Appellate Briefs

Roadmap

- The purpose of an appellate brief is to persuade a court to reverse or affirm a judgment or order below. An appellate brief should not attempt to retry the case.

- An appellate brief should show:

    - that there was or was not error below—that the decision below was incorrect or correct under the applicable standard of review; and

    - that the error requires reversal because the error was not harmless, or does not require reversal because the error was harmless.

- An appellate brief is made up of separate components, usually prescribed by local rules of procedure. Typical components include a statement of issues on appeal, tables of contents and authorities, statement of the case, statement of facts, summary of the argument, discussion or argument with headings and subheadings, and a conclusion.

- The issues on appeal should specifically identify the alleged error or lack of error below. Often whether an error was harmless or reversible is not identified as a separate issue on appeal since it is generally always an issue.

- The statement of the case should set out the relevant procedural history of the case and should also contain the essential reasons why the decision below should be reversed or affirmed. Accurate citations to the record for each fact or document are essential.

- The statement of facts should tell an accurate story that will make readers want to adopt your legal positions and that gives them enough information to be able to do. Accurate pinpoint citations to the record for each fact are essential.

- The purpose of the discussion or argument is to show readers how to rule in your client's favor and why they should do so. This involves making your points as clearly as possible, which usually means organizing complex information so that readers can understand it as easily as possible. It also involves showing why your positions are the better alternative.

- The conclusion section of an appellate brief is usually short reiteration of the request for the relief that you seek.

A. The Purpose, Audience, and Goals of an Appellate Brief

The purpose of an appellate brief is to persuade the court to reverse or affirm a judgment or order below. A judgment terminates the lawsuit and sets forth the parties' rights and obligations. For example, a judgment may be entered in favor of the defendant dismissing the lawsuit with prejudice, or entered in favor of the plaintiff and awarding damages. An order is a command by the court that allows, requires, or forbids something from occurring. Most

appeals are required to be from judgments or final orders to avoid piecemeal appeals.

The party appealing from the judgment or order is usually called the "appellant" especially if the appeal is by right, *e.g.,* an appeal of a final judgment to an intermediate appellate court. However, if a party must petition for review or certiorari in order to proceed, that party is often called the "petitioner." The party opposing the appeal is usually called the "appellee" or the "respondent." It is important to check local rules to make sure you refer to your client with the correct term. In this book, we use the term appellant for the party seeking reversal of a judgment or order, and appellee for the party opposing the appeal and seeking affirmance of the judgment or order.

1. Audience

The audience for appellate briefs will be an intermediate appellate court or a court of last resort. The focus and role of each are somewhat different. The focus of an intermediate appellate court is chiefly on error correction. Courts of last resort also correct errors, but in addition, make policy, make new law, and extend or clarify existing law much more than intermediate courts.

Unlike the trial court, in both intermediate appellate courts and courts of last resort the audience includes more than one decision maker (usually at least three), and you will need to persuade a majority of them to reverse or affirm. Thus, keep in mind that some of your audience may lean favorably toward your position from the outset, some may be hostile, and some may be neutral—and it is often the neutral decision makers who will cast the deciding vote.

a. Intermediate Appellate Courts

The vast majority of appeals are to intermediate appellate courts. At the intermediate level, cases are usually heard and decided by a three-judge panel. One judge is usually assigned as the "writing judge," and this person and a law clerk or court attorney will be the

primary audience for the brief. In most cases, you will not know who the writing judge is until the opinion is issued, however. The other two judges on the panel (and perhaps their law clerk or court attorney) will also review your brief. The writing judge will change if the other two judges do not agree with his or her analyses or conclusions regarding the appeal. In that case, one of the other two judges on the panel will issue the opinion.

The writing judge on the intermediate appellate level will likely spend more time reading the brief than a trial judge spends reviewing a memorandum in support of or opposition to a motion. The person who will probably spend the most time with your brief, however, is the judge's law clerk or the court attorney who is charged with working up the appeal. Working up an appeal involves reading the briefs, reviewing the record on appeal, researching and analyzing the law, and then preparing a bench memorandum or drafting an opinion for review by the judges on the panel. The law clerk or court attorney will probably have and take more time to review your brief than the person assisting a trial judge, but your matter will be one of many they are working on. Thus, you will still want to be as concise and direct as possible. This means working hard on your drafting to ensure your organization is easy to follow and that your points and arguments are easy to grasp—even, or especially, if they are complex.

