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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

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## CHANGING FASHIONS IN ADVOCACY: 100 YEARS OF BRIEF-WRITING ADVICE

Helen A. Anderson\*

### I. INTRODUCTION

American appellate practice is accomplished mainly through the written word, and there seems to be a modern consensus about what constitutes a good appellate brief. Books, articles, and continuing legal education materials tell the appellate advocate to be succinct, to organize arguments clearly, and to present facts and law truthfully yet persuasively. The ideal appellate advocate is a careful strategist and accurate researcher who writes crisply and credibly. The power of emotional or narrative arguments has not been stressed—although this may be changing—because appellate judges are presumed to be less emotional than juries. As one who teaches advocacy, and who has practiced in appellate courts, I wondered about the historical roots of the modern consensus of advice. Has the accepted approach to brief writing always been thus? A

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\* Associate Professor, University of Washington School of Law. This essay arises from a talk at the Applied Legal Storytelling Conference (Chapter Two: Once Upon a Legal Story), held at Lewis and Clark Law School in July 2009. I am indebted to Mary Whisner, one of our extraordinary reference librarians, for much of this research.

survey of brief-writing advice from the last century shows that neither ideas about brief writing nor those about the appellate brief itself have been static.

In fact, researching brief-writing advice proved problematic because the very term “brief” has many meanings, and those meanings have changed over time. Written legal arguments were less common in the nineteenth century, and the modern appellate brief—a lengthy argument based on substantial authority—evolved over time from a short outline of point headings.<sup>1</sup> A key factor in this change is no doubt the rise in importance of written argument and the diminishment of oral argument.<sup>2</sup> When appellate litigators were primarily orators, and briefs merely the oral argument handout, the lawyer’s argument was conveyed by his<sup>3</sup> voice and manner as well as his words. Emotional appeals could be presented orally yet never make it into the written brief. The advocate’s credibility could also be established in person. When the entire burden of persuasion shifted to written documents, more attention had to be paid to every aspect of that writing. The brief could no longer be only an abstract of a logical argument. Thus, the modern American appellate brief is actually a fairly recent development.

Because of this transition from an oral legal culture to a written one, scant written advice about brief writing (or brief making, as it was called) comes to us from the late nineteenth and early twentieth centuries. In contrast, today there is a mountain of written advice for lawyers and law students.

And yet, even with this profound change in the nature of the brief, the materials I found show a shift during the early decades of the last century, a shift that is recurring in our own time. At the end of the nineteenth century the ideal lawyer-writer was the careful scholar or scientist who approached briefing as a logical or mathematical puzzle, and whose only

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1. See e.g. R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth Century United States*, 38 Am. J. Leg. Hist. 482 (1994) (surveying both court rules and court records). As Cozine explains, this evolution was not straightforward.

2. Oral argument continues to have its supporters, of course. See e.g. Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. App. Prac. & Process 247, 263-68 (2009) (describing role and importance of oral argument in modern courts).

3. I use the male pronoun here because almost all lawyers were male during this period.

object was to help the court uncover the truth. This ideal gave way to a view of the legal writer as an artist or novelist whose most important job was to craft a compelling story. Such a shift fits with the philosophical change from classical legal formalism to legal realism in the early twentieth century. As judges and scholars began to emphasize the intuitive aspect of judging and downplayed the role of rational argument based on objective, discoverable legal principles, the lawyer's role came to be seen as that of an artist seeking to move judicial hearts, rather than a scientist assisting the court in a search for the law.<sup>4</sup>

Such an argument can be taken too far. Practicing lawyers have always recognized the importance of storytelling and emotional appeals as well as the need to know the law. The debate between those who favor pure reason in legal argument and those who emphasize the emotional or narrative aspects of argument has been around at least since Aristotle and Plato.<sup>5</sup> We heard echoes of this ancient debate recently in the confirmation hearings for Justice Sotomayor, in which some maintained that judges should be umpires who apply neutral principles and others sought judges with empathy.<sup>6</sup> This disagreement about the nature of law and the role of those principles and qualities in the legal system is a persistent one.

But it is also clear that logos and pathos<sup>7</sup> seesaw up and down in relative importance over time. At certain times, such as the turn of the last century, logos was in ascendancy. A few

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4. See Arthur C. Bachrach, *Reflections on Brief Writing*, 27 Ill. L. Rev. 374, 377-78 (1932).

