Appellate Advocacy

Week One Handout

Winning on Appeal
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Chapter 1

APPELLATE REVIEW— A PANORAMA

§ 1.1 Overview

This book is for lawyers. It is for a special breed of lawyers—the men and women who write briefs and argue appeals before state and federal appellate courts. It is also for those who aspire to be appellate lawyers, either as members of the bar or as law students.

Moreover, the book looks in one direction—from the bench to the bar. It is a vista that perceives written and oral argument from the viewpoint of those to whom arguments are addressed. In 1940 John W. Davis, one of the nation's great appellate advocates, drew an interesting analogy:

> [S]upposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on flycasting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fisherman talk about, if the fish himself could be induced to give his views on the most effective methods of approach? For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.[1]

In this book the fish are giving the advice. Judicial fish are explaining to lawyer anglers how to catch them.

This book recognizes that there are different types of skilled anglers. Many are great trial lawyers, but effective skills in the lakes and ponds with which these fishermen and women are familiar are not necessarily the same skills which are effective in the swift moving streams at higher elevations.

Appellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law. Being a good trial lawyer does not mean that you are also a qualified appellate advocate. The consummate trial lawyer knows how to open to a jury, examine witnesses, protect the trial record with

1. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (Dec. 1940).

objections and motions and how to close to a jury. He or she knows how to prepare a succinct trial memorandum that has the capacity to persuade the harried trial judge chained to the bench and a prisoner to an overloaded calendar.

The successful trial lawyer is really a successful salesperson—successful in the sense of persuading the fact finder to select from the mass of testimony and evidence those adjudicative facts that favor the lawyer's client. To persuade is to sell effectively. I think of good trial lawyers as able salespersons, a function they do not always recognize and one that many of them probably would deny. There comes to mind the rebuke flung in the face of Willy Loman in the play, *Death of a Salesman*: "The only thing you got in this world is what you can sell. And the funny thing is that you're a salesman, and you don't know that."[2]

But salespersons have different customers, dissimilar audiences, disparate objectives, diverse time frames. At trial the major objective is to persuade the fact finder, often a panel of lay jurors, that credibility lies on the side of your witnesses, and to show that the evidence, although controverted, favors your client.

For the most part, trial lawyers work within a framework of existing legal precepts. Out of a congeries of conflicting evidence presented, they seek one objective: to persuade the fact finder to accept a version of the dispute favoring their client. Trial lawyers ascertain the factual strengths and weaknesses of both sides of their cases, and then sift, select and evaluate the evidence to be presented.

The best of this stellar breed carve a convincing argument from an amorphous mass of testimony and create an aura of righteousness around the client and the cause. This is not to say that trial lawyers need only know how to manage the facts. To protect the record and to guard against both improper and unfavorable rulings, they must know and be prepared to argue the legal precepts that will control the precise shade of fact finding that is sought.

The trial courtroom is where the great stars of the legal galaxy shine. But trial courts and appellate courts are constellations far apart in that galaxy. The two settings demand different skills, knowledge and tools. Those lawyers who perform as both trial and appellate advocates must learn to adjust their techniques to match the demands of each court. The appellate lawyer deals primarily with law, not facts, and only with professional judges, not lay juries.

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2. A. Miller, Death of a Salesman 97 (1949).

A trial lawyer may take days or even weeks to persuade a trial judge or jury; an appellate lawyer has time dribbled out to the minute. In the U.S. Courts of Appeals (and other "hot" courts where the judges have studied the briefs prior to oral argument), much of the time is devoted to answering questions from members of the bench.

Then, too, the trial environment honors the oral tradition. Persuasion occurs by speech, rather than by written word. Rhetorical skills, in the effective use of words to influence or persuade, may properly shape the argument before a lay body, but be totally unacceptable when arguing points of law to a court. Thus, arguments of distraction are fair tactics to sway or arouse the jury in a trial court but are not acceptable in an appellate court.

The trial advocate is not limited to reasoned argument and may speak of many things, inlcuding irrelevant, somewhat irrational or shamelessly emotional matters. These are ploys, but ploys that are used everywhere, every day. They are used in advertising and political campaigns, and by essay writers, columnists, editorial writers and television commentators. They are of such ancient lineage that many bear Latin names: *argumentum ad misericordiam* (appeal to pity), *ad verecundiam* (to prestige), *ad hominem* (to ridicule), *ad populum* (to popular opinion), *ad antiquitam* (to tradition), *ad terrorem* (to fear), *ad superbium* (to snobbery or pride), *ad superstitionem* (to credulity). And if the wind is right and the sail is full, the trial advocate can hoist a little *dicto simpliciter* (applying the general rule to exceptional circumstances) or some hasty generalization, or tie on a *non sequitur* or *post hoc ergo propter hoc* (fallacy of false cause) or *ignoratio elenchi* (fallacy of irrelevance, an argument that has nothing to do with the point at issue).

But don't carry these ploys upstairs to the appellate court. Check this baggage after you finish your closing summation. You are still a salesperson when you appear before the multi-judge court, but it's a different audience, requiring different rhetorical skills. The oral tradition of the trial court gives way to a mixture of writing and speaking, but the proportions are not 50/50; it is heavily weighted on the writing side, with perhaps a three-parts-to-one mix. The oral tradition where trials are often measured in weeks gives way to enforced page limits in briefs, and, when the appellate court votes to hear oral argument, the time is doled out in minutes. In the U.S. Courts of Appeals, 15 or 20 minutes a side is usual.

The appellate lawyer is still a salesperson, but the lawyer carries a different sample case. The law is argued principally, and the tools of argument, the rhetoric, if you please, must be adjusted accordingly. Too

many lawyers fail to make this adjustment. Indeed, too many lawyers do not even realize that an adjustment has to be made.

All of which leads to the question I am often asked: "What is the quality of appellate advocacy today?" There is no quick answer. Certainly, most advocacy by brief or by oral argument cannot be rated as "good," let alone "excellent." A substantial amount of "poor" advocacy hangs out there, too much for judges to be lackadaisical about, and too pervasive for the American Bar Association or state bars to do much about, because many of the firms represented by national and state bar leaders are themselves guilty of sloppy appellate practices. I am reluctant to assign percentages in the form of a general evaluation, but suffice it to say that there is a vast wasteland of mediocrity out there. At the very least, the quality quotient is not commensurate with the fees being charged for appellate brief writing and oral argument. The problem is extensive enough to stimulate my writing this book.

I don't think that I suffer from forensic fatigue as a result of reading thousands of appellate briefs since 1968. I deliberately want to discount a crankiness factor that may set in after many years of service. I'm sure of this, because I've held these views since my first days as an appellate judge. I still can remember the shock of first reading appellate briefs when I came to the court of appeals after having served as a Pennsylvania state trial judge. I expected that the quality of these written arguments would be vastly, if not astronomically, superior to the trial memoranda to which I had been accustomed. But that was not the case then, and it is not the case now.

Then, too, there is the reaction, and it has been universal, of the many bright law clerks who have come to me as top honor students from our great law schools. When working on their first assignments in chambers, they immediately note the poor quality of many briefs, even those from prestigious law firms with which they had summered or interviewed. And even today, the clerks, having worked assiduously on the briefs and having come to tentative conclusions in favor of one side, will witness the oral argument performance of the lawyer for that side and moan, "That guy is ruining my case!"

In a 1982 law review article, after witnessing the civil law systems in force on the European continent, I expressed these concerns:

> Because I trust the American system and its reliance on pragmatic, strident and vigorous advocate lawyers more than I trust a system of relying on judges ensconced in ivory towers with their law clerk acolytes, I believe that professional competence of lawyers is essential. Because I see so many dangerously incompetent appellate

> lawyers, I would like to see an immediate emphasis on improving professional competence so that we do not slip by default into an ivory tower law system. . . . I believe that the thrust and parry of opposing appellate briefs is the best instrument to refine the law and to achieve justice.[3]

§ 1.2 The Avalanche of Appeals

Look for a moment at the paper storm that has descended on West Publishing Co. The 27,527 cases West received in 1929 represented approximately the same number it received in 1964—some 35 years later. Yet, by 1981 the volume had almost doubled to 54,104. By 1992 the number had peaked at 66,500, and it seems now to have leveled off.[4] In 1993 there were 62,911 and 61,474 in 1994.

Is case law churning and developing at the rate reflected by the number of opinions submitted for publication? Of course not. Our common law tradition requires unity of law throughout a jurisdiction and requires also the flexibility to incorporate legal precepts as they develop. Within this tradition is the concept of gradual change, with case law that creeps from point to point, testing each step, in a system built by accretion from the resolution of specific problems. Nevertheless, no one, not even the most fervent supporter of publication in every case, can seriously suggest that every one of these cases submitted for publication refines or defines the law or has precedential or institutional value. The reason for the avalanche is not only the expansion of trial and appellate litigation, but also because today there is no institutional inhibition against the paper storm.