Since the focus and function of intermediate appellate courts is primarily on error correction, the appellate briefs should concentrate on whether the correct law was applied and whether it was applied correctly. Hence, arguments would focus on what the correct law *is* rather than what the correct law *should be*. Policy argument may help support arguments regarding which law is correct or how a law is correctly applied, but they should not be your primary support.

Sometimes an intermediate appellate court will be in the position of making new law or clarifying existing law, *e.g.*, where a statutory scheme is new or recently amended. Also, some intermediate appellate courts are more inclined and in a better position to make policy, *e.g.*, United States Courts of Appeals. In general, though, the primary focus of the appellate brief in an intermediate appellate court will be whether, under existing law, there was error below.

Also keep in mind that intermediate courts of appeal are much more likely to affirm the judgment or order of the trial court than reverse it. Indeed, one study indicates that in the past decade, the affirmance rate in the United States Court of Appeals was approximately 90%. Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 Fla. St. U. L. Rev. 357, 358 (2005).

b. Courts of Last Resort

If the appeal is heard by a court of last resort, *e.g.*, the United States Supreme Court or a state supreme court, your brief will be read by as many as nine decision makers (usually referred to as "justices") as well as their law clerks or court attorneys. The number of justices sitting on courts of last resort varies, *e.g.*, the United States Supreme Court has nine, the California Supreme Court has seven, and the Tennessee Supreme Court has five. In some courts a writing judge may be tentatively assigned before the case is heard; in others the writing judge is decided after the matter is heard and the judges have conferred. One thing is certain: your brief will have a significantly larger primary audience than in an appeal to an intermediate appellate court. Also, if review is discretionary, it is guaranteed that a certain amount of the primary audience thinks that the issues presented are significant. (Not all appeals to courts of last resort are discretionary. For example, review by the California Supreme Court is automatic in cases in which the death penalty has been imposed.)

Since courts of last resort have a more expanded role than intermediate appellate courts, they will entertain and, indeed, expect policy arguments to aid them in determining the law, making new law, and clarifying existing law. Justices and their law clerks or court attorneys will also have and take more time reviewing your brief. However, it is important to make your points and arguments as clearly as possible. You will still need to show whether or not there was error and why. Policy arguments involve demonstrating why your position is the better one among choices. In order for policy arguments to be

effective, drafters must first convince the court that their basic legal positions are sound and well supported.

Generally, courts of last resort are not as likely to affirm as intermediate appellate courts. In fact, during the same period that the United States Court of Appeals affirmed 90% of their cases, the United States Supreme Court *reversed* 64% of its cases. Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals,* 32 Fla. St. U. L. Rev. 357, 358 (2005).

Briefs in moot court competitions are often styled for the United States Supreme Court, but are read and scored initially by lawyers or law students. In these competitions it is essential that the briefs be easy to read and understand. Readers may have long, multiple factor scoring sheets, but the reality is that most will rank the briefs based on their overall impression, ease of reading experience, and technical errors like typographical and citation form errors, and assign scores accordingly. As the rounds advance, it is more likely that actual judges will be scoring the briefs, and briefs with the more sophisticated and artful arguments should prevail. However, to make it to the advanced rounds your brief must be easy to read and free from error.

2. Goals

If you are representing the appellant, your goals in drafting the brief are to convince a majority of the judges or justices deciding the case that:

(1) there was error below—that the decision below was incorrect under the applicable standard of review, that is, *it was incorrect to the appropriate degree*, and

(2) that the error requires reversal—that the error *matters* because it sufficiently affected the result below. In other words, it must be reversible or prejudicial and not harmless error.

When representing the appellee or respondent, your goals in drafting the brief are to convince a majority of the judges or justices

deciding the case that:

(1) there was no error below—that, at minimum, the decision at issue *was not incorrect to the appropriate degree*, and

(2) even if there was error, that error was harmless—that it does not warrant reversal because it did not sufficiently affect the result below.

Accomplishing These Goals: Developing a Message

As with trial briefs, drafters of appellate briefs to both intermediate appellate courts and courts of last resort should develop a message through which to package and market their arguments. To develop an effective message, focus on the judgment or order being appealed. If you represent the appellant, ask: How is it vulnerable? What are the essential weaknesses and flaws that you think warrant reversal? How do they relate to each other? How might you link them? If you conclude there is only one ground for reversal, how do you best describe it so it will quickly and easily resound with readers? If you represent the appellee, what shields the judgment or order from attack or makes it irreversible? Since you will already know the appellant's grounds for appeal, ask: What are the flaws or weaknesses in those grounds? Is there a fundamental flaw that permeates them?