5. See Alexander Grant, *The Ethics of Aristotle* 205-20 (4th ed. 1885) (discussing, in the context of a broader analysis, Aristotle's break with Plato's rejection of rhetoric). Readers interested in an electronic version of this edition of *The Ethics* can find one at [http://books.google.com/books?id=JbiQwArgTlgC&dq=inauthor%3A%22Alexander%20Grant%22&lr&as\\_drrb\\_is=q&as\\_minm\\_is=0&as\\_miny\\_is&as\\_maxm\\_is=0&as\\_maxy\\_is&as\\_br=0&pg=PP2#v=onepage&q&f=false](http://books.google.com/books?id=JbiQwArgTlgC&dq=inauthor%3A%22Alexander%20Grant%22&lr&as_drrb_is=q&as_minm_is=0&as_miny_is&as_maxm_is=0&as_maxy_is&as_br=0&pg=PP2#v=onepage&q&f=false) (accessed July 12, 2010).

6. See e.g. Bruce Weber, *The Deciders: Umpires v. Judges*, 159 N.Y. Times WK1 (July 11, 2009); Peter Baker & Neil A. Lewis, *Sotomayor Vows "Fidelity to the Law" as Hearings Start*, 159 N.Y. Times A1 (July 14, 2009).

7. Aristotle named the three core modes of persuasion ethos, pathos, and logos. Ethos refers to the speaker's credibility and character and pathos refers to emotional and narrative arguments, while logos refers to argument based on logic. Aristotle, *Rhetoric* 7 (W. Rhys Roberts trans., Dover Thrift Editions 2004) (describing the "modes of persuasion furnished by the spoken word" as depending on "the personal character of the speaker" for ethos, "putting the audience into a certain frame of mind" for pathos, and "the proof, or apparent proof, provided by the words of the speech itself" for logos).

decades later, narrative and “making the facts talk”<sup>8</sup> was emphasized. We may be in a similar period today, at least in the legal academy, as scholars discover and promote the use of narrative and storytelling in advocacy.<sup>9</sup>

At the same time, some aspects of brief-writing advice have remained remarkably consistent over the years. The authors plead for clarity, logical organization, accuracy, and conciseness. Ours seems to be a profession persistently criticizing its own language, constantly engaged in a quest for clarity, even as literary styles and legal philosophies change. One judge complained in 1908 that lawyers no longer took the time to carefully craft briefs with quill and ink, but instead dictated pages of rubbish to stenographers.<sup>10</sup> We hear similar complaints about lawyers cutting and pasting pages of rubbish with their computers today.

Using books and articles of brief-writing advice, Part II of this essay examines the changing nature of the brief during the early twentieth century and the transition from an abstract or outline to a fully fleshed prose argument. Part III looks at the ways in which the ideal written argument changed from the beginning until the middle of the last century. Brief-writing articles and books show a shift in emphasis from the purely logical argument to one that incorporates storytelling techniques and an artistic approach to the advocate’s task. This shift in the advice followed in the wake of the legal realists. Part III also examines how, as the century went on, the emphasis of the advice givers shifted slightly back to logical argument once again, although they continued to recognize the importance of

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8. K.N. Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 Colum. L. Rev. 167, 183 (1946).

9. One indication of such a revival is the Applied Legal Storytelling Conference out of which this essay arose. As further evidence, a Westlaw search undertaken in June 2010 for law review and journal articles with “narrative” or “storytelling” in the title returned 470 results. Just over one hundred of those articles were published since 2006.

10. Alfred C. Coxe, *Is Brief Making a Lost Art?* 17 Yale L.J. 413, 414, 421 (1908) (characterizing the briefs of the lawyer practicing in the 1850s as “the best product of his brain which hard and conscientious labor could produce,” noting that the lawyer of that bygone era did not “delegate this work to stenographers, clerks and office boys,” and informing the law students of the early twentieth century that they should “never dictate . . . at least until the habit of condensing and clarifying thought has been acquired by long apprenticeship with the pen”).

the facts. Finally, Part IV discusses some of the themes in brief-writing advice that persisted even through all these changes.

I have not attempted a thorough survey of this topic, although it is certainly worthy of more in-depth scholarly attention. From the middle of the twentieth century on, brief-writing literature increased substantially. A thorough evaluation of brief-writing advice from 1905 until now would be a major project. Instead, this essay looks at a sampling of the advice, focusing on the early part of the twentieth century.