Reasons why there was no such deluge of appeals as recently as 25 years ago are easily identifiable. To be sure, we must recognize the general litigation increase attributed to the growth of population, commerce, industry and the explosive effect of civil rights, environmental and securities regulation, products liability and expanded concepts of torts. But there are other reasons. At one time, most state and federal courts had a specialized appellate bar, experts in evaluating the prospects of relief on appeal. No such bar exists today, even at the level of the U.S. Supreme Court. Most lawyers now believe that they are competent to pursue and to win an appeal. However, even

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3. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U.L. Rev. 444, 455 (1982) (footnote omitted).
4. R. Aldisert, Opinion Writing 1-2 (West 1990).

though you may be a good trial lawyer and know the rocky terrain of trial courtrooms, this does not guarantee that you will successfully scale the slippery slopes of appellate advocacy. Experienced appellate judges despair when they examine the superficial case preparation by some lawyers who crowd their dockets.

Moreover, we have seen a profound change in the lawyer-client relationship. Many lawyers are no longer able to control, or even moderate, the demands of emotion-laden clients. Often, professional advice and wisdom are insufficient to curb the excesses of losing parties in lawsuits. Persons who would never dare to instruct a cardiovascular specialist on heart surgery have no qualms about instructing their lawyers when and how to prosecute appeals of highly technical cases.

Such persons are everywhere. They are not restricted to any economic or social class. Appellants are rich or poor, from the east, west, north and south, scarred by adverse jury verdicts or angered by judicial rulings. They are chief executive officers of multinational corporations who direct prestigious law firms on when to move and when not to move. They are impecunious defendants in criminal cases represented by court-appointed counsel who have nothing to lose by cluttering appellate dockets. Some appellants rationalize their actions thus: "I got a raw deal. Hey, it's just a crap shoot and maybe I'll be lucky." Most people think cases are retried on appeal *de novo*. They simply cannot recognize that courts of appeals have limited review powers.

Then there are the lawyers. Some accede to demands for appeal because they fear they may lose clients and earn reputations as "no-guts" lawyers. Others frankly and vulgarly resort to a self-interested, protective maneuver, taking appeals as calculated defenses against possible malpractice suits by clients for failure to exhaust all remedies. Others, unfortunately, take appeals to keep the fee meter running.

Another very important factor is economics. Until recently, taking an appeal required a substantial cash outlay. When I came to the bar, all appellate briefs and the entire record had to be commercially printed. This was a major expense that discouraged some unnecessary appeals. Now appeals are available at discount prices. New court rules no longer require professional printing, which means that the office photocopy machine may grind out briefs at a fraction of the former cost. The rules also allow the appellant to select those parts of the record necessary to support the brief. Appeal costs that formerly ran to substantial preinflation dollars are now reduced, in most cases, to a few hundred dollars. In addition, what does an appellant stand to lose if the appeal costs are assessed against him or her? In the majority of cases, the only

expense is to pay minimal court costs and the opponent's costs in photocopying the brief and some pages from the record.

The high cost of delivering legal services at trial also has a direct bearing on the increase of appeals. Once a litigant has invested a substantial amount of money at trial, the additional expenses of taking an appeal do not appear extremely formidable. Unlike trial costs, where additional witnesses and depositions and prolonged court days make the legal costs an open-ended affair, there are discrete steps of processing an appeal that can be calculated with specificity in advance.

Even in the most borderline case, if the losing party has already invested $100,000 or $125,000 to present or defend a claim at trial, the costs of taking an appeal, by comparison, do not appear prohibitive. For another $10,000 to $20,000 investment, a respectable appeal may often be lodged and carried to fruition. Comparatively speaking, the appeal expenses are not high because your counsel can take the trial brief, cut and paste it for appellate court consumption, examine the record already prepared for post-trial argument, select parts for inclusion in the appendix or excerpts of record, and have it reproduced in-house or at the photocopy shop. Counsel can then take a few hours to prepare for oral argument, travel to the city (coach class) where the appellate court sits, deliver the 15-minute argument and return home.

To be sure, these shortcuts do not produce the most desirable or effective advocacy—as is suggested in the chapters that immediately follow—but taking an appeal today is relatively cost-effective when compared to massive trial expenses. And if you lose on appeal, unless the case involves a fee-shifting statute, generally speaking, as stated before, you have to pay only the minimal court costs and expenses your opponent incurred in photocopying its brief. Thus, the sheer cost-effectiveness at the appeal level when compared to the astronomical costs at trial is probably a major factor causing the dramatic recent increase of appellate filings. It is the opposite of the old adage, "In for a penny, in for a pound." It is now, "In for a pound, in for a penny."

I emphasize these particular circumstances because the increase of appeals has not been directly related to the increase of trial court filings. Proportionately, the increase in appeals has been much higher. In the federal system, district court filings increased by 244 percent in the two decades from 1968 to 1988. The number of appeals increased by 366

percent. Thus, the number of appeals rose at a 50 percent faster rate than did the number of trial court filings.[5]

§ 1.3 The Odds of Winning an Appeal

I often have wondered how an attorney responds to the client when asked: "If I take an appeal, what are my chances of winning?" The statistics are there to make book. For example, if you take a direct appeal of right to the U. S. Court of Appeals, the odds of getting a reversal are as follows:

U.S. Court of Appeals—National Average[6]

Nature of Proceeding	1986	1991	1992	1993	1994	1995
ALL APPEALS	15.5 %	11.1 %	11.0 %	9.8 %	10.4 %	9.3%
Criminal	8.8	7.4	7.6	7.4	7.8	6.6
U.S. prisoner petitions	12.3	5.6	5.8	4.8	3.9	3.2
Other U.S. civil	21.4	17.5	16.8	13.2	14.1	13.4
Private prisoner petitions	13.1	9.3	7.5	7.5	8.2	5.9
Other private civil	18.7	14.5	15.2	13.9	14.8	14.1
Bankruptcy	21.9	17.2	15.7	16.5	14.7	13.5
Administrative appeals	11.5	10.9	11.6	9.1	9.4	10.6

From this, what may we conclude as to odds of an appellant winning in a federal appeal? From 1991 to 1995, the reversal rate for all appeals averaged 10.3 percent. This means that the odds were one in ten, generally; in direct criminal appeals, about one in fourteen; and in collateral appeals in criminal cases, about one in twenty-one. In state prisoner petitions, including the much discussed federal habeas corpus cases, the petitioner's odds of getting appellate relief were about one in thirteen.

Shifting to the state courts, the following table reflects the chances of obtaining a reversal before a sample group of state intermediate courts where appeals generally may be taken of right. The percentages are for 1990 unless otherwise indicated.

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5. Statistics on federal court filings and dispositions are published annually in Director of the Administrative Office of the United States Courts, Annual Report. *See* reports for years 1968 through 1988.

6. *Id.* at Table B-5. *See* reports for years 1991 through 1995.

State Intermediate Courts[7]

State	*Reversal Percentage*
Arkansas	9.0 %
California	11.6 %
Connecticut	24.2 %
Hawaii	28.0 %
Illinois*	18.6 %
Iowa	13.7 %
Kansas	24.0 %
Maryland	17.3 %
Missouri	20.0 %
New Jersey*	18.3 %
New Mexico	27.8 %
North Carolina	24.8 %
Pennsylvania*	15.0 %
Texas	13.3 %
Virginia	21.2 %
Wisconsin	30.3 %

*Statistics are for the 1989 fiscal or court year.

Certiorari Appellate Courts

When the highest court of the jurisdiction grants a petition for review (also known as a petition for writ of certiorari), the odds of prevailing generally increase. The real trick is to get the court to grant your petition. During the 1994-1995 court term, the U.S. Supreme Court granted only 110, or 2 percent, of the 5,014 petitions it received from litigants attempting to appeal from judgments of the various U.S. Courts of Appeals.[8]

The following table reflects the chances of having a petition for review granted by the highest court of several representative states, if applicable, as well as the odds for obtaining a reversal. The statistics are for 1990 unless otherwise indicated.

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7. The state court statistics in this chapter were obtained directly from the administrative offices of the individual state courts, some in published reports and some in private correspondence with the author.