Going through this process will help you to package and organize your arguments, and will focus your drafting. Your mission is to file a cohesive brief that, *as a whole*, persuades the court to reverse or affirm the decision below, rather than a brief that constitutes an assortment of arguments.

Finally, an overarching goal for both appellant's and appellee's counsel is to draft a brief that the appellate court adopts in whole, or in large part, as its own opinion in the case. This demonstrates that the drafter has persuaded the court and made it very easy for the court to rule in her client's favor by adopting their positions.

For further discussion on developing a message in persuasive drafting, see Chapter 6, section A.

B. Standards of Review and Reversible versus Harmless Error

The standard of review on appeal is the filter through which the decision below is evaluated. Sometimes it is enough merely to show the decision below was wrong; other times you must show it was "clearly wrong," or an "abuse of discretion," and so on. Deciding whether there was error is only the first step in the appellate court's decision making process, however. If the court finds error, it must next decide whether the error requires the judgment or order to be reversed, *i.e.*, whether the error is reversible or harmless. This inquiry requires evaluating whether and how the error affected the overall result.

1. Standards of Review

Despite the many articulations of the standards of review that are discussed below, the human mind generally only applies two: deferential and non-deferential review. Deferential review is generally applicable to factual determinations and matters within the trial court's discretion. This makes sense as the jury, court, or agency below is the body that received the evidence and made its factual findings accordingly. A reviewing court is not in a position to have enough information to reliably review every nuance of the proceedings below. Similarly, the deferential standard of abuse of discretion is reserved for decisions particularly within the trial judge's province such as courtroom management matters.

Non-deferential review is a different story. Non-deferential review is usually applicable to questions of law. In these situations, the reviewing court is in just as good a position as the court below to pass on these issues.

However, even when the standard of review is non-deferential, at the intermediate appellate court level there is an unwritten presumption of correctness in favor of the trial court. This

presumption is generally not present or not as strong in the case of discretionary review of cases in courts of last resort.

Keeping in mind the observation that there are probably really only two basic standards of review in practice—deferential and non-deferential—spread along a spectrum, here are four basic standards of review as well as the one used by the Tennessee Appellate Courts:

(1) *De Novo* (Wrong);
(2) Presumption of Correctness (Tennessee) (Pretty Wrong);
(3) Clearly Erroneous (Very Wrong);
(4) Substantial Evidence (Very Wrong);
(5) Abuse of Discretion (Very, Very Wrong).

If the applicable standard of review is not satisfied, the decision or action below will be upheld.

De Novo: Wrong

Under the *de novo* standard, the appellate court reviews the question anew, on its own, with no deference given to the lower court's decision on the matter. The court need only find that the decision below was incorrect. The appellate court is under no constraints. It does not have to give any nod, respect, or deference to the court below.

De novo review typically applies to questions of law, for example, the proper interpretation of a statute or the determination of whether a statute is constitutional. Typical statements of this standard of review are: "This is a question of law which we review *de novo*" or "We independently review whether *x* applies to juveniles."

Presumption of Correctness (Tennessee): Pretty Wrong

Apart from the four standard standards of review discussed above and below that permeate the Federal and many state court systems, some jurisdictions have their own enunciations of their standard of review. When faced with a differently enunciated standard

of review, it is important to understand its nuances, both as the standard is stated and as it is applied—remember to watch what courts *do* as well as what they *say*. Tennessee appellate courts, for example, afford a trial court's findings of fact "a presumption of correctness, which is overcome only when the preponderance of the evidence is contrary to the finding of fact."

This standard of review applies to a Tennessee state trial court's findings of fact. There appears to be a lot of wiggle room in the wording of this standard, which affords the appellate court more flexibility should it choose to use it and deniability should it choose not to do so. On one hand, there is a presumption of correctness. On the other hand, the appellate court may conclude that the evidence preponderates the other way.

We have included the Tennessee standard of review as an example of the many permutations of standards among the various jurisdictions. It is important in each appeal to correctly articulate the standard used in the jurisdiction. Not only might it make a substantive difference (as in the case of Tennessee), even if it is only a matter of "semantics," articulating a different standard than the one used by the court will reflect poorly on the drafter and his or her brief.