This short historical survey of advice shows that the modern American appellate brief is not a venerable tradition, but a fairly recent invention, both in form and in substance. Ideas about the relative importance of narrative and logic are anything but fixed. Knowing this history should give us some perspective on our own approach to written advocacy, and should also free legal educators, lawyers, and judges to consider alternative ways of presenting argument to appellate courts.

## II. THE CHANGING NATURE OF THE BRIEF

Law students today learn that “brief” has at least two meanings: the case briefs that they learn to write during the first weeks of law school and the persuasive briefs that lawyers write on behalf of their clients. Historically, the term had additional meanings. Originally, a brief was exactly what the name implies: a short abstract of the argument a lawyer would make orally. The ratio of written argument to oral presentation was the inverse of what it is today: Oral arguments would go on for hours—maybe even days—while briefs were for the most part only a few pages.<sup>11</sup> But the evolution from abstract to the fully

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11. See Cozine, *supra* n. 1, at 483-85. The legal profession was changing significantly at the beginning of the twentieth century: The Canons of Professional Ethics were adopted in 1908, Langdell was developing his case method of legal education at Harvard Law School, and bar associations were increasingly powerful—all of which reflected increasing professionalization. See Richard L. Abel, *The Transformation of the American Legal Profession*, 20 L. & Socy. Rev. 7, 8 (1986) (asserting that “American lawyers constructed the contemporary legal profession between the 1870s and the 1950s,” and pointing out that “[t]hey developed local, state, and national bar associations; promulgated ethics codes; and established disciplinary procedures”); Philip Gaines, *The “True Lawyer” in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 Am. J. Leg. Hist. 132, 132-33 (2001) (noting that Langdell has been called “the symbol of the new age”).

fleshed modern brief was not straightforward, nor was it perfectly tied to the availability and length of oral argument. Even in the eighteenth and nineteenth centuries, lawyers sometimes submitted cases to the appellate courts without oral argument and we sometimes encounter references to briefs in those days that are hundreds of pages long.<sup>12</sup> It is not clear how much of those briefs was argument, and how much was excerpts from the record or other material. For example, the original Brandeis brief, filed in the 1908 case of *Muller v. Oregon*,<sup>13</sup> was 113 pages long, but only a few of its pages were legal argument. The remainder was data supporting the argument.<sup>14</sup>

Legal argument and decisionmaking<sup>15</sup> were primarily oral during the first century of the republic. For that reason, perhaps, there is little written advice about legal writing until the beginning of the twentieth century.<sup>16</sup> The first textbooks were written in the early years of the twentieth century. For the most part, they defined a brief as an outline or abstract of a logical argument, especially if there was to be oral argument. Consider these examples:

In American appellate practice a brief is a document, prepared by counsel as a basis for oral argument of a cause in an appellate court, containing a statement of the manner in which the questions in controversy upon the appeal arise;

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12. Justice Story mentioned a 230 page brief in an 1812 case, although no other record of that brief survives. Cozine, *supra* n. 1, at 492 n. 57. Judge Coxe said in 1908 that briefs of 800 pages were not unknown. See note 41, *infra*, and accompanying text.

13. 208 U.S. 412 (1908).

14. The full text of the brief is available at <http://www.law.louisville.edu/library/collections/brandeis/node/235> (accessed May 21, 2010; copying prohibited).

15. Before the early nineteenth century, judges delivered appellate decisions orally, and these decisions were summarized by private reporters. See e.g. Peter M. Tiersma, *The Textualization of Precedent*, 82 Notre Dame L. Rev. 1187, 1272 (2007). "By the end of the [nineteenth] century, nearly all states in the U.S. had established publicly sponsored law reports that disseminated opinions of at least their highest court. These opinions were written by the judges themselves, rather than a reporter's reconstructions of remarks delivered ex tempore from the bench." Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 Villanova L. Rev. 1, 10-11 (2008); see also Erwin C. Surrency, *A History of American Law Publishing* 63 (Oceana Publications 1990) ("In 1817, the Supreme Court was authorized to appoint a reporter at an annual salary of \$1,000, with the requirement that he deliver to the Secretary of State fifty copies of his volumes.").

