an administrative law judge's or circuit court's description of the evidence.

If all of the facts in a paragraph are set forth in the same page of the extract, a citation at the end of the paragraph is sufficient. If multiple pages are involved, however, provide a citation at the end of each sentence, even if these facts come from the same source such as a witness or document. Citations to a pleading, affidavit, or other document with numbered paragraphs should include a reference to the appropriate paragraph (*e.g.*, E. 247 ¶ 8).

Principle 20: Discuss the decision being reviewed.

Whenever possible, the statement of facts should include a succinct and meaningful discussion of the decision that the appellate court is reviewing. Remember, judges read the statement of facts just before proceeding to your argument. A discussion of the decision below reorients their focus; it can be used to highlight either the central error that you are asking them to correct or the major flaw in your opponent's argument. Consider the following example from the State's brief:

> Following a two-day hearing, the circuit court enjoined the implementation of the Commissioner's regulations restricting smoking in indoor places of employment. (E. 308; 311.) The circuit court found that plaintiffs satisfied the likelihood of success factor set forth in *Dept. of Transp. v. Armacost*, 299 Md. 392 (1984), because they raised "significant questions" as to two of their claims and "additional evidence" was required as to a third claim. (E. 307.) The court further held that the balance of convenience favored the plaintiffs because the Commissioner's regulations "would work a severe hardship upon a significant number of citizens of this State." (*Id.*) The court also found that plaintiffs would suffer irreparable monetary losses absent an interlocutory injunction and that it was in the public interest to enjoin the implementation of the regulations. (E. 307-308.)

Great care should be taken, therefore, to squeeze out whatever juice the lower court's decision contains. Sometimes, of course, there may be very little to discuss, such as when a circuit court simply enters a pro forma order granting a motion to dismiss or a motion for summary judgment. In those cases, state the basis of the motion and summarize what the court did.

Principle 21: Decide where to put the heart of the best facts.

In some cases, particularly those that involve substantial evidence issues, you may want to put the best facts up front so that the judge is practically convinced of the correctness of your position from the statement of facts alone. In other cases, however, it may be more effective to save the best facts for the argument section of the brief, and so it might make sense to discuss them in a summary fashion in the statement of facts. Do this, without making your brief sound redundant, by restating, rather than repeating, good facts. For example, the circuit court decision that you are defending on appeal may contain very powerful and helpful language. You can get extra—not the same or repetitive—mileage out of that language by paraphrasing in the statement of facts what the circuit court did, and then quoting in your argument relevant portions of the circuit court decision. The same approach would work with an exhibit or a witness's testimony: If this is "smoking gun" evidence, you might want to give an abridged version of this evidence in the statement of facts and then quote the exhibit or the witness in the argument.

Principle 22: Consider when to repeat "great" facts.

Although facts should not be repeated as a general rule, some facts are so good that you'd almost be crazy *not* to repeat them. If, for example, the plaintiff in an age discrimination case inadvertently states at his deposition that he is thirty-eight years old—and thus not old enough to enjoy the protections of the Age Discrimination in Employment Act—you may want to quote this admission both in the statement of facts and the argument.

E. Summary of Argument

In the federal courts of appeals, attorneys are told to draft a summary of argument setting forth "a succinct, clear, and accurate statement of the arguments made in the body of the brief."[21] While no counterpart to this rule exists in the Maryland

21. Fed. R. App. P. 28(a)(5).

Rules, the latter do not prohibit the inclusion of a summary of argument in briefs filed in the Maryland appellate courts. We encourage attorneys in our Office to write a summary of argument in briefs that contain either more than fifteen pages of argument or multiple, complicated issues. The summary of argument section immediately precedes the argument section of the brief.

Principle 23: State the theme of the brief in the summary of argument.

A properly written summary of argument fulfills the important goal of providing a concise overview of the arguments set forth in the brief, thus informing the reader of the theme and scope of the brief. As illustrated in the following introductory paragraph from a summary of argument, the objective is to provide the court with the "big picture":

> This case involves fundamental issues of federalism that affect one of the most basic rights of the *amici* states: the right not to be sued in their own courts without their consent. That right was a core attribute of state sovereignty when the Constitution was ratified; it was made an explicit part of our national framework when the Eleventh Amendment was adopted; and it is as much an essential component of state sovereignty today as it was when this nation was formed over two hundred years ago. In holding that Congress lacks the authority under its Article I Commerce Clause powers to usurp what is and always has been an inviolable element of state independence and integrity, the Supreme Judicial Court of Maine properly recognized these postulates and reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the states.

Principle 24: Include all significant issues and sub-issues in the summary of argument.

The federal rule cautions that the summary of argument "must not merely repeat the arguments headings."[22] Nevertheless, argument headings should serve as a guide to constructing the summary of argument because argument headings, like the summary of argument, are designed to apprise the judges of the core arguments set forth in the brief. The summary should advance a theme that will be "all-inclusive and [will] subsume the various points to be discussed in the brief."[23] In contrast to argument headings, however, the summary needs to include a more extensive (albeit condensed) discussion of the different issues discussed in the brief.

Having said this, do not feel compelled to include in the summary of argument a reference to every issue addressed in the brief. Some issues are truly inconsequential and merit terse treatment in the argument section of the brief. It is not necessary to waste ink in the summary on such issues.