Clearly Erroneous: Very Wrong

A finding is clearly erroneous where the appellate court is said to be "left with the definite and firm conviction that a mistake has been made." As long as the findings are plausible, they will not be set aside, even if the appellate court would have reached a different result.

The clearly erroneous standard generally applies to trial court findings of fact in the federal system and elsewhere. A typical enunciation of this standard of review is "Although we might have found differently, we cannot say that the trial court's findings are clearly erroneous."

Substantial Evidence: Very Wrong

When the substantial evidence standard is used, the appellant must show that the decision or finding is not supported by "substantial evidence"—often referred to as evidence that is reasonable, credible, and of solid value. The appellate court reviews the issue in the light most favorable to the finding and makes all reasonable inferences in the finding's favor. This standard may sound rather favorable to the appellant, but as a practical matter, it is not. The appellant must show there is *no* substantial evidence to support the decision or findings. Often the court, aided by the respondent, can find *some* substantial (reasonable and credible) evidence in the record. The substantial evidence standard often applies to findings of fact made by a jury and, in California and many other jurisdictions, also to findings of fact made by the trial court.

Abuse of Discretion: Very, Very Wrong

Under the abuse of discretion standard, the appellate court must conclude that the court below abused its discretion in making the decision. The court must find that the decision below was very, very wrong. This usually means the trial court acted arbitrarily, capriciously, or "outside the bounds of reason."

This standard often applies to sanctions, courtroom management issues, protective or sealing orders, or decisions regarding whether or not to admit certain evidence. Although difficult, the standard is not impossible to meet, and often comes down to the court not doing its job. For example, "a district court may abuse its discretion by ignoring a material factor that deserves significant weight, relying on an improper factor, or even if it mulls over the proper mix of factors, by making a serious mistake in judgment." *Siedle v. Putnam Inves., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998). In the *Siedle* case, the trial court rescinded an order sealing the record "after a brief colloquy with counsel" without writing a decision or otherwise stating its reasons. The appellate court reversed, stating "In this instance, we discern no evidence that the district court identified and balanced the interests at stake, or that the court endeavored to determine whether any information contained in Siedle's filings actually fell within the ambit of the attorney-client privilege. In the circumstances at hand, these

omissions amounted to an abuse of discretion." In other words, the court below had not done its job.

2. Reversible versus Harmless Error

If the appellant successfully convinces the appellate court that there was error under the applicable standard of review, the court then determines if the error requires reversal of the judgment or order below.

In appeals where the court has concluded that the jury's or trial court's finding of facts are clearly erroneous or not supported by substantial evidence, this process is compressed. Findings of fact that are not plausible (under the clearly erroneous standard) or unsupported by any reasonable or credible evidence (under the substantial evidence standard) cannot stand, and judgments or orders based on them will be reversed. In other words, if an appellant shows error under the clearly erroneous or substantial evidence standards, reversal is automatic.

Also, certain errors, called "structural errors," require automatic reversal because they render a trial fundamentally unfair or the verdict fundamentally unreliable. For examples of errors involving fundamental unfairness, *see Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (complete denial of counsel*); McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial), *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge). Regarding unreliability, an erroneous jury instruction that misdescribed the prosecution's burden of proving guilt beyond a reasonable doubt was held to require automatic reversal because "it vitiate[d] all the jury's findings" leaving a reviewing court "to engage in pure speculation—its view of what a reasonable jury would have done." *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182, 190 (1993).

If the court determines the error is structural, it will automatically reverse the judgment below. The term automatic is a bit misleading to

the extent it implies that this is a quick and easy process. On the contrary, structural error analyses and arguments are often complex.

If the error did not involve insufficient evidence or was not structural, the court will engage in a harmless error analysis to determine whether and how much the error affected the result at the hearing or trial. The tests used to determine if an error requires reversal or is merely harmless depend on the type of error involved. For example, if the error relates to a right protected by the United States Constitution in a criminal matter, the government must prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction; otherwise, the judgment must be reversed. *Chapman v. California*, 386 U.S. 18, 26 (1967). However, if the error involves only a state rule, a more lenient harmless error standard may be applied. For example, in California cases involving errors of state law, the appellant must show it is reasonably probable that he or she would have received a more favorable result or verdict if the error had not been committed; otherwise the judgment will be affirmed. *People v. Doolin*, 87 Cal. Rptr. 3d 209 (Cal. 2009). In both instances, however, appellate courts weigh the significance of the error against all the other evidence. Whether the error is reversible/prejudicial or harmless is a matter of degree.