16. Kathleen M. Carrick & Donald J. Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, 30 N.Y. L. Sch. L. Rev. 645, 649 (1985).

of the facts of the case so far as they relate to these questions; a specification on the part of the plaintiff in error or appellant of the errors alleged to have been committed by the court below, upon which reversal is asked for; and a brief of the argument, consisting of the propositions of law or fact to be maintained, the reasons upon which they are based, and citation of authorities in their support. In most jurisdictions it is required that the brief shall be printed.<sup>17</sup>

If there is to be an oral argument, the brief will probably contain merely an abstract of the argument. On the other hand, if the case is to be submitted on the brief alone, that document should, of course, contain the full argument.<sup>18</sup>

In the legal sense a brief is a document prepared by counsel for the use of the Court, generally as the basis for oral argument, but sometimes as the only presentation of the writer's contention. It is an elaborated outline.<sup>19</sup>

The brief is a special form of outline used extensively in the practice of law on account of the fact that it is adjusted to the needs of a controversial subject-matter. This especial adaptation to argumentative discourse results from the aim of a brief to set out and emphasize the inferential relations between propositions employed in argument.<sup>20</sup>

As late as 1923, a textbook described the brief as more outline than narrative argument. Although the document could be long, that length appears to have been due primarily to factual matter or the statement of the case:

A brief may be nearly anything the maker chooses it to be. It may be the detailed statement of a case, many pages in length, such as counsel hand to courts, or it may be only a few roughly correlated headings set down on a single sheet of paper. It may be prepared for the benefit of the writer himself, to assist him to analyze and arrange his own thought, or it may be addressed to the mind of another. It may be the synopsis of a longer work already written, or it

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17. Henry S. Redfield, *The Brief on Appeal*, in William M. Lile, et al., *Brief Making and the Use of Law Books* 5 (Nathan Abbot ed., West Publ. Co. 1906).

18. *Brief Making and the Use of Law Books* 11 (Roger W. Cooley ed., West Publ. Co. 1910).

19. W.G. Thompson, *Method of Analysis and Use of Symbols in Brief-Making* 1 (Geo. H. Ellis Co. 1916) (footnote omitted).

20. Jesse Franklin Brumbaugh, *Legal Reasoning and Briefing* 437 (Bobbs-Merrill Co. 1917).

may be the outline of something that is to follow. It may be argumentative, or it may be expository; it may contain evidence and illustrative matter or it may not. There is, in short, no single formula that will describe all that is comprehended by the word “brief.”

Nevertheless, most briefs, whatever their purpose or design, have certain like characteristics. They are, as a rule, short or brief statements of their subjects; they contain nothing not vitally essential to the relation of thought; they are phrased as lucidly as possible, and they have little rhetorical embellishment. In the second place, they are usually so constructed that their contents can be grasped with the greatest economy of the reader’s attention. And this, perhaps, is their most distinguishing characteristic. In a brief, the logical progress of the thought and the relation of one part to another are not, as in an essay, indicated by continuous sentences and by verbal connectives; they are shown by letters and numbers, and by typographical differences. In this aspect, a brief is a series of more or less independent divisions, sentences, and paragraphs through which the reader’s mind is guided by carefully constructed signposts.<sup>21</sup>

The brief described in these early books—at least the argument portion—sounds much like the table of contents of a modern appellate brief.<sup>22</sup> Thus, what began as an abstract of an oral argument now requires its own abstract (the table of contents) for easy digestion.

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21. Ralph Curtis Ringwalt, *Brief Drawing* 3-4 (Longmans, Green & Co. 1923). The author does acknowledge, however, that among the purposes of the “argumentative brief” is persuading the reader. *Id.* at 7 (noting that the brief “must contain all that is necessary for conviction”).

22. Indeed, Ringwalt’s own text comes close to suggesting as much:

On my desk is what is described as a brief in support of a motion in a lawsuit. It isn’t at all in the brief form; it is a compact argument, solidly covering two pages of legal size. In its present form, I doubt if its contents can be digested in less than thirty minutes. In brief form—as it contains but three points and cites but a single authority—all that is essential could be stated in less than a page and could be comprehended in half the time now required. At the hearing on the motion, the court took the papers and reserved decision. Had the argument been stated in brief form, it is wholly conceivable, as the authority was really controlling, the decision might have been rendered at once, as all parties wished.

*Id.* at 10.