Principle 25: Use the summary of argument as an organizational tool.

The summary of argument, whether you write it before or after you draft the argument portion, also ensures that the brief is correctly organized. Briefs often address multiple issues and sub-issues, and frequently contain alternative theories. Writing the summary first helps map out an outline of the argument for you to follow. Alternatively, if you write the summary after you have written the argument, use the summary to revisit the structure of the brief, such as when the summary logically suggests a better order to the argument.

22. *Id.* 28(a)(8).

23. Aldisert, *supra* n. 2, § 10.2, at 177.

F. The Argument

Principle 26: Give context before discussing details.

The way in which an argument is organized marks the principal difference between a brief that is mediocre and one that is good or superior. As the late Maryland Court of Appeals' Chief Judge Robert C. Murphy suggested, focusing your effort on "more sensible and effective organization" will lead to a "fundamental improvement" in any brief.[24] A critical part of an argument's organization is an introduction that gives readers the context for your argument so that they understand the basic elements of your position. An effective way to do this is to structure the beginning of your argument so that it "goes for the jugular vein."[25]

Translation: If you are writing an appellant's or petitioner's brief, the way to convince the appellate court that the decision below is wrong is, *first*, to identify the mistake that the lower court committed, and *then* to set forth the reasons mandating reversal. Similarly, if you represent the appellee or respondent, your objective is to persuade the court that the decision below should be affirmed; therefore, *first* show what the lower court did with respect to the specific issue raised on appeal, and *then* explain why and how the court correctly resolved that issue. Consider the following introductory portion of the petitioner's argument from a case used in several of Maryland's brief-writing programs:

> The district court improperly granted the Department's motion to strike Autos, Inc.'s jury trial request because, under Md. Cts. & Jud. Proc. Code § 4-402(e), Autos, Inc. has a right to a jury trial that, once demanded, immediately vested sole jurisdiction in the circuit court over Autos, Inc.'s dispute with the Department. Section 4-402(e)(1) provides that a party may demand a jury trial "[i]n a civil action in which the amount in controversy exceeds

24. Quoted in Aldisert, *supra* n. 2, § 11.1, at 192.

25. Paul Mark Sandler & Andrew D. Levy, *A Methodology of Brief Writing*, in *Appellate Practice for the Maryland Lawyer: State and Federal* 328 (Paul Mark Sandler & Andrew D. Levy, eds., Md. Inst. for Continuing Prof. Educ. of Lawyers, Inc. 1994).

> $5,000 . . . ." Autos, Inc.'s counterclaim asserted that its possessory interest exceeded $5,000. The Department offered no evidence below that contradicted this assertion. Nor did the district court cite any such evidence in striking Autos, Inc.'s jury trial request. Under the express terms of § 4-402(e)(2), therefore, the district court was obligated to transfer the case "forthwith" to the circuit court. *Accord Carroll v. Housing Opportunities Commn.*, 306 Md. 515, 518 (1986).
>
> The circuit court thus erred in believing it had no jurisdiction over this case, as did the district court in thinking that it did and ruling on the Department's motion to strike, because "it is the *demand* for a jury trial, in and of itself, which acts to divest the district court of jurisdiction and simultaneously to confer jurisdiction upon the circuit court." *Ruddy v. First Natl. Bank of Maryland*, 48 Md. App. 681, 684 (emphasis in original), *aff'd*, 291 Md. 275 (1981).

Principle 27: Begin the argument by (a) succinctly identifying the central issue that the appeal presents, (b) stating why that issue was correctly or incorrectly resolved below, (c) setting forth the applicable law, and (d) saying why the law supports your position.

To state this principle another way, consider the following "formula" as a means of supplying the court with the necessary context for your argument: (a) Identify the heart of the decision being appealed; (b) state the central reason why that decision should be reversed or affirmed; (c) set forth concisely the governing legal principles; and (d) explain why those principles mandate the result that you advocate. You can usually do all this in a paragraph or two. As shown in the example below from an appellant's brief challenging a lower court's decision, beginning an argument in this manner focuses readers on the specific issue on appeal and tells them what to expect in the pages ahead:

> The circuit court held that the cost-containment measure at issue in this case constitutes a "regulation" within the meaning of Md. State Govt. Code § 10-101(e) and was required to be promulgated in accordance with the notice and comment requirements of the Administrative Procedure

> Act. In reaching this holding, the court rejected the State's argument that existing regulations authorize the containment measure, stating that "the Court believes that COMAR does not provide a valid regulatory basis for the implementation of the 1994 cost containment policy." (E.124.) The decision below should be reversed because the specific implementation of existing regulations does not constitute rulemaking within the meaning of the Administrative Procedure Act, and those regulations properly authorize the precise regulatory action that the circuit court invalidated.

This example could have begun with the statutory definition of "regulation" set forth in the Administrative Procedure Act, as that is the central issue involved in the case. But such a beginning would have been too abstract and unwieldy—the definition of regulation consumes almost half a page—and it would have left the appellate judges wondering, "Why do we care about this?" The writer needs to let readers know as early as possible why they should care.

There is a caveat to this principle. If your brief contains a summary of argument, it may be repetitive to include this type of context-setting introduction at the beginning of the argument section. Repetition should be avoided, but an introduction that avoids literal repetition may be useful to reinforce the brief's theme.