8. Director of the Administrative Office of the United States Courts, Annual Report, Table B-2 (1995).

State Highest Courts

State	*Petitions Considered*	*Number Granted*	*Percentage Granted*	*Total Cases Decided*	*Percentage Reversed*
Arizona	762	80	10.5 %	54	24.1 %
Arkansas	—	—	—	448	21.2 %
California	3,402	150	4.4 %	—	—
Colorado	759	98	12.9 %	75	58.6 %
Connecticut	190	31	16.3 %	227	30.0 %
Delaware	—	—	—	515	7.6 %
Hawaii	—	—	—	311	31.2 %
Illinois*	1,321	109	8.3 %	—	—
Iowa	—	—	—	411	21.0 %
Kansas	390	34	8.7 %	200	29.0 %
Louisiana	2,571	563	21.9 %	—	—
Maryland	608	113	18.6 %	165	49.7 %
Mississippi	—	—	—	779	30.0 %
Missouri	612	56	9.2 %	31	41.9 %
Nebraska	—	—	—	421	21.1 %
New Jersey	1,200	111	9.3 %	205	40.0 %
New Mexico	315	28	8.9 %	166	38.0 %
North Carolina	601	106	17.6 %	141	36.9 %
North Dakota	—	—	—	—	38.0 %
Ohio*	1,686	161	9.5 %	—	—
Oklahoma**	—	—	—	415	15.9 %
Oregon*	733	101	13.8 %	—	—
Pennsylvania*	2,227	230	10.3 %	—	—
Rhode Island	121	1	0.8 %	660	11.2 %
South Carolina	27	7	25.9 %	—	—
South Dakota	—	—	—	273	26.4 %
Tennessee	772	60	7.8 %	—	—
Texas***	876	84	9.6 %	154	77.3 %
Texas****	1,352	202	14.9 %	457	46.2 %
Utah	80	14	17.5 %	—	—
Vermont	—	—	—	207	27.1 %
Virginia	1,135	194	17.1 %	164	54.9 %

State	*Petitions Considered*	*Number Granted*	*Percentage Granted*	*Total Cases Decided*	*Percentage Reversed*
West Virginia	—	—	37.2 %	—	—
Wisconsin	674	77	11.4 %	—	—
Wyoming	—	—	—	161	27.3 %

*Statistics are for the 1989 fiscal or court year.

**Statistics are for the Oklahoma Court of Criminal Appeals, which is the court of last resort for the state's criminal cases.

***Statistics are for the Supreme Court of Texas, which is the court of last resort for the state's civil appeals.

****Statistics are for the Texas Court of Criminal Appeals, which is the court of last resort for the state's criminal appeals.

§ 1.4 The Odds of Being Granted Oral Argument

When I was appointed to the U.S. Court of Appeals for the Third Circuit in 1968, the court permitted oral argument in every case. When, later in the year, we reduced the length of argument from 45 minutes per side to 30 minutes, the Philadelphia bar moaned and wailed as if the advocacy world were coming to an end. One generation later, the customary allotted time allowance is 15 minutes, and oral argument is now the exception, and not the rule. In the U.S. Courts of Appeals, the advocate's major tool is the written brief, not oral presentation. Notwithstanding protestations to the contrary, I think that the trend is irreversible, and I do not believe that justice suffers as a result.

Federal Appellate Courts

My experience in riding the circuits has taught me that if an appeal presents an issue of institutional or precedential significance, oral argument will be granted by the court. Various courts have different procedures through which this decision is reached, but by and large the judges seem to err on the side of granting oral argument in unworthy cases, rather than denying the opportunity in deserving cases.

What then are the odds that the judges will grant oral argument in your case? Records of the U.S. Courts of Appeals for the 1990 calendar year provide some indication:

Circuit	*Percentage Argued**
ALL CIRCUITS	44.8 %
D.C.	56.5 %
First	66.8 %
Second	76.4 %
Third	25.8 %
Fourth	31.9 %
Fifth	27.9 %
Sixth	48.1 %
Seventh	56.2 %
Eighth	44.1 %
Ninth	51.6 %
Tenth	41.1 %
Eleventh	45.7 %

*Director of the Adminstrative Office of the United States Courts, Federal Judicial Workload Statistics, Dec. 31, 1990, Table B-5.

By way of explanation, the Third Circuit traditionally grants oral argument at the lowest rate because its cases generally are not screened by staff attorneys or screening panels, as is the practice in most other federal courts. Oral argument on counseled cases is determined by the judges hearing the appeal on the merits after full briefing and extended chambers study without participation of staff counsel or truncated consideration by a special screening panel. It appears, and understandably so, that where courts rely largely on relatively inexperienced staff attorneys, more cases are argued than not, and for lengthier periods of time.

State Appellate Courts

The chances of obtaining oral argument in the state appellate courts vary greatly from state to state. For example, the Oklahoma Supreme Court accords oral argument in civil appeals only under very rare circumstances. Because most states do not maintain published statistics on the percentage of oral arguments granted, it is difficult to determine if there is a national trend in the states favoring or disfavoring oral argument. Recent statistics from the highest courts of several representative states suggest that oral argument frequently is allowed in those cases submitted on the merits:

State	*Percentage Argued*
Iowa	49.5 %
Mississippi	69.3 %
North Carolina	98.9 %
Oregon	95.5 %
Pennsylvania	89.0 %
Texas Supreme Court	74.5 %
Vermont	66.8 %

§ 1.5 Summary

The reality is that a large majority of cases stand or fall at the intermediate appellate level. And as shown in § 1.3, the chances of winning are small. Why then are more cases appealed than ever before? The cause, at least in part, can be found in the forces described above: the litigious temperament of our American society and the attitudes of many lawyers. It should be noted that this thesis does not apply to the many advocates of ability and integrity who practice before the appellate courts of this country—attorneys distinguished not only by the appeals they present but also by those they do not.

I will not devote much space in this book to the process of deciding which cases to appeal. But a basic premise underlying the entire discussion is that altogether too many cases are sent up, or rather dragged up willy-nilly, before appellate courts. Honing cases along the lines suggested here will cause some to disappear entirely. What will remain, hopefully, will be a solid core of substantial questions, adequately explored and clearly presented. The judicial system would benefit from this result, certainly, and lawyers could conserve their resources and use their time more effectively.

This is a book about bringing effective appeals. It is a book for lawyers, and lawyers like to win. I do not guarantee to the reader greater successes than the merits of the cases warrant. I do believe, however, that cases with merit will find their way into the minds of the deciding judges.

Together with many other state chief justices, Robert N. Wilentz of New Jersey has graciously furnished me with advice for appellate lawyers for inclusion in this book. In concluding his suggestions, he wrote:

> The foregoing has nothing to do with the effectiveness of the art of advocacy in the sense of trying to help lawyers with their cases. It has to do only with the effectiveness of briefs and oral argument in helping the court arrive at a totally rational, totally informed, and probably correct decision.

Chief Justice Wilentz recognizes a distinction here, and so do I. I also see appellate justice at its best as a cooperative effort between the court and counsel. Excellence on either side is infectious. We should hold each other, and ourselves, to the highest standards. My hope is that this book will serve that important and honorable endeavor.

Chapter 2

THE PURPOSE OF BRIEF WRITING

§ 2.1 Overview

An appellate brief may be defined as a written, reasoned elaboration that justifies a conclusion. It is a demonstration of written, reflective thinking expressed in a logical argument which is designed to educate and to persuade. It is a written statement of reasons explaining why an appellate court should reverse, vacate or affirm the judgment or final order of the tribunal from which the appeal is taken.

Briefs are written for one audience and one audience only—judges and their law clerks. They have the most limited readership of any professional writing. You write to persuade a court, and not to impress a client. You write to persuade a court to your point of view; at a minimum, you write to convince the court to grant oral argument in your case. The key word is persuasion. If a brief does not persuade, it fails. Every brief writer must understand this and never forget it. As you write, prop a sign, literally or figuratively, on your desk that asks, "Will this brief persuade the reader?"

Persuasion is the only test that counts. Literary style, massive displays of scholarship, citations that thunder from the ages and catchy phrases all are pointless if the writing does not persuade.

Authorities may differ as to a precise definition of persuasion. Kenneth Andersen describes it as "a communication process in which the communicator seeks to elicit a desired response from his receiver."[1] Erwin Bettinghaus is more specific: "As a minimal condition, to be labeled as persuasive, a communication situation must involve a conscious attempt by one individual to change the attitudes, beliefs, or behavior of another individual or group of individuals through the transmission of some message."[2]

Although both these definitions effectively express a general concept, what Bettinghaus says has a special relevance to counsel for the appellant, who has the burden of persuading the appellate court that the trial judge committed reversible error. Although not usually stated as a traditional burden of proof, in actual practice, the

1. K. Andersen, Persuasion Theory and Practice 6 (1971).
2. E. Bettinghaus, Persuasive Communication 4 (3d ed. 1980).

presumption of correctness lies with the trial tribunal. Evidence of this presumption is the jurisprudential axiom: When an appellate court is equally divided, the judgment of the trial court must be affirmed.