It is important to keep in mind this two-step process when drafting an appellate brief: First the court determines whether there was error under the applicable standard of review. If yes, it then considers whether the error requires reversal, which depends on what type of error was committed. With decisions based on insufficient evidence under the clearly erroneous or substantial evidence standards, or structural errors, reversal is largely automatic. In other cases, the court conducts a harmless error analysis under varying standards—depending on the type of error committed. Thus it is possible to win the battle (convince the court there was error below), but lose the war (fail to convince the court that the error requires reversal) and vice versa.

C. Appellate Brief Formats

Always check the most recent rules of the court in which the appeal is pending before drafting your brief. Most appellate court rules state exactly the format required for appellant opening briefs, appellee responding briefs, and appellant reply briefs. These rules will include the sections required in each brief, as well as length and type face requirements. It is particularly important to know the page limitation before starting to draft the brief so that you are sure to come within it.

D. Summary of Typical Appellate Brief Components

Statement of Issues on Appeal. This section identifies the legal questions presented in the appeal. First and foremost, make sure the issues are clear. We recommend using the "whether (legal question), when (essential facts)" format taken from the office memorandum, discussed in Chapter 5 (C)(1).

Tables. These contain the table of contents and authorities cited in the brief. Fill in the page numbers last or code all headings and citations for your word processor's automatic table creation utility. Refer to your appellate rules of court for the order in which to list the authorities.

Statement of the Case. This is where you set out the pertinent procedural history of the case, telling the appellate court what is being appealed, the nature of the action, what happened below, the parties involved, and why the matter has come before the court. It is also your first opportunity to state your reasons why the judgment should be reversed or affirmed—in setting forth or responding to the grounds for appeal.

Statement of Facts. This is where you set out the relevant facts that were heard or considered by the court or jury in rendering a decision.

You are limited to evidence in the record and must provide cites to the appellate record for every fact you describe. Some jurisdictions require the statement of the case (procedural facts) and the statement of facts to be set forth in one section usually called “The Statement of the Case.” If this is the case, the procedural facts should come first to establish context and background.

Summary of the Argument. The summary of the argument provides the road map for the brief and is where drafters deliver their message —their theory, theme, or pitch—for reversal or affirmance of the judgment or order. First tell the court what you want it to do—affirm or reverse—and then the grounds for that action. Clearly and concisely state the legal and factual basis for your appeal or response citing the most important legal authorities.

Discussion/Argument with Headings and Subheadings. The discussion section forms the heart of the appellate brief. Like the trial brief discussion section, this is where you show the court in detail how to rule in your favor and why it should. Showing the court how to rule in your favor involves presenting your points clearly and showing that your positions are sound and well supported. Showing the court why it should rule in your favor involves convincing the court that your points and positions are not only sound, but also that they are the best way to resolve the issues (or at least that they are better than the opposite side’s). Headings flag the issues in a way that summarizes and advances the main point made in each section.

Conclusion. In this section drafters briefly remind the court of what they want it to do (affirm or reverse) and, if court rules allow, the main reasons in support.

E. Drafting the Components of the Appellate Brief: Order and Timing

The table of contents and the table of authorities should always be drafted or generated last, after the rest of the brief is complete, to ensure the entries and the corresponding page numbers are accurate. *Any* change made in the brief, no matter how small or minor may cause the pagination to change.

The sequence in which the other components are drafted varies from lawyer to lawyer. Some proceed in loose order from beginning to end, starting with the statement of issues, followed by the statement of the case, statement of facts, and the discussion/argument, and then go back and draft the summary of the argument and the headings once the analysis and arguments have gelled. Others begin with the headings as a way of outlining the argument, and then draft the statement of the case and the statement of the facts to set up the argument they have outlined, and then draft the summary of the argument and the discussion/argument section. Some draft the discussion/argument section first. There are risks in drafting the discussion/argument before the statement of facts because the drafter may mistakenly rely on and include facts in her analysis that are not actually in the record. For example, she may be quite certain that a witness made a particular statement, but later be unable to find it in the trial transcript.

No matter what order you choose to draft the appellate brief, approach the process as a series of discrete smaller tasks rather than one giant, looming job. It is best to start drafting as soon as possible and calendar enough time to complete each task well before the filing deadline. Do not wait until you think you have found all the cases and all the answers—because you will not know what additional cases you need and what all the questions may be until you start drafting. Also leave plenty of time to proofread the appellate brief. Once you are sure it is error-free, the tables of contents and authorities can be generated. Generating tables often takes longer than expected and often reveals proofing errors such as alternative spellings of the same case that will need to be corrected.