Principle 28: Incorporate the standard of review and other pertinent information into the argument.

Many briefs begin with: (a) a "standard of review" section that recites well-settled (and over-cited) legal principles, such as those pertaining to statutory construction or substantial evidence; (b) a complicated discussion of the complex statutory/regulatory regime at issue in the case; or (c) a detailed review of the relevant facts that lie at the heart of the appeal. While some or all of the above may be instrumental to the argument, an abstract presentation of such principles at the beginning of the argument, or indeed, anywhere in the argument, will be ineffective unless an adequate foundation has been laid for readers to fully understand the context surrounding these principles, statutes, or facts.

For example, it is not uncommon to see a brief in an administrative appeal begin with an extended discussion of the law governing the various machinations of the substantial evidence test. Judges know this stuff, and their eyes glaze over when they see it. A recitation of these principles is likely to be much more effective if you first identify the factual findings that the agency made, then set forth the evidence that supports those findings, and *then* use the well-settled substantial evidence principles to drive home the point that the agency's findings cannot be second-guessed on appeal. Similarly, a discussion of the statutory scheme or facts that underlie the issue on appeal will have significantly more meaning if you first tell readers how the statutes or facts fit into the argument.

Consider how the following introductory paragraphs of a brief incorporate this approach in setting up a discussion addressing a substantial evidence issue:

> The Board committed no error in disciplining a physician who sexually harassed co-workers and engaged in other immoral and unprofessional conduct while on duty in a hospital. As the Board found, the conduct that Dr. Banks engaged in had a profound and undisputed impact on the hospital environment that adversely affected patient care because of the deleterious effect his conduct had on his working relationships with others. Indeed, one of the witnesses in this case gave stark testimony on this precise point, stating that she would physically leave her work area when Dr. Banks would "put his hands through my hair, or rub or caress the parts of my shoulder/neck area. I would just get up and move away because I didn't want to cause any trouble and I just would avoid the situation." (E. 22-23.) As this witness explained, as a result of being subjected to Dr. Banks's actions on two prior occasions, "when he came over after that, I tried to avoid being around when he was doing his job at the nurses' station." (App. 27.)
>
> These facts and other substantial evidence discussed earlier in this brief amply support the Board's determination that Dr. Banks's conduct sufficiently implicated the practice of medicine to fall within § 14-404(a)(3). The Court of Special Appeals nevertheless accorded no deference at all to that determination, stating instead that "[b]ecause an agency's finding that a

> physician's immoral or unprofessional conduct occurred in the practice of medicine is an application of law to facts, *see Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-39 (1985), we may substitute our own judgment for that of the agency as to the legal issue." (App. 11.) The intermediate appellate court misread *Ramsay, Scarlett* both in applying a *de novo* review standard to the Board's decision and in substituting its own judgment that Dr. Banks could not be disciplined for the actions he took against Witnesses #1 and #3 because he was not diagnosing, caring for, or treating a specific patient when he sexually harassed those individuals.
>
> The *de novo* review standard that the court below used is inapplicable here because "this is not a case, as found by the Court of Special Appeals in substituting its judgment on the law for that of the agency, where the [agency's] factual findings supported by substantial evidence were susceptible of only one legal conclusion . . . ." *Ramsay, Scarlett*, 302 Md. at 839. Rather, the Board's determination that Dr. Banks's acts affected patient care and the actual practice of medicine within the meaning of § 14-404(a)(3) is "not solely a question of law," 302 Md. at 838, but is instead a mixed question of fact and law. The Court of Special Appeals erred in casting aside the Board's determination of that question because, "contrary to the view taken by the intermediate appellate court, . . . agency expertise was involved in the determination . . . ." *Id.*

Introducing readers first to unfamiliar information—the specific issue before the court—invites them to start thinking about the case right away and to begin processing that information along with the familiar substantial evidence principles that follow. This approach fosters an appreciation of the applicable legal principles that would not exist had the brief commenced with the general before getting to the specifics.

Principle 29: Use Principle 27 together with IRAC—Issue, Rule, Application, Conclusion.

Beginning the argument using the formula set forth above in Principle 27 sets up the rest of the brief by establishing the theme that the writer is to follow as the argument is developed. This approach forces the writer to focus on the logical

progression of each of the argument's components and to edit out premature or even immaterial digressions. For example, by first articulating the theme that the court below reached a result that is at odds with the plain language of a statute and is inconsistent with the statute's legislative history, the writer sets himself up to discuss these two points in that order. Moreover, the attentive writer should then be able to recognize and reorganize a draft that had haphazardly mixed the two points together.

In developing the argument, remember IRAC—Issue, Rule, Application, Conclusion. The introductory paragraph(s) of the argument will identify the issue. The argument should then set forth and fully develop the law that applies in the case, apply that law to the facts, and set forth the reasons supporting the conclusion being advocated. This approach acts as an additional check on the brief's organization by ensuring that sub-issues are discussed one at a time. The IRAC approach also minimizes the likelihood that the writer will discuss a case, apply the law in that case to the facts in the case on appeal, then discuss another case, and apply that case to the facts at issue on appeal. Although such a format is frequently used, it is ineffective because it is repetitive and because it prevents the argument from advancing in a forward direction.