The appellant is required to rebut this presumption of correctness. To do this, the appellant must challenge the attitudes or beliefs expressed by the trial court and presumably endorsed by the appellate court; the appellee's task is to reinforce these attitudes or beliefs.

When considering persuasion in the abstract, however, Professor Nicholas M. Cripe reminds us that persuasion in an appellate court "differs from the common persuasive [writing or] speaking situation such as political speeches, protest rallies, legislative debates, revival meetings, jury trials, and especially commercial advertising and selling."[3] Appellate advocates must tackle rhetorical problems rarely encountered by other persuasive writers or speakers. They are limited to a small number of available relevant arguments. They must carefully select and present these contentions in a setting where the atmosphere and traditions render ineffectual or inappropriate techniques commonly used in other types of persuasive writing and speaking.

The audience is a concise grouping of highly trained, intelligent, frequently articulate judges who likely will react unfavorably to anything but the formal style of authoritative persuasion.[4] Moreover, unlike most literature of scholarly persuasion, appellate briefs are not read at a leisurely pace nor are their contents savored and digested in a contemplative environment. Rather, briefs must compete with other demands on an appellate judge, as described in § 2.5, The Brief-Reading Environment. It is enough to say at this time that astronomical caseloads require judges to read large numbers of briefs while simultaneously performing other judicial functions demanding equal priority.

§ 2.2 Elements of the Argument

In law, as in formal logic, the word "argument" takes on a special meaning. An *argument* is a group of propositions of which one is claimed to follow from the others, which are regarded as support or grounds for the truth of that one. An argument is not a loose collection of propositions: It has a formal structure that one trained in the law recognizes.

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3. Cripe, *Fundamentals of Persuasive Oral Argument*, 20 Forum 342, 345 (1985).
4. *Id.*

The *conclusion*, or "therefore" statement of an argument—the precise relief sought in the brief—is a proposition that is affirmed on the basis of the other propositions of the argument. The logicians call these *premises*; we call them points, or issues, in the brief. These points are designed to serve one purpose and one purpose only: They supply evidence or reasons for supporting the desired conclusion.[5]

Reasoning is the process of reaching a conclusion through a series of propositions in argument form. Reasoning is reflective thinking. In a brief we reason from something we know—the statute, procedural rule or case law—to something that we did not know prior to our reasoning—the conclusion. *Reasons*, as distinguished from reasoning, are the considerations set forth in the terms and propositions in the premises " 'which have weight in reaching the conclusion as to what is to be done, or which we employed to justify it when it is questioned.' "[6]

The conclusion in a brief is not just the major thing; it's the only thing. It's the only game in town. The purpose of a brief is to convince the court to accept your conclusion—to reverse, vacate or affirm the lower court's judgment. The only purpose of the brief's contents that precede the conclusion—statements of jurisdiction, standards of review, issues, facts and the discussion of legal precepts—is to set the stage for logical premises to justify the suggested conclusion.

Unlike an opinion of the court, a law review article or a professional treatise, a brief sells only its conclusion. Remember, the brief writer is a persuader. The lawyer is selling something, and that something is the conclusion.

Your brief is nothing more or less than an expanded categorical syllogism containing premises (propositions). The conclusion you urge in your brief can only be true when (1) the other propositions (premises) are true, and (2) these propositions imply the conclusion; in other words, the conclusion is inferred from these premises.[7]

The argument is designed to educate the court by setting forth solid reasons which, if accepted, may be incorporated into the court's opinion. The reasons must be logical, but until they appear in a judicial opinion, they are not "performative utterances" that possess the strong bite of precedent. Reasons in a brief have no life of their own. They are tools of education and persuasion only. Their role in an appellate brief differs from a law review article or legal treatise, where the focus is information and comprehensiveness. Reasons in an appellate brief are designed to

5. R. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* 36 (Clark Boardman 1989).
6. *Id.* at 36-37 (quoting J. Dewey, *How We Think* 17 (2d ed. 1933)).
7. *Id.* at 37.

do one thing: to convince a court to accept your conclusion. The only measure of their success is the extent to which they persuade the judge to accept the brief's conclusion.

The written brief always has played an important role in the American appellate court system. By contrast, the English appellate system relies entirely on oral argument.[8] Oral argument in an American appellate court is a fleeting moment; a written brief is a permanent formality. The court relies on the written brief prior to oral argument, in the decision-making process afterward, and in the post- argument decision justifying process—the preparation of the opinion.

Moreover, the astronomical increase in appellate court caseloads has emphasized the importance of briefs and diminished the importance of oral arguments. Crushing caseloads have imposed severe restrictions on the time available for oral argument and the length of time allotted. From 1961 to 1987, for example, the total number of filings in the U.S. Courts of Appeals increased from 4204 to 35,176, or 737 percent.[9]

Notwithstanding many exhortations about the importance of oral argument, in today's appellate environment, you must write to win. Don't depend solely on your powers of speech, regardless of how great they may be. Your hopes hang on the written argument; the oral argument is only a safety net.

§ 2.3 Gaining and Maintaining Attention

Pioneer psychologist William James once said, "What holds attention determines action." To the brief writer, this means two things: (1) you must gain the attention of the reading judge, and (2) you must maintain it. Attention is a necessary condition for persuasion.

When you start to plan your brief, place yourself in the judge's shoes. The judge will pull down from the shelf the set of briefs—typically blue for the appellant, red for the appellee, gray for the reply and green for the amicus curiae. (Mine will have been tied together with the Judiciary Act of 1789 "tape, red"; traditions persist long and hard in my chambers.) The judge then will open the briefs and ask, "Now, what is the excuse for this appeal?" This is not an indication that the judge is prejudging the merits; it's only the presumption of trial court correctness at work.

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8. For an excellent description of the English appellate system, *see* R. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* (1990).
9. *Id.* at 155.

The appellant always must be conscious of this presumption and remember that the odds of reversal favor the appellee. Keep in mind the track records set forth in Chapter 1: In 1990, the appellant's odds of prevailing were one in seven in the U.S. Court of Appeals, and about one in five in the state intermediate courts.

Whether appellant or appellee, you must plan your brief to gain the immediate attention of the judge. You do this by:

- Leading from strength; hitting the reader between the eyes with your strongest argument.
- Expressing a message that the reader will understand.
- Structuring a presentation within the framework of the reader's knowledge, beliefs and attitude.

John W. Davis once wrote:

> [Judges] are anxiously waiting to be supplied with what Mr. Justice Holmes called the "implements of decision." These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unravelled? What would make easier your approach to the true solution?[10]

To gain the attention of the judge, the writing must be simple and clear. Here you may benefit from the advice of professors of speech and debate at the undergraduate level. Dr. Robert Huber at the University of Vermont taught his debate students a simple argument pattern, designed to keep the argument clear, which brief writers can adopt to gain and maintain the judges' attention. The schematic is N-E-P-C: NAME IT, EXPLAIN IT, PROVE IT, CONCLUDE IT. Although devised for oral argument, this design works equally well for written briefs. Professor Cripe says, "If outlined, NAME IT would be a Roman numeral, EXPLAIN IT the capital letters, PROVE IT, the Arabic numbers and small letters under the EXPLAIN IT sections, CONCLUDE IT probably a capital D or E tying up the point."[11]

The first principle of gaining and maintaining attention is to write for the person who will read your brief. You don't write for publication. You don't write to impress your colleagues how smart you are, or how well you know the subject matter, or how stupid you believe the judges

10. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940).
11. Cripe, *supra* note 3, at 350.

to be. All this may well be true. But the name of the game is "persuade the judge." You don't score points for anything else.

The second principle is subsumed in the first. To gain the judge's attention, you must immediately establish your credibility as a brief writer. Without credibility you may possibly gain the judge's attention, but you will never maintain it. Unless you maintain it, you will never get the judge to accept your conclusion. And unless you persuade the judge to accept your conclusion, the brief is not worth the paper it's written on. Getting the judge to accept your conclusion is to appellate advocacy what the bottom line is to business.

So much for this short exposition on brief writing theory. I now pause to survey the problems that many appellate judges see in brief writing.

§2.4 Criticisms of Briefs

Before we address the criticisms of briefs that judges lodge against lawyers, certain things must be said. First, writing an appellate brief is not easy. It may be the most difficult task of advocacy. What you write, in most cases, is your client's last opportunity to claim or defend. Before we criticize, let us put certain things in perspective.