### III. THE CHANGE IN IDEAS ABOUT WRITING A GOOD BRIEF

The textbook authors quoted above for the most part expected written legal argument to be a short, dry, logical abstract or outline.<sup>23</sup> These authors were focused on the brief as an aid to the court, not as a vehicle for persuasion.<sup>24</sup> Thus, they stressed making the brief useful to the court:<sup>25</sup>

[T]he primary purpose of a brief is to aid the appellate court in reaching a correct decision.

That court, having no prior knowledge of the case, should, by a properly constructed brief, be fully informed as to the points at issue between the parties, and the facts and law relating to those points. The brief should be so prepared as to minimize the labor of the court in the examination of the record upon which the appeal is heard and determined; it should enable the court to clearly understand the contention of counsel; and care and honesty should be exercised in the citation of authorities with the aim of rendering the greatest possible assistance to the court in its efforts to ascertain the rule or rules which should control its decision.

A subsidiary purpose of a brief is to give information to the opposing counsel. It indicates the limits of the oral argument, and should serve to make the same clear, logical, and helpful to the court.<sup>26</sup>

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23. Yet others of the same era had a very different view of the brief. Consider this summary, given by a law librarian of the New York Court of Appeals in 1898:

A good brief is a fascinating statement of the truth of the case, presented pointedly, clearly and logically, and with as much brevity and force as is possibly consistent with the perplexity of the question. The object of a brief is to persuade, convince, convert readers who are often prejudiced. It must be attractive logical, clear and forcible. It must be fascinating in order to be a success to the writer and to the reader. An advertisement of a merchant is often a good brief. . . . A brief should be luminous, not voluminous.

Irwin Taylor, *Preparation of a Legal Brief*, 6 Am. Law. 219 (1898). This statement recognizes the importance of advocacy and the role of pathos in legal argument. It suggests a more complicated picture of briefing than the early textbook authors acknowledge.

24. For this reason, their advice may not always reflect the wisdom of the profession.

25. I have always questioned this emphasis of much legal writing advice, contemporary and historical. Of course we should strive to make briefs readable and well organized, but if we focus exclusively on judges' stated desires, we may not always serve our clients' real goals—to get certain results. As with advertising, there may be some techniques that are irritating, yet effective.

26. Redfield, *supra* n. 17, at 6-7 (footnotes omitted).

The following excerpts also demonstrate a view of the judicial process as one of scientific inquiry, and the lawyer's role as an assistant in that project. In the spirit of science, there is no place for emotional advocacy:

Since it is made to assist a learned tribunal to arrive at a technical decision it should be scientific in construction and formal and didactic in style. . . . The effect must be one of life and vigor, but these must grow out of the subject-matter and not be sought for by spangles of rhetorical display tacked upon the outside.<sup>27</sup>

The proper personal attitude of legal reasoning on appeal is analogous to what is known as the scientific spirit in inquiry, it must be assiduously cultivated. The higher tribunals, and particularly the appeal courts, are constituted in the eye of the law a logical machine, and in no sense a group of heartburning philanthropists. Law is not a program or system of mercy or of vengeance, but of justice, and justice is a pair of scales which weights out deserts rather than desires. To presume therefore to move such a tribunal by other than logical methods is to impute to it at once a fundamental weakness.<sup>28</sup>

The brief differs from the essay only in form of statement, and in that its appeal is to the intellect instead of the emotions. Persuasion is not necessarily excluded from the brief, but it is subordinate to reasoning.<sup>29</sup>

The foregoing passages are striking for their evident faith in neutral judicial reasoning. A reaction to such faith emerged in the writing of the legal realists. Scholars such as Karl Llewellyn and Jerome Frank, and members of the bench such as Justice Cardozo, argued that judges did not decide cases by logic alone, and that indeed they should not.<sup>30</sup> They focused on the intuitive aspect of judging. The implications of these views for lawyers soon became evident in the brief-writing advice of the late 1920s and the 1930s, in which an emphasis on narrative in legal writing emerged. The image of the scientist was replaced by the lawyer as artist and storyteller:

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27. Brumbaugh, *supra* n. 20, at 462-63.

28. *Id.* at 589.