Look at how the following excerpt from the brief of petitioner Autos, Inc., implements the IRAC technique to argue that the district court had no jurisdiction to strike Autos, Inc.'s request for a jury trial. The excerpt consists of an entire argument that is admittedly lengthy for the purpose of a brief-writing manual, but that is actually succinct for the purpose of an appellate brief.

> The district court erred in granting the Department's motion to strike because, under Md. Cts. & Jud. Proc. Code Ann. § 4-402(e)(2) (1995 Repl. Vol.), Autos, Inc.'s request for a jury trial divested the court of jurisdiction over this case. The district court apparently determined that it retained jurisdiction because § 4-402(e)(2) divests the district court of jurisdiction only when "a party is *entitled* to" a jury trial, and, as the Department's motion to strike asserted, Autos, Inc. waived such a right in its lease with the Department. This Court's decision in *Vogel v. Grant*, 300 Md. 690 (1984), makes clear, however, that the circuit

court (1) had exclusive jurisdiction to decide whether Autos, Inc. waived its jury trial request and (2) improperly refused to exercise jurisdiction over this case because of the purported unappealable nature of the district court's order.

The plaintiffs in that case asserted, as does Autos, Inc. here, that they were entitled to a jury trial because their claim exceeded the jurisdictional amount set forth in § 4-402. The defendant in *Vogel* filed a motion to strike the plaintiffs' jury trial demand, contending, as did the Department in this case, that the plaintiffs waived it. Similar to the actions taken by the courts below, the district court in *Vogel* ordered the jury trial demand stricken, and the circuit court refused to exercise jurisdiction over the case, finding instead that the plaintiffs noted an untimely appeal from the order striking the demand. This Court reversed, holding that the district court had no jurisdiction to decide the defendant's motion to strike, because the plaintiffs' jury trial demand vested jurisdiction exclusively in the circuit court:

> [A]s the statute and cases make clear, when a party has a right to a jury trial and files a demand, jurisdiction over the case is immediately vested in the circuit court. If another party believes that there was a procedural defect, which results in a waiver of the jury trial right, or which otherwise should deprive the demandant of a jury trial, his recourse is to file a motion *in the circuit court.*

300 Md. at 697-98 (emphasis in original).

Vogel thus confirms that "as long as it is the type of case to which the jury trial right attaches and a jury trial is demanded, it is normally the circuit courts, and not the District Court, which have jurisdiction over a motion opposing a jury trial." *Id.* at 698. This case presents no exception to this rule. Like the defendant in *Vogel*, the Department of General Services has never questioned Autos, Inc.'s statutory entitlement to a jury trial. On the contrary, there is "no doubt that, in the present case, the value of" Autos, Inc.'s "right to possession exceeds" the jurisdictional amount set forth in § 4-402(e)(1). *See Carroll v. Housing Opportunities Commn.*, 306 Md. at 527; *see also id.* at 522 (stating that a "'*claim* that the value of the

> right to possession exceeds' the jurisdictional amount entitles a party to a jury trial") (quotation and citation omitted) (emphasis in original). It is undisputed, therefore, that Autos, Inc. has a right to a jury trial under § 4-402.
>
> Rather than challenge Autos, Inc.'s jury trial right, the Department instead argued in the district court below only that Autos, Inc. waived that right in its lease. That argument is indistinguishable from the waiver argument that the defendant in *Vogel* made in challenging the plaintiffs' right to a jury trial. As this Court held in *Vogel*, however, "it is clear that the District Court had no jurisdiction to entertain the motion to strike the demand for a jury trial," 300 Md. at 699, because "[t]he motion to strike was not based upon the theory that there was no right to a jury trial in the case." *Id.* Accordingly, "[o]nce the . . . demand for a jury trial was filed, the District Court lost jurisdiction over this case . . . and the Circuit Court acquired jurisdiction." *Id.* at 699-700 (footnote omitted).
>
> The circuit court should not have dismissed Autos, Inc.'s appeal, therefore, from the district court's order striking its jury trial demand. Where, as here, "jurisdiction is actually in the circuit court because there was a right to and demand for a jury trial, the matter can be immediately corrected by the circuit court." *Vogel*, 300 Md. at 699-700 n. 9. "Consequently, the circuit court erred in refusing to decide whether the District Court had jurisdiction to try this case after the demand for a jury trial." *Kawamura v. State*, 299 Md. 276, 285 (1984) (footnote omitted). This case accordingly should be remanded to the circuit court for further proceedings.

After first providing an overview of why the circuit court was wrong, the writer then uses a case as a means of discussing the rule that controls the outcome of the case—that a jury trial request divests the district court of jurisdiction. Following that discussion, the brief applies that rule in two ways: first, by establishing that, under the facts in the case, Autos, Inc. has a jury trial right; and second, by using an argument that the other side raises to confirm the applicability of the rule to the case. The brief then wraps up the discussion with a paragraph concluding that the circuit court erred in dismissing Autos, Inc.'s appeal.

Principle 30: Advocate your case, not general propositions.

Your argument is likely to be more effective if it begins by advocating your case as opposed to discussing a general legal proposition. Contrast the following two introductory sentences of an argument from Autos, Inc.'s brief:

Example 1

Under well-established Maryland law, a demand for a jury trial divests the district court of jurisdiction and automatically vests jurisdiction in the circuit court.