On a scale of difficulty, writing a brief is much more arduous, calls for much more research and requires much more intellectual choice and judgment than writing a judicial opinion. It is easier for a judge to write an opinion than for a lawyer to write a brief from scratch; the judge has the advantage of both parties' work product. The brief writer has to narrow the issues; this part of the judge's task already is performed. The brief writer has to select the precedents and supply the authorities; the judge examines them, confirms their authenticity and, by computer-aided research, ascertains their continued vitality. In so doing, the opinion writer has a distinct advantage over the brief writer, because it can be assumed that the cited authorities already have been cross-checked by opposing counsel in answering briefs.

Second, many of the criticisms leveled against briefs also may be directed against judicial opinions.[12] There is sufficient criticism to go around to all hands—to those on the bench as well as to those at the bar. Both have much room for improvement.

But the similarity stops there. A litigant does not lose a case because a judge's opinion fails to convince. Judges' tenures seldom are affected

12. *See* R. Aldisert, Opinion Writing 6-7 (West 1990).

if their work product is sloppy, turgid, rambling, repetitious and, at times, incomprehensible. But the quality of professional legal writing directly affects the persuasive powers of briefs, and, indirectly the reputation of the lawyer in the professional community and personal standing in the law firm.

Examine, if you will, the following criticisms and decide if you are guilty of any of these practices. Remember the bottom line. For writing a convincing brief, you don't get "Brownie points" or a star on the forehead. You win the case. For writing a bad brief, you are not directed to sit in the corner. You probably will lose the case. It's that simple.

What then are the criticisms generally expressed by judges against lawyers' briefs today? Here are some:

- Too long. Too long. Too long.
- Too many issues or points.
- Rudderless; no central theme(s).
- Failure to disclose the equitable heart of the appeal and the legal problem involved.
- Lack of focus.
- Absence of organization.
- Cluttering the logical progression with excessive citations and verbiage.
- Uninteresting and irrelevant fact statements.
- Misrepresented facts and case holdings.
- Failure to mention or properly cite cases against you.
- Failure to state proper jurisdiction (appellate and trial court).
- Failure to set forth the proper standard of review for each point presented.
- Failure to apply the standard of review properly.
- Failure to prepare an accurate table of contents.
- Failure to prepare an accurate table of authorities with page references to the brief.
- Failure to set forth a summary of argument before proceeding into a discussion of each point.
- Unclear, incomprehensible, irrelevant statements of reasons.
- When applicable, failure to state that a point is an independent reason that may support the brief's conclusion, regardless of how the court rules on other issues.

- Misrepresenting or exaggerating the adversary's arguments.
- Inaccurate or incomplete citations.
- Citing cases that have been overruled.
- Discussing unnecessary details of precedents and compared cases.
- Failure to show similarity or dissimilarity of material facts in compared cases.
- Failure to cite to the record when necessary.
- Citing to a record not contained in the appendix or excerpts of record.
- Failure to support the brief with a sufficient appendix or excerpts of record.
- Failure to complete the brief with a terse summation demonstrating why the reader should agree with conclusion.
- Failure to state the relief requested.
- Typos, misspellings and grammatical mistakes.
- Failure to observe the court's appellate rules.
- Failure to observe color-codes on brief covers when required by court rules.
- . . . and more, as will be subsequently developed.

§ 2.5 The Brief-reading Environment

Lawyers should understand the environment in which briefs are read. The general public and the legal profession generally are familiar with the working environment of trial judges—the courtroom and the chambers. However, typically they are not familiar with where and when appellate judges, to use the popular idiom, do their thing. Briefs are sometimes, but not very often, read in a cloistered setting, a quiet, library room where the only sound is a softly ticking clock. Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message or another judge's draft opinion, the reviewing of which is given a higher priority than drafting your own opinions. The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose

that you have been reading in the blue- or red-covered brief must await another moment. Or another hour. Or another day.

So the briefs are wrapped and taken home, where they are to be looked at after the evening news but before your nine o'clock favorite television program. In the meantime, your spouse wants to talk with you, or the kids clamor for attention, or friends telephone. The briefs are rewrapped and set aside for another time. Or they are read in airport waiting rooms, or aboard a plane with the person in the next seat glancing across and saying, "Gee, I suppose you are a lawyer. Let me tell you about the claim that I have." Or the briefs are read late at night in hotel rooms with poor lighting, thus inviting soporific consequences.

Look at the numbers. When I first became an appellate judge in 1968, each active judge on the court was required to hear 90 appeals a year, which amounted to 6 sittings a year and 15 sets of briefs per sitting. Each active judge on the court now has to decide over 300 appeals a year, participate in standing panels for pro se cases and motions, and sit in 7 scheduled sittings a year with 39 counseled appeals on the merits per sitting. This means that each judge must read approximately 550 briefs a year written by lawyers, plus at least 50 briefs written by pro se litigants and a like number of counseled responses, and frequently many briefs in reply to appellee's briefs. In many of the state intermediate courts, the caseload is even more formidable.

I have described in detail the brief-reading environment for one purpose only: to emphasize that the written brief can be an effective instrument of persuasion only if it is concise, clear, accurate and logical. Only if it is readable. In the chapters that follow, I will offer suggestions on how this may be accomplished.

Bryan Garner
The Winning Brief

1

Plan every writing project by breaking it up— and carry it out in stages.

Quotable Quotes

"Lawyers are inclined to act too quickly and to think too little, if they ever think at all. A brief is not written even by a 'brilliant' lawyer in a single afternoon; if it is, the product is unworthy both of the client and of the court. Before writing a brief it is necessary to plot out the exact line of attack or defense fully. The brief should contain only one key point with possibly two or three material but subordinate points of attack or defense."

—Jean Appleman, *The Written Argument on Appeal*, 41 Notre Dame Law. 40, 41 (1965).

"How does one manage this feeling of being overwhelmed? It's like eating an elephant: You do it one bite at a time. Sit down and spend a few minutes breaking the project into logical bite-size units. Check your deadline. If it's a big project, figure out how far along you want to be with the job by when. Then mark these stages down on your calendar."

—Karin Mack & Eric Skjei, *Overcoming Writing Blocks* 57 (1979).

"Breaking down the various decisions involved in writing into separate stages reduces panic by making the job less awesome. It also makes writing a routine. No longer are moods of inspiration needed, no longer is writing only possible when you are exceptionally awake and fresh. The various stages can be worked through even when you are tired, or simply not feeling like concentrated creative thought. All professional writers learn this early in their careers. You probably use writing as an adjunct to professionalism in other spheres; but learning the divide-and-conquer techniques of the professional writer is still a valuable career asset."

—Christopher Turk & John Kirkman, *Effective Writing: Improving Scientific, Technical, and Business Communication* 43 (2d ed. 1989).

"Before actually beginning to write, do two things. *First*, ensure that you have a strong thesis. There's a good way to tell if you have one, but it takes courage. Write on some notepaper, 'I contend that——,' and complete the sentence. . . . *Second*, have on hand a list of concrete details and apt quotations, and be

ready to use them. Remember, if you lead off with a string of abstract generalizations, your reader may impatiently mutter, 'Sheesh,' and tune you out."

—John R. Trimble, *Writing with Style* 29–30 (2d ed. 2000).

Explanation

Most writing advice focuses on the end product. But we shouldn't neglect the process by which writers produce their words—because, in important ways, the process determines the product.

Now, I can't tell you what type of pen to use or what to sip while you're working. You can't teach the *physical* aspects of writing. But it's quite possible to teach the *mental* aspects of writing.

Before we get to that, though, think of the ways in which legal writers so frequently get mired:

- By starting to write in earnest before they fully understand what they're writing about—and then treating that draft as something sacrosanct.
- By sidestepping the creative stage altogether, so that the brief isn't nearly as imaginative as it could be.
- By writing and sharpening sentences before knowing what the overall structure will be—and thereby wasting valuable time. When structural changes later emerge, as they inevitably will, this early work will have to be changed.
- By allowing their critical side to interrupt throughout the process.

How can you avoid these pitfalls?

The Flowers Paradigm: Madman–Architect–Carpenter–Judge

Several years ago Dr. Betty S. Flowers, a LawProse instructor who teaches in the University of Texas English Department, devised a method that dramatizes the writing process. Her method helps minimize the problems and maximize both efficiency and effectiveness.

It's called madman–architect–carpenter–judge.* It breaks down the writing process into four steps—each one based on a "character" or personality that we all have within us.

The madman "is full of ideas, writes crazily and perhaps rather sloppily, gets carried away by enthusiasm and desire, and if really let loose, could turn out ten pages an hour" (p. 7). Typically, the legal writer doesn't really "write" at all during this stage, but instead takes copious notes, jotting down ideas and possible approaches to a problem.