29. Ringwalt, *supra* n. 21, at 7.

30. Bachrach, *supra* n. 4, at 374 n. 1 (citing articles by these and other authors).

Nevertheless, it is the central theory of this paper that brief writing is essentially a creative function in just as real a sense as writing dramas, novels, poems or short stories; that the greatest and most lasting satisfactions in life can be gotten from truly creative work; that thus really understood brief writing can become the most desirable and satisfaction-giving activity of the lawyer; further that the lawyer with the necessary equipment (principally a clear, emotional, as well as intellectual, understanding of the truth of this statement) the job will be attacked with pleasurable anticipation and zest.<sup>31</sup>

The statement of the facts of the case is the heart of the brief, and draws most heavily upon the skill of advocacy. . . . The beneficent effect of providing a labored judge with a good story is apparent. The facts, after all, will be the material for building the decision and opinion, and laying bare with a novelist's art the drama that has produced the dispute is paramount. Of all the brief, this statement will most surely be read, and carefully, and must be referred to repeatedly. This demands that there be more than arrangement and proportion; the telling itself must catch and hold attention. But so many lawyers, seemingly steeped in the law of real property, insist on writing as though the statement were a mortgage; indeed it is not infrequent that in paraphrasing relevant documents the stilted jargon of the formal papers is mercilessly adopted. . . .

Writing the statement is not easy. It requires time, imagination, and care. But it is the vital job. Nine times out of ten it determines the case. . . .

The brief is as peculiar and exacting as the sonnet. The busy lawyer, prone to dictate, does not often find time to cultivate an art which should be the pride of his profession, and for some reason the law schools seem to have neglected it.<sup>32</sup>

Looking back a few decades in 1946, Professor Llewellyn commented on what he perceived as a general change in approach to brief-writing and argument. The change he saw and welcomed was a more frank acknowledgment of the role of storytelling in the lawyer's advocacy:

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31. *Id.* at 377-78.

32. Howard C. Westwood, *Brief Writing*, 21 A.B.A. J. 121, 122-23 (1935).

As little as twenty or even ten years ago, leading advocates were still apologizing in private for that necessity of their profession that they termed “atmosphere.” They meant the introduction, as a technical need, of matter and manner not really “legal” and in some undescribed way felt to be somehow illegitimate, which would make a tribunal *want* to decide their way. Today, as the courts’ own sense of their felt duty to decency and justice becomes unmistakable in the decisions and increasingly articulate in the opinions, leading advocates have ceased apology and simply set to work. It is no longer a question of “introducing atmosphere.” It is now a question of making the facts talk. For of course it is the facts, not the advocate’s expressed opinions, which must do the talking. The court is interested not in listening to a lawyer rant, but in seeing, or discovering, from and in the facts, where sense and justice lie.<sup>33</sup>

As the century went on, there would be no return to pure reason in brief-writing advice, but there was some retreat from the idea of the lawyer as artist or dramatist. In the latter half of the twentieth century, the learned advice-givers continued to acknowledge the importance of the facts, but still spent most of their advice on logical argument and the technical aspects of brief-writing. These advisors integrated narrative, ethos, and logos with in-depth advice about use of authority and the proper construction of each section of a brief.

The brief by the late twentieth century was much more a complex prose argument than an abstract. As Judge Re wrote in the 1970s:

The lawyer confronted with the task of writing a legal document, especially the statement of facts in a brief, would do well to remember what may be called the ABC of legal writing. These letters represent three indispensable requirements of brief writing in particular and legal writing in general—*Accuracy, Brevity and Clarity*.

Since the primary purpose of the brief is to *persuade* by conveying knowledge and information to the court, this purpose cannot be achieved unless the advocate states clearly and distinctly the facts which gave rise to the legal dispute and the governing propositions of law supported by

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33. Llewellyn, *supra* n. 8, at 183 (italics in original).

authority. Hence, a mere statement of opinion by counsel, however lengthy or elaborate, is not a brief, and the court is justified in affirming the judgment without a further examination of the merits of the cause.<sup>34</sup>

Yet Re also acknowledged, in the section of his book addressing the statement of facts, what he called the “supremacy of facts”:

It is beyond the power of any jurist, lawyer or teacher to over-emphasize the overwhelming importance of the facts. It is not inaccurate to speak of the *supremacy of facts* in giving rise to law. The phrase *ex facto oritur jus* expresses a truism that cannot be forgotten for a single moment by the brief writer.<sup>35</sup>

Similarly, Frederick Weiner’s book emphasized mastery of all the technical requirements of the appellate brief, while stressing the importance of the facts in his section addressing the statement of the case. Thus, he wrote in the section introducing the brief:

The really essential features [of an effective brief] are:

Compliance with rules of court.