Example 2

The circuit court erroneously dismissed Autos, Inc.'s appeal because, under well-established Maryland law, a demand for a jury trial divests the district court of jurisdiction and automatically vests jurisdiction in the circuit court.

The first example is not bad, but it wastes time, and worse, sets up the writer for a general discussion of the "well-established law" that relates to jury trial demands and district court jurisdiction. A brief will be more effective if it avoids the abstract and sticks to a discussion of the case before the court. The second example sidesteps the potential problem that the first example sets up by cutting right to the chase and by forcing the writer to produce a follow-up sentence that expands on what one of the brief's themes should be—the circuit court's error in dismissing Autos, Inc.'s appeal.

Principle 31: Use topic sentences that move the argument forward.

The best way to keep a judge's interest is to advance the argument in a forward direction. To avoid stagnation that may lose the judge's attention, try to structure the beginning sentence of each paragraph in a manner that propels the discussion toward the ultimate goal of persuasion. Consider the following examples from the appellee's brief:

Example 1

Montgomery County claims that it has a right to intervene on the basis that the circuit court will define the parameters of an adequate system of education throughout the state. There is no merit in this argument.

Example 2

There is no merit in Montgomery County's claim that it has a right to intervene on the basis that the circuit court will define the parameters of an adequate system of education throughout the state.

In the first example, the reader has to wait until the second sentence before being told the writer's position on Montgomery County's claims. The second example informs the reader immediately of the writer's view and discusses the reasons why Montgomery County's claims lack merit. The second example is also more effective because it does not start out by reiterating the position of the opponent, Montgomery County, as the first example does, but rather comes out advocating the State's view first.

Principle 32: Give context to paragraphs by telling readers where you are going.

Be conscious of paragraphs that stand alone and have no seeming connection to the information immediately set forth in the surrounding paragraphs. When structuring paragraphs, ask yourself the following types of questions:

Does the beginning of a paragraph identify the issue to be discussed?

Does the point you are making about the issue appear either at the end of the paragraph (that is, after the discussion of the issue) or just before the discussion begins?

If the paragraph is simply a narrative without an express point, does the beginning of the paragraph alert the reader to that purpose?

Stated differently, make sure judges see why your paragraph is worth reading. Armstrong and Terrell offer

questions that you should ask continually throughout your development of the argument:

> At the start of each argument, each part of an argument, and each chunk of information that goes into an argument, give readers advance information about what they will read. Why is it relevant? What is its structure? Where will it lead? In other words, make your readers smart. This will reduce the time and effort they need to put into reading and increase the chances they will understand, remember, and be persuaded by your arguments. If you refuse them this help, they may move through your prose with no more speed and comprehension than a person walking backwards down a twisting road.[26]

Principle 33: Use headings and subheadings to organize and provide context for the argument.

Headings and subheadings are excellent tools for structuring the organization of the argument and for telling the reader what to expect. These devices consist of *complete sentences* that capture the theme of the discussion to which they pertain. A good heading advocates your position and goes beyond merely reciting the subject matter of the argument. Consider the following examples:

Example 1

Contrast

The district court properly exercised its jurisdiction in striking the jury demand.

with

The district court properly exercised its jurisdiction in striking the jury demand because Autos, Inc. waived and thus was not entitled to a jury trial.

26. Armstrong & Terrell, *supra* n. 4, at 3-28.

Example 2

Contrast

The circuit court correctly dismissed Autos, Inc.'s appeal of the district court's order striking the jury demand.

with

The circuit court correctly dismissed Autos, Inc.'s appeal of the district court's order striking the jury demand because that order was an unappealable interlocutory order.

The first heading in each of these examples tells the reader very little about the case and so is not nearly as effective as the second heading in each example. A heading should also complement, rather than repeat, the question presented by stating the theme of the case in different language. Therefore, to maximize the persuasive value of the brief, do not make verbatim statements of the questions presented in the brief's headings.

Principle 34: An argument that consists of separate issues should have a separate heading for each.

Briefs that contain independent issues should include a heading for each. Subheadings are warranted when the argument made in support of each of those separate issues consists of sub-arguments and reaches a length that threatens to lose the reader's interest. As a general rule, subheadings are useful when the contents of an argument are greater than five to seven pages in length.

Principle 35: As a general rule, develop ***your*** *position before advancing any rebuttal argument.*

The development of the argument should also be structured with an eye toward another generally applicable formula: Make *your* argument *before* responding to points that the other side asserts. Lawyers often feel the need to respond right away to some outrageous contention that opposing counsel raised. Brief writers also frequently get sucked into the other side's argument

by setting up a counter-argument that simply reacts to points made by opposing counsel. These approaches result in a disjointed product lacking a coherent theme, and worse, highlighting the opponent's position rather than the writer's own. Accordingly, "you need to create an organization based on your own logic, rather than letting your analysis emerge (often awkwardly) on the rebound from an organization forced on you by your opponent."[27] As a general rule, therefore, try to avoid the temptation to blast the other side until after your position has been fully developed.