If you are not sure where to begin, start with one that seems easiest, *e.g.*, a particular subsection of the discussion. For more discussion on the drafting process, see Chapter 2 and Chapter 6, section D.

F. Individual Components

1. Issues on Appeal

The Statement of Issues on Appeal describes the issues the court is being asked to address and decide.

If you represent the appellant, the issues on appeal should identify the individual grounds on which you believe the judgment or order below should be reversed. If the same attorneys that handled the case at the trial level are handling the appeal (and this is often a mistake as new counsel can bring an unbiased eye to the record), their initial reaction may be that there are many, many errors or that the court or jury "got it wrong." It is important, however, to isolate the issues and errors that are likely to result in reversal because the case cannot be retried on appeal. This requires examining the record objectively with the various applicable standards of review and harmless error standards in mind.

In other words drafters must first identify a specific *error*. Then they need to examine the likelihood that that error will mandate a reversal. This involves assessing the type of error involved and applicable harmless error standard. For example, it may be clear that a court erred in admitting certain evidence, but whether this error would require reversal depends on the strength or impact of this evidence compared to all the other properly admitted evidence. Did the court erroneously admit your client's confession, or did it allow equivocal hearsay testimony from one of many witnesses?

Counsel for the appellant should then phrase the grounds on which they are appealing the judgment or order as issues on appeal. For each ground set out the legal question the court must decide to find error along with the factual context. Appellants generally control the issues to be decided on appeal since the issues reflect the grounds for appeal. Counsel for appellees, however, are not bound by appellants' choice of wording. Rather they will state the issues on appeal so as to advance their reasons for affirming the judgment or order. What is essential for both appellants' and appellees'

statements of the issues is that the issues be set out clearly, specifically, and not in a conclusory fashion.

Whether any error is reversible or harmless does not have to be set forth in the issues on appeal. However, if counsel for the appellant or appellee wants to emphasize this as an issue or advocate a particular standard they should add it to the statement of issues.

Statements of issues on appeal are much like questions presented in an office memorandum. They set out the legal question for the court to decide along with the essential facts that raise the question. We recommend using the "Whether/When" format: Whether (a legal result occurs), when (essential facts)? The question should appear neutral, but think: what ruling do you want the court to make and what *concise* facts support the ruling.

An example of a Statement of Issue on Appeal from Appellant's counsel:

> "Whether a confession is inadmissible on the ground that the defendant's Sixth Amendment right to counsel was violated when police continued questioning him after he stated "I'm thinking I should speak to my attorney."

The first, "Whether," part of the statement of issue contains the ruling the appellant wants the court to make along with the legal ground therefore, and the second, "when," part of the statement contains the essential facts that raise the issue.

Appellee's counsel may phrase the issue this way:

> Whether a confession is admissible under the Sixth Amendment where police ceased questioning the defendant after he stated, "I want to talk to my attorney."

Both statements of the issue identify for the court that the legal issue is whether the defendant's confession was properly admitted under the Sixth Amendment pertaining to the right to counsel. However, the counsel for the appellant and counsel for the appellee have focused on different facts that they considered essential to resolving the issue: appellant's counsel on what happened when the suspect *initially mentioned* an attorney, and appellee's counsel on

what happened when the suspect later stated he *wanted to speak* with his attorney.

Also, neither statement of the issue is conclusory. Conclusory statements occur when the facts are described in such a way that a particular answer is mandated. In other words, do not overstate by answering your own question; do not assume the very point that you are trying to make.

Examples of conclusory statement of issues on appeal:

> Appellant: Whether a confession is inadmissible when the police violated the defendant Sixth Amendment's right to counsel by continuing to interrogate him after he invoked his right to counsel. (If the statement is posed this way, the answer has to be yes in favor of the appellant).
>
> Appellee: Whether a defendant's confession is admissible under the Sixth Amendment where the police honored his right to counsel once he invoked that right. (If the statement is posed this way, the answer has to be yes in favor of the appellee).

Both questions are conclusory because the central issue is *whether* and *when* the defendant invoked his right to counsel.

Also, resist the urge to cram in so many supporting facts that your statement of issue becomes long and muddled. If this happens, your readers will stop reading and skip over it.

If you are having trouble formulating your statement of issues on appeal, put that task aside and revisit it after you have drafted other portions of the brief such as the statement of the case or discussion/argument section.