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* Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, 44 Proceedings of the Conference of College Teachers of English 7–10 (1979). Page citations in this explanation are to this article.

The madman's nemesis is the judge—your critical character who really needs to be reined in until the final step. But many legal writers have an out-of-control judge, who is easily recognizable. As Flowers describes the judge:

> He's been educated and knows a sentence fragment when he sees one. He peers over your shoulder and says, 'That's trash!' with such authority that the madman loses his crazy confidence and shrivels up. You know the judge is right; after all, he speaks with the voice of an English teacher. But for all his sharpness of eye, he can't create anything. (*Id.*)

The secret to defusing this battle between madman and judge is to keep the judge at bay until the end of the writing process. Otherwise, the judge will stifle the madman altogether.

But what about the other steps?

Once the madman has generated lots of ideas, the architect takes them, makes connections between them, and starts planning their structure. In the first instance, the architect's work is nonlinear, but it will end up in the form of a linear outline. This means that the outline will finally have the form that seems obvious to most people today but was a great insight when Aristotle devised it: a beginning, a middle, and an end. And if the architect functions satisfactorily, ultimately producing a linear outline, you'll know each intermediate point—step by step—through the middle parts of the brief. In fact, the more detailed the architectural plans are, the better.

Then comes the carpenter, who starts building the draft. At this stage, the writing begins in earnest. And because you've planned the draft, the carpenter's work is greatly eased: it's more or less a matter of filling in the blanks. That may overstate how easy the carpenter's work is. But the process of building is greatly simplified when you have the architect's specifications laid out in front of you.

Charles Alan Wright makes this very point in the *Scribes Journal* essay in which he describes his writing process:

> For my kind of nonfiction it is necessary first to have a complete grasp of whatever subject it is I am going to be writing about. This we can take for granted, though the research is often long and tedious. The next stage, and to me the hardest of all, is organization. I never sit down to the keyboard—in the old days it was a typewriter, then an electronic typewriter, and in recent years it has been a computer—until I am clear in my mind how I am going to organize whatever it is that I am doing.**

That's why, earlier in his essay, Wright says that writing is easy—the preparation is the difficult part.

The most important thing about the carpenter stage is to write rapidly, without editing along the way, simply filling in the details according to the architectural specs. If you edit, then the judge starts getting active—and this is just the type of interference your carpenter doesn't need. If

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** Charles Alan Wright, *How I Write*, 4 Scribes J. Legal Writing 87, 88 (1993).

you get stuck in a certain part, then move to the next section: you may have to leave a little hole here and there.

You'll notice, too, that the carpenter has some discretion—deciding how to finish off a corner, how to build the passage from one room to the next. Some architectural details, in other words, are left to the carpenter.

Once your carpenter has built a draft, the fun begins for your judge, who can start looking for ways to improve the draft. The judge will check many of the things that the rest of this book is devoted to: whether there are transitions between paragraphs, whether you've used passive voice where you really shouldn't have, and so on. And the judge will check many things that aren't mentioned in this book, from comma splices to misplaced modifiers to subject–verb agreement problems. The judge is a quality-control inspector.

Each of these characters needs time on stage—at the forefront of your brain. If you neglect any of them, your writing simply won't be as good as it might be.

Two Qualms Answered

But is it possible, in the hurly-burly of a busy law practice, to go through these four steps with every writing project? Of course. Even in the space of an hour-long writing project, you can spend 10 minutes on madman, 7 on architect, 20 on carpenter, and 10 on judge. What about the rest of the time? Well, you need breaks in between, both to get away from the project momentarily and to shift your focus to that of another character.

But isn't it true that we all approach problems differently? Isn't that the lesson of Myers-Briggs and other personality tests? Yes, and Flowers designed the paradigm with this in mind. Everyone is most comfortable working in a particular compartment of the brain. This approach ensures that you benefit from all that your brain has to offer, not just from the mental realm you're most comfortable with.

I, for example, spent years neglecting the architect. I wrote highly polished sentences and paragraphs, and people who read my stuff generally thought of me as a good writer. But when I now look at what I wrote in those days, some of it appears to be a highly polished mishmash. The organization was unpredictable. Now that has changed—and writing has become relatively painless for me, and much quicker. I do what Professor Wright mentioned: I plan my writing better than I used to.

Advantages of the Flowers Paradigm

In her original essay, Flowers pointed to eight advantages of her paradigm, rewritten here with my glosses:

1. It's easy to remember.

2. It stresses the sequential nature of the writing process—that you're likely to get better results if you work through the madman stage first rather than going back to the idea stage after you've spent three hours crafting sentences.

3. It dramatizes the need for rewriting and gives a sense of individual purpose to every draft.
4. It breaks the writing task down into manageable stages and allows you to enjoy each stage; that is, it shows you how to do one thing at a time.
5. It defuses the conflict that often arises when you try to write for an authority figure.
6. It offers a way to deal with self-image problems that sometimes interfere with the writing process. That is, if you see yourself as a creator, you might be impatient with the polishing and careful proofing that the judge can provide—and that every draft needs. And if you see yourself as a consummate critic, you may have a highly "repressed" style characterized by dry and unmemorable (but technically correct) prose.
7. It gives a new language for critiquing drafts, one that doesn't shove the editor exclusively into the role of judge. Now, an editor can look at a brief and say, "Try playing the madman more with this section," rather than just picking up a red pen and marking away.
8. It clarifies what you can and can't teach about writing. The madman stage is personal and subjective, a private area left almost exclusively to the writer. The judge can be taught from good writing texts. But in the architect and carpenter stages—where many writers are least experienced and usually least well trained—a teacher can be very helpful.

Many writers need more help with the writing process than with anything else. For those who do, the Flowers paradigm can be invaluable.

You'll likely find that you can most readily apply the rest of the tips on process—#2 through #7—if you capitalize on the paradigm.

2

When first working on a writing project, let the madman run loose for a while.

Quotable Quotes

"Ordinarily—not always, but more often than not—writing proceeds like this: Collecting material—trying to find a good approach—spending some time on something else—getting a sudden bright idea—planning and organizing—writing—revising. The most mysterious—and most fascinating—part of the whole process is the one you don't read about in the handbooks: the search for a good approach, the period when you abandon the search, and the moment when, out of nowhere, an idea pops into your mind.

"Maybe you won't believe me when I say that this is common experience. All right, I'll cite chapter and verse. This is the way the human mind works in creating *anything*—whether it's the mind of a poet or a mathematician, a philosopher or a historian, a scientist or an advertising man."

—Rudolf Flesch, *The Art of Readable Writing* 55 (1949; repr. 1967).

"[T]he attorney [must] allow his ideas to develop over a period of time. He should jot down ideas as they come to him, even developing ideas in their entirety but taking care not to write the full argument. As he does research upon the facts or the law, more and more ideas will come to him so that his notes should begin to grow and even overlap each other, but it will be simple to organize the material at the proper time. Until this meditating process is complete, a lawyer should not attempt to write his brief."

—Jean Appleman, *The Written Argument on Appeal*, 41 Notre Dame Law. 40, 41 (1965).

"The point is that a deeper level of thinking can go on when you relinquish your conscious grip on your material. A kind of letting go is necessary for this deep cooking. Having a beer, taking a walk or a bus ride, taking a nap or a shower—these all serve some people as ways of letting go."

—Peter Elbow, *Writing with Power* 40 (1981).

"Your subconscious mind does more writing than you think. Often you'll spend a whole day trying to fight your way out of some verbal thicket in which you seem to be tangled beyond salvation. Frequently a solution will occur to

you the next morning when you plunge back in. While you slept, your writer's mind didn't. To some extent a writer is always working. Stay alert to the currents around you. Much of what you see and hear will come back, having percolated for days or months—or even years—through your subconscious mind, just when your conscious mind, laboring to write, needs it."

—William Zinsser, *On Writing Well* 126 (5th ed. 1994).

Explanation

Few legal writers seem to think of their work as being essentially creative. They often think that writing well is simply a matter of finding the law and getting it down.

In fact, though, every brief presents opportunities for creativity—for imaginative approaches that will convey the point most effectively. In Example A below, Mike Hatchell of Tyler, Texas, begins a motion for rehearing with a play, in which the lawyer tries to make sense of an intermediate court's holding. Not only did Hatchell succeed in persuading the court to accept the appeal it had earlier rejected, he also succeeded in having the lower court's decision altered.*

Example B, by Neal Goldfarb of Washington, D.C., also contains a "Prologue," but it's not in the form of a play. Instead, he uses a series of hypotheticals to open an amicus brief on behalf of three victims'-rights organizations. In doing so, he takes a difficult constitutional issue and frames it favorably for his clients.