As with all rules, however, this one has its qualifications and exceptions. First, applying this rule does not mean that you should postpone any and all discussion of what the other side says until you have presented your argument. In fact, when you write an appellee's or respondent's brief, home in on the specific (purported) errors that the other side has identified; otherwise, your briefs will appear as two ships passing in the night. You might, therefore, start out with a point that the other side raises. Where your opponent says something that goes straight to the heart of the controversy, consider starting off with that as a means of focusing the court. Just be sure, as the following example illustrates, that what you argue is *your* point, not theirs:

> Pointing to what it calls "a major doctrinal error by the District Court" in treating the registration fee at issue here as a "user fee" and applying a purportedly more relaxed standard to Maryland's law, Br. at 19, CAS asserts that "this fee structure must stand or fall according to whether it satisfies the test outlined by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which the District Court did not even mention." Br. at 20. The district court did not refer to the *Complete Auto Transit* test because that test does not apply to fees such as those under attack in this case that are imposed to reimburse the State for the costs it incurs in policing conduct to protect the public. Rather, as the Supreme Court has recognized, a State may regulate commerce to protect local interests and impose fees to offset its regulatory costs if the fees are neither discriminatory nor excessive in relation to those costs, and reflect a fair approximation of the State's

27. Armstrong & Terrell, *supra* n. 4, at 3-11.

> expenses in administering and policing its regulations. *See* [citation]. The court below committed no error—fundamental or otherwise—in applying these principles and finding that the challenged fee results in no violation of the Commerce Clause.

Second, the general rule discussed above does not mean that you should ignore everything that the other side or the lower court says until you reach the end of your brief—if an argument consists of several sub-arguments, you should make sub-argument A, then address the other side's response with respect to that argument, and then proceed with your sub-argument B. For example, if your global argument is that the decision below is supported by both a statute's plain language and its legislative history, give the reasons supporting the plain language aspect of this argument, then respond to any opposing points on this sub-issue, then make your legislative history argument, and then refute the counter-arguments on this point.

Third, while you should avoid allowing the format and structure of your brief to be dictated by the other side or by the lower court's opinion, you can use specific points that they raise as transitional devices for advancing your argument and expanding your analysis. The example for Principle 29 above illustrates how this can be done.

Principle 36: Advance your *position even when writing a reply brief.*

Even when you are writing a reply brief, avoid a point-counterpoint approach. Instead, use your theme to respond to those contentions, as illustrated below:

> In claiming that a circuit court judge's revisory authority constitutes a "personal right" that can be exercised with respect to that judge's final decisions only, Br. at 14, Ms. Nechay's brief confuses fundamental principles of judicial power and court jurisdiction, and as a result advocates a rule that has utterly no jurisprudential support. Ms. Nechay does not dispute that the June 6, 1995 hearing before Judge Hubbard took place within 30 days of the time Judge Ward's order was docketed. It is undisputed, therefore, that under Md. Cts. & Jud. Proc. Code Ann. § 6-408 (1995 Repl. Vol.) and Maryland Rule 2-535(a), the Circuit Court

> for Baltimore City continued to have jurisdiction over this case when the parties appeared before Judge Hubbard. Ms. Nechay concedes as much, as she acknowledges that, at that time, "Judge Ward could have revised the order himself." Br. at 12-13. The circuit court did not suddenly lose either its jurisdiction or its power to grant relief in this case simply because a judge other than Judge Ward exercised the court's authority.

As this example shows, the reply brief should use what the other side has said in an affirmative manner that advances the reply brief writer's theme. In following this principle, however, be conscious of the reply brief's central goal, to respond to the other side's argument. While the reply brief should refrain from adopting a they-say/we-say format, neither should it be a mere regurgitation of the same points advanced in the principal brief. The opposing brief may not dispute some of those points, and it may ignore or mischaracterize others. Your job is to bring these matters to the Court's attention in a way that convinces it to uphold the position you advocate.

Principle 37: Give context to the cases you cite so the court will understand their relevance.

The late Maryland Chief Judge Robert Murphy suggested that a brief would benefit by the "utilization of relevant cases only."[28] A case authority needs context to communicate its relevance. To use a case effectively and establish its relevance, therefore, the brief needs to weave it into the discussion and employ it as a means of advancing the theme of the moment. Consider the following:

> Both the statute and the case law make clear that the transfer of jurisdiction occurs "forthwith," *i.e.*, automatically and instantaneously upon the filing of a proper jury demand. The district court does not retain jurisdiction, therefore, to decide issues of a possible waiver of the right to jury trial. For example, in *Vogel*, the district court granted a motion to strike a jury demand on the ground that the party making the demand had waived the right to jury trial because of procedural defects in the

28. Quoted in Aldisert, *supra* n. 2, § 11.1, at 192.

> demand. The Court of Appeals reversed, holding that the district court, having lost jurisdiction upon the filing of the jury demand, lacked the power to consider the waiver argument. Any waiver argument, the Court held, should have been made in the circuit court, where jurisdiction had been transferred by operation of law: "If another party believes that there was a procedural defect, which results in a waiver of the jury trial right, or which otherwise should deprive the demandant of a jury trial, his recourse is to file a motion *in the circuit court.*" *Id.* at 697-98 (emphasis in original). If, in fact, there has been a waiver or procedural default, the circuit court can then remand the case to district court. *Id.* at 698.
>
> Thus, in light of *Vogel,* the district court has no power to adjudicate issues of a waiver of a jury trial. The only inquiry for the district court in deciding whether a party is "entitled to" a jury trial within the meaning of section 402(e)(2) is the narrow question whether the case is the "type of case to which a jury trial attaches." *Id.* at 698.