2. The Statement of the Case

The statement of the case in an appellate brief sets forth the relevant procedural history of the case. Its purpose is to tell the appellate court what is being appealed and to describe the nature of the action, the parties, and how and why the matter has come before the court. The statement of the case is also the first opportunity for

drafters to deliver their message—to set forth their essential reasons why the decision below should be reversed or affirmed. Thus, although the statement of *facts* should be free of legal conclusions or argument, in the statement of the *case,* you may and should advance your legal positions in describing the grounds for appeal or stating the reasons the decision should be affirmed.

Statements of the case in both appellants' and appellees' briefs should begin with a description of the decision being appealed from, *e.g.*, a conviction of first degree murder after a jury trial, a summary judgment dismissing appellant's personal injury suit, an order denying certification of a class action, and the like. If representing the appellant, include the date of judgment or order was entered, state when the notice of appeal was filed and set forth the grounds on which you are appealing the decision. Appellants need to set forth the relevant dates to show the appeal was timely filed.

If you are representing the appellee, you may follow your description of the decision being appealed with the reasons it should be affirmed or, if the statement of the case is relatively short, you may set out the reasons to affirm at the end of the statement—try it both ways and choose. The appellee does not have to repeat the appellants' grounds for appeal, nor is it necessary to include the dates the judgment was entered or the notice of appeal filed unless you are challenging the appellate court's jurisdiction based on failure to file a timely notice of appeal.

Next, this is the typical order for setting forth the additional information in the statement of the case:

1. Briefly describe the nature of the action if it is not already clear from the description of the decision being appealed;

2. In chronological order, set out the pertinent acts and pleadings that led up to the decision, *e.g.* the filing of a motion to exclude the appellant's statement to police, the opposition to the motion, and the hearing on the motion;

3. Set out the court's ruling or decision and its basis (if given) or the jury's verdict. (Often it is unnecessary to repeat the jury's verdict if it is set forth in the beginning of the statement in describing the judgment being appealed); and

4. If representing the appellant, briefly elaborate on the reasons the decision should be reversed. If representing the appellee, set forth the reasons the decisions should be affirmed, or elaborate, as necessary, on the reasons you gave in the beginning of the statement of the case.

For every procedural act described and document filed, provide a cite to the appellate record so that the judge, law clerk, or court attorney working up the case can easily locate the pleading or other document detailing the action. Also, in the statement of the case, define terms for the parties and other persons or entities you refer to frequently in the brief.

Statements of the case vary in length and complexity depending on what happened procedurally in the court or courts below. In some cases the proceedings are simple and straightforward. In others they may be complex and contain the source of the reversible error.

The following are examples of simple preliminary statements in an appeal of a judgment of conviction of first degree murder after a jury verdict. The issue is the admission of statements the appellant made to police.

Appellant's version:

> On March 15, 2009, Appellant Steven Turner ("Mr. Turner") was convicted of murder in the first degree after a jury verdict. (Record on Appeal "R" 978) Mr. Turner filed a notice of appeal on April 12, 2009 (R 981). He appeals his conviction on the ground the court erroneously admitted his statements to police that were obtained in violation of his right to silence under the Fifth amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966). Prior to trial, Mr. Turner moved to exclude statements he made to police on the grounds they were improperly obtained while he

was in custody and after he invoked his right to silence. (R 677) The government opposed the motion. (R 679). After a hearing on the matter (R 688), the trial court denied Mr. Turner's motion to exclude concluding that the statements were voluntary and thus admissible. (RT 690). The statements were admitted into evidence at trial and considered by the jury. (RT 967).

Mr. Turner maintains on appeal that the trial court erred in admitting his statement to police because "voluntariness" is not the standard for admissibility of statements obtained from persons who are in police custody and have invoked their right to silence. Rather, after a person has invoked his right to silence under *Miranda*, police must "scrupulously honor" his right to cut off questioning. *Michigan v. Mosley* 423 U.S. 96 104 (1975). Police failed to scrupulously honor Mr. Turner's right to cut off questioning, rather, they undermined it. This error requires reversal of Mr. Turner's conviction because Appellee cannot prove that admission of these damaging statements did not contribute to the jury's verdict. *Chapman v. California*, 386 U.S. 18, 26 (1967).