All of this is not to suggest, of course, that you should start writing fictional prologues in your briefs. Instead, you should think hard about how best to get your point across. You may think of apt illustrations, analogies, diagrams, and other devices. Don't stop when you've thought of the most obvious approaches. Delve more deeply.

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* *See Caller-Times Pub. Co. v. Triad Communications, Inc.*, 826 S.W.2d 576 (Tex. 1992).

Example A

[The "Prologue" follows a listing of points of error, which were required in Texas appellate practice until 1997.]

"The court of appeals erred in failing to reach and sustain Caller-Times' Point of Error No. 13, because there is no evidence to support Triad's tortious interference claim, as submitted and determined in Questions Nos. 7–8 (Tr. 113, 125–127, 129–130, 153–154; IV S.F. 113–114; V S.F. 113–114, 120; MFR Assignment No. 50.)"

9.

The court has erred in failing to grant Caller-Times' application for writ of error and to reach and sustain Caller-Times' Conditional Assignment No. 2, which reads as follows:

"If it is determined there is a scintilla of evidence to support Questions Nos. 7–8, the cause should be remanded to the court of appeals to rule on Caller-Times' Conditional Point of Error No. 14, which is in the exclusive jurisdiction of that court, reading as follows:

'*** (T)he trial court erred in failing to grant defendant's motion for new trial, because the jury's answers to . . . [Questions Nos. 7–8] . . . are not supported by factually sufficient evidence or are against the great weight and overwhelming preponderance of the evidence.' " (MFR Assignment No. 51.)

PROLOGUE

"Well, apparently not in Texas . . ."

Scene: Corporate board room of Widgets & Surfboards/Plus, Inc., a manufacturer of widgets, surfboards, and gadgets with a major share of the Corpus Christi market and minor facilities in El Paso and Texarkana.

Players: The Chief Executive Officer, three directors, and the corporate counsel.

Staging: A conference table, a Black's Law Dictionary, a Webster's Dictionary, a telephone, a newspaper, and a large bottle of Tylenol.

CEO: Gentlemen, I got good news and bad news. The bad news is that sales have been soft this quarter and, with the payment of our retainage to settle that injury suit against one of our truck drivers, profits are "zilch" this quarter; in fact, we've sustained about a 10% loss. Now, we've got to do something to turn this around.

Director/1: What do you suggest?

CEO: Well, I think the price of our widgets is at the limit, and, if we lower it about 20%, we ought to be able to increase sales, reduce our per product overhead by using up some idle plant capacity, and, maybe, even permanently increase our market share. That oughta turn profits around real quick.

Director/2: Great, let's do it!

Counsel: Not so fast! That may be illegal!

Director/3: Come again?

Counsel: Yeah, there's this new case out of the Corpus court construing the Texas Anti-Trust Act—Caller-Times versus Triad. It says: if a business tries to increase its market share—in other words, if it takes business away from its competitors—by cutting its prices and the price is cut by a percent greater than the business's profit margin, that's evidence of what's called "predatory pricing," and we can be sued by a competitor for treble damages.

CEO: You've got to be kidding?

Counsel: I'm dead serious. And, you see, since we have a zero "profit margin," we can't lower prices. In fact, this case is so dangerous, I was prepared to suggest we raise our prices 10% on all products, because, under that case, if we maintain our present prices in the face of this loss, that might be considered a *de facto* cut and our present prices might be illegal—or might become illegal even as we speak.

The court didn't distinguish between product lines in that case, either—didn't seem to make any difference. So, even if the price of our widgets is way over what it costs to make them—especially with higher production—we still run the risk of predatory pricing—because, you see, the evidence in that case was just overall "profit margin."

Director/3: But, look, to raise our prices now when we need to lower them—and we can lower them and still make money—that's economic suicide. It's just insane!

Director/2: Now, wait a minute. Look at today's paper. Here are all these businesses advertising 25% off, 33% off, 50% off, here's one even 75% off. You know, Oriental rugs are 50% off all the time. Now, I know none of these businesses have

that kind of profit margin—except maybe Oriental rugs. Are you telling me they're all violating this law?

Counsel: Well, let me put it this way. No one can say they're not—that's because you can't say what their profit margin is when these cuts are made. I bet they don't have a clue about what their profit margin is during these sales. They're all at risk under this case.

Director/1: Let me get this straight! I can understand why someone might say we can't lower our prices to a point that we consciously take a loss on that product just to increase our market at a competitor's expense, but what does profit margin have to do with that? It's just some balance sheet deal—a function of overall operations, bookkeeping transactions, maybe bad investments, off-the-wall accounting theories, like FASB-38, and all that—none of which has anything to do with whether we make money selling a product—like widgets.

My gosh, you just heard that our profit margin—or the lack of it—is due to stuff that doesn't have anything to do with making money from sales—especially widgets. This is crazy!

Counsel: I know—but it's the law.

Director/1: Well, at what point in time do we compute this "profit margin" test? Is it today's or last month's or last quarter's?

Gosh, we might actually have a favorable profit margin next quarter after we lower prices—especially if we can increase cash flow and we don't have these extraordinary expenses unrelated to production. Are we stymied because we didn't make money this quarter?

Counsel: That's a good question. This Caller-Times case doesn't really say. The testimony they used didn't identify if it was today's margin or last year's or just some historical average—as I say, it was just "profit margin." There were just a couple of lines of testimony about it.

Director/2: Well, can't we just refigure our "profit margin" under some other theory? Is it cast in stone how you compute that? I mean, how did the Corpus court figure it?

Counsel: They just took a definition from *Black's Law Dictionary*. Here it is:

> "Sales minus all expenses as a single amount. Frequently used to mean the ratio of sales minus all operating expenses."

Director/1: They define an economic concept from a law dictionary?

Counsel: Yep!

CEO: But I still don't understand what "all operating expenses" has to do with the profitability of the price of one product. Is Black's definition related to antitrust law? What reference does Black's give for that?

Counsel: It doesn't—no texts, no cases, no nothing. You can't tell what they're talking about.

Director/3: Look, Webster defines it differently.

> "The minimum return or reward, barely covering the costs of production."

Now, that seems to me to be more what we're talking about here. The cost to produce one product.

Which dictionary definition do we use?

Counsel: Don't ask me.

CEO: Well, if the lawyers don't know, I certainly don't.

Counsel: Don't get mad at me. I didn't write the silly thing.

Director/3: Call the accountant. Maybe he can help.

CEO (after dialing): Charlie, this is Mack over here at Widgets & Surfboards/Plus. We need some help. How do accountants figure "profit margin"?

Offstage Voice: Well, that's not an accounting term. We don't recognize it in any official way. It can mean just about anything. In the eye of the beholder, so to speak. I can give you a bunch of textbook definitions, but they're all different.

CEO: Oh, great.

Offstage Voice: This must be about that Caller-Times case. Everybody in town has been calling me about that. You seen today's paper? All the guys running sales are in a sweat. Nobody believed this case was for real. Pretty weird, huh?

CEO: Yeah, and scary, too. Makes you wonder if this is the USA or "The Twilight Zone." Well, thanks.

[Hangs up phone.]

Terrific! The lawyers can't tell us what we can do or what test to follow, the accountants can't tell us. What did the trial court tell the jury in that Caller-Times case?

Counsel: That's an interesting question. In fact, in that case the plaintiff said there wasn't any test other than intent to target your competitor's customers with low prices, even if they were profitable, and Caller-Times said you should use a test out of the federal Fifth Circuit that asks whether the price is below "average variable cost." That's a complicated economic term, but at least you can figure it out using standard economic data.

So, what happened—the court didn't tell the jury anything. This "profit margin" business was invented in the appeals court.

CEO: All right, what you're telling me is that this case was—what do you lawyers call it—"affirmed"?—on some theory that neither party said applied, that the judge didn't tell anybody about, and the jury didn't know anything about?

Counsel: Precisely.

Director/2: Is that legal?

Counsel: Well, it happened. Now "fair" or "logical" is another matter altogether.

CEO: Is it correct to say, then, that the only way we can know if our prices today are legal or illegal is to get ourselves sued? Then some months or years down the road, a jury tells us, but they don't have any rules to go by—other than maybe big guys versus little guys? And, that jury finding can be upheld by looking at some law dictionary and, then, figuring out what our profit margin was sometime—doesn't make any difference when?

Counsel: That's about the size of it.

Director/3: This Caller-Times case—is that the last word?

Counsel: Well, at least here in Corpus it is. Now, I don't know what the other courts of appeals will do.