As this excerpt shows, a case can be used to propel the discussion forward when it is part of the discussion. Cases lose their effectiveness, however, when the reader has not been adequately prepared to understand their significance. A case-by-case discussion, for example, does little other than impress upon the reader how well (or not so well) the writer can describe them. As the following examples show, using cases is much more effective if you first give the reader a sense of how the cases fit into the argument:

Example 1

> In *Radiological Socy. of N.J. v. New Jersey State Dept. of Health,* 506 A.2d 755 (N.J. App.), *cert. denied,* 517 A.2d 434 (N.J. 1986), a regulation provided that . . . . The court held . . . . Similarly, in *Bendix Forest Products Corp. v. Division of Occupational Safety & Health,* 600 P.2d 1339, the regulation at issue stated that . . . .The Supreme Court of California held that a state agency did not engage in rulemaking when it . . . .

Example 2

The decision below is in conflict with the decisions of a number of courts from other jurisdictions that have addressed regulatory action similar to that at issue here, and that have held that it is not necessary to proceed by rulemaking to take such action. For example, in *Radiological Socy. of N.J. v. New Jersey State Dept. of Health*, 506 A.2d 755 (N.J. App.), *cert. denied*, 517 A.2d 434 (N.J. 1986), a regulation provided that . . . . The court held . . . . Similarly, in *Bendix Forest Products Corp. v. Division of Occupational Safety & Health*, 600 P.2d 1339, the regulation at issue stated that. . . . The Supreme Court of California held that a state agency did not engage in rulemaking when it . . . .

The first example just plunges into a discussion of the first two cases without providing any notice to the reader as to why these cases are significant or what point they support. As these contrasting examples illustrate, you can use cases to advance the discussion; do not make their mere descriptions the sole feature of the discussion.

Principle 38: Use parentheticals to explain the significance of the cases you cite.

Briefs that resort to string citations may show off research skills, but they do not accomplish much more. Consider how a simple explanatory parenthetical can change the effectiveness of a case citation:

Example 1

Numerous other jurisdictions have also reached the same result in the cases discussed above. *See e.g. Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992); . . . .

Example 2

Numerous other jurisdictions have also reached the same result in the cases discussed above. *See e.g. Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) (rulemaking is not required when the challenged

> agency does not "substantively change existing rights and duties");. . . .

Principle 39: Use cases to support propositions.

While parentheticals have their value, consider how much more effective the case from Example 2 above becomes by removing the information from the parenthetical, placing it in text, and using the case to advance the argument:

> Numerous other jurisdictions have also reached the same result in the cases discussed above, and have held that rulemaking is not required when the challenged agency does not "substantively change existing rights and duties." *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992). *See also* . . . .

You should also consider whether it is necessary to use introductory phrases as "The Court of Special Appeals held that . . . " when it is just as easy to use the quotation or to state the proposition directly, followed by the citation.

Principle 40: Discuss material facts from other cases sparingly.

Avoid a lengthy explanation of the facts of a case. A protracted discussion of another case's facts interferes substantially with the flow of your argument because it has the unintended effect of completely redirecting the court's focus away from the facts and issues in your case. This is not what you want when you are attempting to persuade the court to resolve the appeal in favor of your client. Judges know how to read cases. Good advocacy focuses on the key portions of a relevant case and articulates, generally in no more than a few sentences, the reasons why that case is relevant and compels the result you are asking the court to reach.

Qualification: Sometimes it may be appropriate to discuss a state supreme court decision at length in an intermediate state court appellate brief when, in your view, that case is directly on point and controls the outcome of your case. Exercise care, however, in determining how "on point" the decision is.

Principle 41: Be brief in distinguishing cases that the other side cites.

As a general rule, cases cited against you should be disposed of as succinctly as possible. "Elaborate analysis and rebuttal of every case cited in an opponent's brief, or too lengthy or too numerous references to his principal cases, may show over-concern about their importance. One should dispose of them as ably and as pungently as one can—and move on."[29] Sometimes a summary dismissal of such cases can be very effective, *i.e.*, "Jones misplaces his authority on cases such as . . . because none of those cases involves the issue presented here of whether . . . . Indeed, in *Smith v. Birmingham*, 8 F.3d 100, 109 (14th Cir. 1995), the court of appeals specifically refused to address this issue. Similarly, in . . . ."

The point is to avoid, whenever possible, spending too much time discussing your opponent's authority.

Principle 42: Carefully scrutinize the use of footnotes.

As one federal appellate court judge says, "Generally speaking, if the matter is important enough to communicate to the appellate court, put it in the text. If it's not important enough for the text, . . . then it has no place in the brief."[30] Footnotes are counterproductive in at least two ways. They are, by nature, an abrupt distraction from the textual flow of argument. They are also like a home for wayward ideas—who among us has not thought, "I'm not sure where this belongs, so I'll just put it in a footnote"?

Even so, footnotes can fulfill a legitimate purpose. They are a good place either for case citations that stand for the same proposition or for lengthy text from statutes or regulations. It may also be useful to include in a footnote an argument that the other side has not made but that the court is likely to address at oral argument. The bottom line is that if you are uncertain about where an idea should go in a brief, think twice and then again before packing that thought off to "footnote land."

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29. Henry Weihofen, *Legal Writing Style* 297 (2d ed., West Publg. Co. 1980).