Effective statement of the facts.

Good, clear, forceful English.

Argumentative headings.

Appealing formulation of the questions presented.

Sound analysis of the legal problems in argument on the law.

Convincing presentation of the evidence in argument on the facts.

Careful attention to all portions of the brief.

Impression of conviction that allays the reader’s doubts and satisfies his curiosity.<sup>36</sup>

Continuing in the section devoted to the statement of facts, he wrote:

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34. Edward D. Re, *Brief Writing and Oral Argument* 7, 102 (4th rev. ed. Oceana Publications 1977) (italics in original).

35. *Id.* at 126 (italics in original).

36. Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* 38-39 (BNA 1967) (italics omitted).

In many respects, the Statement of Facts is the most important part of the brief; hence the priority given it in the present discussion. . . .

For facts are basic raw materials of the legal process, as all great lawyers, from ancient worthies down to the great judges of modern times have recognized. *Ex facto jus oritur*—the law arises out of the fact—is a well-worn maxim of old, to the point of being hackneyed. . . .

A lawyer stating the facts of his case is telling a story, a story the court should be able to accept and understand as it reads along, without having to supplement your narrative by its own independent efforts. Or to use a different metaphor, the lawyer stating the facts is painting a picture—and those who look at that picture should not be troubled by the details of how the artist mixed his colors.<sup>37</sup>

These more recent advisors—Re and Weiner—refer to creativity in legal writing, but it is a restrained, constrained creativity. The ideal lawyer-writer is not overtly emotional. He or she is clever and somewhat manipulative, but not transparently so. This lawyer is not a scientist or an artist, but uses the tools of both in a reasonable way.

In the 1970s and 1980s a new sort of legal writing advisor emerged: the legal writing professor. In first a trickle, but soon a torrent, their advice was published in innumerable textbooks, most aimed at the first-year legal-writing courses taught in law schools.<sup>38</sup> For the most part, these books, like the courses, begin with a focus on objective (predictive) analysis and research, and conclude with a chapter on brief writing. Such an approach necessarily emphasizes logical reasoning over storytelling. Did these books signal a return to the primacy of logos? Was reason's side of the see-saw in ascendance?<sup>39</sup>

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37. *Id.* at 44-45.

38. Carrick & Dunn, *supra* n. 16, at 657-59 (discussing early texts).

39. This period also saw an increase in judicial advice about brief writing, arguably in response to further restrictions on oral argument. See Thomas D. Cobb, *Judges' Brief-Writing Advice and the Caseload Crisis* (circulated in draft at 2009 Annual Conference, Association for the Study of Law, Culture, and the Humanities (Boston, Mass., Apr. 3, 2009)) (discussing the increasing visibility of judicial brief-writing advice during the 1970s) (copy on file with author); see also *e.g.* Re, *supra* n. 34. (President Johnson appointed Judge Re to the United States Customs Court (now the Court of International Trade) in 1968, but the judge had of course published the first edition of his influential guide to appellate practice in 1951.).

One might argue that the emphasis on logos was sensible in such books since this is the aspect of legal argument with which law students are most unfamiliar. Arguing facts may come naturally, but inductive or deductive use of authority may not. Perhaps. But the textbooks' emphasis on formal logic makes them somewhat reminiscent of the first "brief making" textbooks.

In recent years, an emphasis on the importance of narrative and creative storytelling has re-emerged in legal-writing scholarship.<sup>40</sup> There is excitement as scholars and lawyers rediscover the effectiveness of pathos in legal argument. In many ways, we seem to be reliving the renewed emphasis on creative brief writing that followed the rise of the legal realists early in the twentieth century.

#### IV. PERSISTENT CRITICISMS: SOME THINGS NEVER CHANGE

Yet through all this change documented above, some aspects of brief-writing advice have been remarkably consistent. Certain aspects of what is deemed bad lawyering when writing an appellate brief emerged early and have persisted over the years: The bad lawyer-writer is verbose, inarticulate, disorganized, and quarrelsome. And the advice to this hapless practitioner has remained the same: Think, organize, and edit! Don't malign opposing counsel! Don't criticize the judge below!