Director/1: Well, what can they do?

Counsel: They can adopt some different test and different evidence rules.

Director/2: Get serious! You mean if our prices here in Corpus are illegal, still, the same kind of prices under the same circumstances can be okay in Texarkana or El Paso?

Counsel: That's exactly right. Corpus decisions just bind Corpus. There could be as many as 14 different tests.

In fact, it's pretty certain there will be other tests. The federal circuits—and our act is supposed to be construed in line with federal precedent—have adopted various definitions of "predatory pricing," but they all use an economic test based on "cost" of the goods versus price.

There isn't any case anywhere that's allowed "profit margin" to prove cost to make one product. And, for obvious reasons—you can see, our profit margin says very little about what it costs to produce and sell our widgets—in fact, it may be terribly misleading in that regard. We make good money on widgets.

Director/3: Tell me this is just a bad dream! I mean, won't the Supreme Court just straighten this thing out?

Counsel: Well, you would think so. The specialist antitrust lawyers are in an uproar about the case—really, it's so ludicrous, they just laugh at it. There was this speech in Dallas last week about it—pointed out that even the test Corpus purports to adopt makes "***mince meat***" out of its reasoning and result.

So, everybody has just assumed the case will be reversed or sent back because it was tried on the wrong theory, or something. But, bad news! The supreme court dodged the issue. It denied writ of error on September 6.

CEO: What did it say?

Counsel: Nothing.

Director/1: What's the basis for that?

Counsel: Well, about all you can tell is that the court thinks this just isn't important to the jurisprudence of Texas—that's their test for hearing cases.

CEO: You mean, stating a test for predatory pricing under this statewide act

. . . and saying how we can figure out whether or not we're violating the act today so we can stay out of court and stopping all these different tests from being created for different parts of the state

. . . and keeping businesses from being dragged through the courts maybe with different results in different parts of the state for the same conduct—all because nobody knows what the test is

. . . that's not important?

Director/2: Yeah, I thought the whole purpose of law was to have one place you could go look and tell what the rules are so you know how to stay out of court—so we can obey the law and avoid all this litigation expense. What's more important than that? Results? Why do we even have a Supreme Court, if they won't speak on those kinds of problems?

Counsel: Good question. These are hard cases. Murky economic concepts and all that—they're really tedious.

CEO: I'm not sure that really explains anything. I mean, it's the *supreme* court, isn't it?

[Silence. All stare into space. CEO takes Tylenol.]

Anybody got any bright ideas?

Counsel: Well, I do have a couple. This is the good news Mack was referring to. Let's try to make the best out of a bad situation.

We've just learned that our principal competitor that has the lion's share of the market out in El Paso—since it had to pay a big fine to EPA last and used some loss carryovers—didn't show a profit last year. Now they're offering a 25% discount on widgets this quarter.

On the other hand, since we just collected on these big open accounts claims we had to sue on, plus a lotta prejudgment interest, that gives us a profit margin of about 45%—at least this quarter.

So, I say we lower our prices on widgets out there about 40%—at least to our competitor's customers; now we may actually have some losses on that, but it's clearly legal to do it—that's what happened in the Caller-Times case. At the same time, we write them a letter claiming their prices are "predatory."

One of two things will happen: They have to jack their prices back up under this Corpus case, and, then, we oughta be able to run them out of their market pretty quick—then, we will raise our prices back to super-profitable levels. Or, if we fail—and that might actually be the better thing to happen, since El Paso is marginal anyway—we close down the plant and sue them for treble damages.

Director/2: Good thinking! All we've gotta do is prove their "profit margin" last year, some price cut greater than that and the fact they want us out of the way—right?

Counsel: Right! And, that's a cinch. Then, we get the right jury and it's "Katy, bar the door."

Director/2: Well, sounds pretty unsavory to me, but the way I look at it, what's sauce for the goose—and all that.

Director/1: Yeah, if these laws work that way, there's no reason we shouldn't play the game.

Director/3: Now, this just sounds like another tort theory to me. And another thing, it pretty much allows us to control our competitor's business—kinda creates a reverse monopoly, so to speak.

CEO: One thing is curious to me. The customer gets the short end of the stick in all this. They pay our competitor's higher prices if we force them up. Or, they pay our higher prices if we force our competitor out. And, they pay higher prices that now have to be maintained because of fear of these suits under this Corpus case.

But I was always told these antitrust laws were supposed to benefit the public with more competition and lower prices.

Counsel: Well, apparently not in Texas . . . .

BRIEF OF THE ARGUMENT

This portrayal is not a figment of the imagination. It is already being played out in the offices of the financial advisers and legal counselors to businesses all across the state. Sadly, apart from the derision and ridicule to which the Corpus court's opinion has been subjected (it has yet to find a scholarly champion, only critics, e.g., Appendix A), the most common response is frustration and disappointment with the system.

Frustration because legal advisers who genuinely wish to give their clients sage advice on how to properly price products under the Texas Antitrust Act have no tools with which to do so; they have no definitive test from the court of last resort; they have no certain evidentiary standards; they only have a result that has no analogue in antitrust law anywhere, that resorts to bizarre, worthless criteria, and that is so internally inconsistent, it actually repudiates itself.

Example B

PROLOGUE: THREE CASES

1.

Consider the hypothetical case of Peter Alladyn and John Powell.

Alladyn was an enforcer for the mob; Powell was a small-time hood who aspired to move up in the criminal pecking order. Powell heard that there was a contract out on Thomas Hope, and he wanted to be the one who did the job. Since he had never before killed anyone, he went to Alladyn for advice. Alladyn spent an hour with Powell, giving Powell the benefit of his experience. Alladyn told Powell what kind of gun to use, how to alter the gun to make it untraceable, where to aim (the head, preferably the eye sockets), how many shots to fire (at least three), and many other helpful hints.

Powell followed Alladyn's advice. He used the kind of gun Alladyn had recommended, he altered the gun as Alladyn had recommended, and he shot Hope three times in the head as Alladyn had recommended, killing him instantly.

After an investigation, the police arrested Powell and charged him with Hope's murder. At the police station, Powell broke down and confessed. He told the police about the advice he had gotten from Alladyn. The next day, Alladyn was arrested and charged with aiding and abetting murder.

When Alladyn was arraigned, his lawyer moved to dismiss the charges. "Your honor," he said, "the charges against my client are barred by the First Amendment. The First Amendment protects freedom of speech. And the only charge against my client is that he spoke to John Powell; Mr. Alladyn isn't charged with doing anything other than speaking. Since speech is protected by the First Amendment, the charges have to be dismissed."

In the back of the courtroom, several lawyers tried to stifle their laughter. The

prosecutor approached the lectern, but the judge waved her away. "I don't need to hear from the State," he said. "The motion is denied."

2.

Now consider a variation of the first case. The facts are the same, but with one change. When Powell went to Alladyn for advice, Alladyn didn't have an hour to spare. So he gave Powell a book, *Hit Man: A Technical Manual for Independent Contractors*, written by "Rex Feral" and published by Paladin Press. "Read this," Alladyn said. "It will tell you how to do it."

Powell read the book and followed its instructions. He killed Hope, he was arrested, he confessed, and he told the police about the book he had gotten from Alladyn. Alladyn was arrested and charged with aiding and abetting. His lawyer made the same motion to dismiss. "The only charge against my client is that he gave someone a book," he said. "Books are protected by the First Amendment." This motion, too, was denied.

3.

Finally, consider the case now before this court. The facts are similar to those of the hypotheticals, except that the killer was not John Powell but James Perry; that he obtained the book *Hit Man* not from Peter Alladyn but directly from the publisher; and that the victims were not imaginary Thomas Hopes but three real human beings.

Those differences aside, the three cases are in all important respects identical. Paladin acted with the same knowledge and intent as Peter Alladyn: Paladin stipulated for the purposes of its summary-judgment motion that in publishing and selling *Hit Man*, it "intended and had knowledge that [the book] would be used, upon re-

ceipt, by criminals and would-be criminals to plan and execute the crime of murder for hire." Moreover, the result in all three cases was the same. Both Powell and Perry followed the instructions in committing murder. And Paladin's motion in the district court was the same as Alladyn's motions in the hypotheticals. But while Alladyn's motions were denied, Paladin's was granted.

Paladin apparently agrees that in the circumstances of the first two hypotheticals, Peter Alladyn could not hide behind the First Amendment.[1] The question raised by this appeal is whether the hypothetical case of John Powell and Peter Alladyn is any different from the real-life case of James Perry and Paladin Press.

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[1] *See* Paladin Memorandum in Support of Motion for Summary Judgment at 33 n.24 (D.E. 18).