30. Aldisert, *supra* n. 2, § 11.4, at 202.

Principle 43: Keep the subject and verb close together.

This guideline is easy to follow and makes for a much-improved sentence, as the following examples illustrate:

Example 1

The district court's reliance on the jury trial waiver provision to strike Autos, Inc.'s request for a jury trial was wrong.

Example 2

The district court was wrong to rely on the jury trial waiver provision to strike Autos, Inc.'s request for a jury trial.

The first example does not flow as well as the second, because the subject, "the district court's reliance," is so far removed from the predicate, "was wrong." The modest revision made in the second example redefines the subject, places it next to the verb, and results in a much more readable and effective sentence.

Principle 44: Avoid using lengthy quotations, whether from cases, statutes, or other sources.

As one judge notes, long quotations "are difficult to read and suggest you were too lazy to extract the truly relevant material."[31] In part, lengthy quotations are hard to read because they are single-spaced. Consider paraphrasing the material in your own words (which as part of the regular text of the argument are double-spaced). Another suggestion is to break up the long quotation into smaller portions that are linked by a narrative discussion. When following the latter technique, however, you should precede each quotation with an explanation telling readers why they should be interested in something that someone else wrote. The following examples illustrate how you can improve such introductions:

31. Motz, *supra* n. 11, at 313.

Example 1

The Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976), stated:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Example 2

Making a similar comparison between judges and prosecutors, the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976), stated that absolute immunity is essential to a prosecutor's ability to perform his or her job properly:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

The first example just uses the quotation without giving the reader any sense as to why. The second example is more effective because it notifies the reader of the significance of the quotation.

Principle 45: Sustain your argument with substance, not adjectives.

Bombast and hyperbole do not produce effective advocacy. Once you have vented your spleen at opposing counsel in a draft, step back as an editor to assess whether your tone is appropriate. In almost every instance, sharp rhetoric is risky and unnecessary. When you write that your opponent's argument is "ludicrous" and "beyond the reach of any reasoning mind," you will have offended the court for no reason if the judge reading your brief has any inclination at all toward that conclusion. Similarly, when your position really is compelling, your argument will lead your reader to that conclusion without your providing adjectives like "clearly," "plainly," and "obviously." When your position is not so compelling, don't be afraid to say so. You are no less an advocate if you tell the court that an issue presents a close question and then explain the sound reasons why that close call should go to your client.

These points apply to any advocate, but they are especially important to the Attorney General advocating for the State. We are expected to temper zealous advocacy with the public interest, and the Attorney General has and must preserve a special credibility with the appellate courts.

G. The Conclusion

Principle 46: Do not include substance in the conclusion.

In Maryland, an appellate brief must contain "[a] short conclusion stating the precise relief sought."[32] The operative words here are "short" and "precise." Many of us, by the time we arrive at this section of the brief, feel the need to summarize arguments and to wrap things up for the court. Don't. The typical conclusion should be, "For the reasons set forth above, this Court should affirm/reverse the decision of the Circuit Court for __." Think about what relief is technically appropriate, and spell out the request for more precise relief if that is necessary,

32. Md. R. 8-504(a)(6).

i.e., "For the reasons set forth above, this Court should reverse the decision of the Court of Special Appeals with instructions to remand the case to the Office of Administrative Hearings for the entry of an order affirming the clinical review panel's decision to administer medication to respondent."

H. Editing the Brief

Principle 47: When you finish writing the draft, let it rest, but then go back to revise and edit.

Even those born clutching a silver pen have to edit. Step back and try to get an objective view of what you have written. Ask a respected colleague, particularly one who has little or no knowledge of your case or the pertinent law, to read your draft and to give feedback. Consider also the following editing suggestions by Armstrong and Terrell:

> Ask yourself if the tone, length and approach of the brief is appropriate;
>
> Review the brief's organization and the content of its introductory paragraphs;
>
> Examine the coherence of the paragraphs and assess whether the transitions between and within the paragraphs are smooth;
>
> Scrutinize the clarity of the sentences;
>
> Check grammar and punctuation;
>
> Proofread.[33]

III. CONCLUSION

The goal of Maryland's Civil Appeals Style Manual, as stated previously, is to enhance the quality of the Office's written advocacy in the state and federal appellate courts. Before the Manual was put into use, the quality of briefs ranged from poor to excellent and, in the absence of written standards and

33. Armstrong & Terrell, *supra* n. 4, at 9-19 to 9-20.

guidelines, that quality was affected by the writing experiences, skills, and styles of the respective authors. While all civil appellate briefs filed on behalf of the Office were reviewed—and still are—by the Civil Litigation Division and invariably improved as a result of that process, brief review was perceived to have its limits, because it is purely reactive and structured to confer no benefits until the writer submits the brief for review. The editing that took place during brief review was also considered far more effective in making a poor brief into an adequate brief than it was in transforming an adequate brief into an excellent one.

The influence of the Manual, however, has aided substantially in this latter transformation. Establishing concrete standards and rules has enabled our attorneys to improve the quality of their briefs prior to review, and, thus, reviewers have more time to spend on producing a superior product. The guidelines set forth in the Manual have also enhanced the brief-review process and reduced inconsistent demands during brief review. We have seen an improvement in our briefs since the Manual was written and since it was made the central focus of our continuing brief writing programs. We hope that our experience will benefit others as well.