Thus, a federal judge in 1908 lamented the demise of good editing and writing:

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40. See e.g. Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 *Leg. Writing* 127, 130 (2008) (noting that "legal briefs focus . . . on the abstract law and overlook the people"); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 *Seattle U. L. Rev.* 767, 769 (2006) (pointing out that "the use of the metaphoric hero's journey provides one potential and powerful option in the arsenal of lawyers' persuasive techniques"); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 *Rutgers L.J.* 459, 465 (2001) (asserting that the story may be "[t]he most powerful tool for persuasion"); David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 *Legal Stud. Forum* 449, 450 (1999) (indicating that "narrative appreciation brings the appellate opinion to life and contributes to a critical understanding of law").

The age of combinations, bureaucracies, telephones and stenographers is at hand, but is still in its infancy. Some of us may yet live to behold a machine where the pleadings and proofs are inserted in a condensing hopper, passed through a solution of text-books and syllabi and from there to a drying chamber, to be deposited finally in a receiver attached to the clerk's desk, in the form of a completed brief.

It is to-day as difficult to find a hand-made brief as it is to find a hand-made shoe.

The prevailing characteristics of the modern brief are discursiveness and prolixity. In the courts of the United States a brief under thirty pages is the pleasing exception and there are authentic instances where they have exceeded eight hundred printed pages.<sup>41</sup>

Similarly, almost twenty-five years later, another author complained that lawyers simply copied large amounts of law and factual material into their briefs:

Aside from being brutally long-winded, the most common failings of the argument are the "digest method" and the "record method" of writing. The former consists of confining argument largely to extracts from the digests—or so it appears; the latter of copying pages from the record. Properly this is not argument at all.<sup>42</sup>

In 1952, citing judicial advice, another author cautioned against personal attacks:

The experienced advocates appreciate that the justices have neither the time nor the attitude for reading belittling comments on the learning or ability of the judge who tried the case or for disparaging remarks about counsel for the opposing side. "The pejorative phrases and personal excoriation," recently mentioned by Justice Schwartz, are best left unsaid. Former Justice Floyd E. Thompson cautioned the bar some years ago that "the court wants light, not heat . . . and flights of oratory of the street corner variety are neither entertaining nor enlightening." It should also be recalled, that scandalous matters will not be

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41. Coxe, *supra* n. 10, at 416-17. Given the then-prevalent idea of the brief as an abstract, these lengthy documents probably consisted largely of factual materials. *See* nn. 17-22, *supra*, and accompanying text.

42. Westwood, *supra* n. 32, at 121.

countenanced. Briefs have been stricken and counsel rebuked for such practice.<sup>43</sup>

And in our own time, Bryan Garner has campaigned against legalese, verbosity, and overly complex sentences, as well as “hyperbole and personality attacks.”<sup>44</sup> Whether one is writing an argument with the ideal of a scientist or novelist in mind, the advice to clarify, edit, and be professional remains the same.

## V. CONCLUSION

Two important lessons can be drawn from this quick survey of brief-writing advice:

First, the modern brief is a relatively recent invention, not an ancient legal tradition. Thus, we need not give its current form and usage as much deference as we have tended to. This knowledge should free judges, lawyers, and legal educators to think of ways to improve the readability and persuasiveness of briefs.<sup>45</sup>

Second, the debate about the relative importance of reason and emotion (logos and pathos)—or what might be called the tension between law and storytelling—is an old one, and likely to continue. And while the importance of narrative seems to be enjoying increased recognition today, even a quick review of our history reveals that the wisest advisors have always urged appellate lawyers to use both logic and narrative as they attempt to persuade the judges before whom they appear.<sup>46</sup>



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43. Paul Ware, *Effective Brief Writing*, 1952 U. Ill. L. Forum 85, 96 (citations omitted).

44. Bryan Garner, *The Winning Brief* 285 (Oxford U. Press 1996); *see also id.* at 108, 145 (advising lawyers to “[b]reak up long, complex sentences” and “eliminate the jargon known as ‘legalese’”).

45. Even oral arguments in the appellate courts already sometimes include sophisticated video or Powerpoint slide presentations. Aside from electronic filing and the occasional hyperlink, why has the appellate brief been exempt from similar changes?

46. *See e.g.* Aristotle, *supra* n. 7, at 10; Llewellyn, *supra* n. 8, at 184.