Appellee's version:

Appellant has appealed his conviction by jury of first degree murder in the stabbing death of Shawn Martin ("Mr. Martin"). (Record on Appeal "R" 976–78). Appellant was indicted for first degree murder after stabbing Mr. Martin in the back and through the heart. (R 3). Prior to trial, Appellant moved to exclude statements he made to police from evidence at trial. (R 677). The People opposed this motion. (R 679). The trial court, after holding an evidentiary hearing (R 688) and considering the moving and opposition papers as well as the oral argument from counsel, denied the motion, (RT 690) After a six-day jury trial, the jury found Appellant had committed first degree murder. (R 900-910).

Appellant's conviction should be affirmed because his statements were given freely and voluntarily in compliance with the Fifth Amendment. *Michigan v. Mosley*, 423 U.S. 96 104 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966). Moreover, any error in admitting the statements was harmless: The evidence at

trial against appellant was overwhelming and the statements were merely cumulative and did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 26 (1967).

Both appellant's and appellee's statements of the case are accurate and supported by citations to the record, but their messages are different. Appellant's statement focuses on the police officers' conduct and the admission of appellant's statements at trial. Appellee's focus is more diffused—on the nature of the crime, all that the court considered before ruling on the motion, and the length of the trial. The treatment of appellant's ground for appeal is almost matter of fact—implying "all is fine."

In sum, use the statement of the case both to explain the pertinent procedural history to the appellate court, and to deliver your message. The statement of the case is often the first opportunity to package and market your positions, be sure to make the most of it.

Statement of the Case Drafting and Editing Checklist

1. Does the statement of the case begin with the specific decision or action being appealed, *e.g.*, a particular judgment or final order? Does the appellant's statement include the date the judgment or order was entered?

2. In the appellant's brief, is the description of the action or decision being appealed followed by the grounds for appeal? The appellee may choose to state the reasons the decision should be affirmed here or at the end of the statement of the case.

3. Does the statement of the case briefly describe the nature of the case?

4. Does the statement of the case set forth the pertinent parties, persons, and entities and define a term for each?

5. Does the statement of the case set out the pertinent pleadings, hearings, and other acts that led up to the decision with citations to the record for each?

6. Does the statement of the case state the rulings or decisions below and their basis, if given?

7. In the appellant's brief does the statement of the case then briefly elaborate on the grounds/reasons the judgment or order should be reversed? In the appellee's brief does the statement of the case then set forth the reasons the order or judgment should be affirmed, or elaborate, as necessary, on the reasons given in the beginning?

8. Is the statement of the case easy to follow: does it clearly explain what is being appealed, the nature of the case, the pertinent parties and other players, and how and why the matter has come before the appellate court?

9. Does the statement of the case effectively deliver the drafter's message—the essential reasons the judgment or order should be reversed of affirmed?

10. Is the statement of the case free from any grammatical, punctuation, formatting, or proofing errors?

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3. The Statement of Facts

a. Goals

In the statement of the case, you described the procedural posture of the matter and stated your essential reasons why the decision below should be reversed or affirmed. Thus, when readers turn to the statement of facts, they will probably know the nature of the case, the parties, and your basic legal positions. Your goal in drafting the statement of facts is to tell an accurate story that will make readers want to adopt your legal positions and that gives them enough information to be able to do so.

While readers at the trial court level may have been vaguely familiar with the case, readers on the appellate level will usually know nothing about the case except for what you and your opponent tell them and what they find in the record. Appellate court readers must be able to easily understand from the statement of facts what the case is about and what facts form the basis of the appeal. They can only be persuaded by a story they can follow.

Keep your message in mind as you draft and package the statement of facts. This will focus your drafting and help you tell an accurate story that is both easy to understand and persuasive.

Show versus tell: The statement of facts should lay out the specific details that will lead readers to the conclusion you want them to reach. It is much more powerful if they feel they have reached the conclusion themselves than if you tell them what to conclude. Save legal conclusions and argument for the discussion/argument section. Describe the underlying story in the statement of facts.

Finally, keep in mind the overarching goal of having the court adopt your brief in large part as their opinion—this should help keep you on track in drafting a statement of facts that is easy to follow, accurate, and tells the story in a compelling, professional way.

b. Material Facts in the Record

The record consists of the documents from the proceedings below that the parties have designated to be in the record.

Procedures for designating the record vary by jurisdiction, but the basic process is the same: The appellant makes an opening designation of the record, the appellee then gets to counter designate, and the clerk of the lower court transmits the record, as designated, to the appellate court. The degree to which the clerk independently assembles the record or to which the parties are involved in selecting, copying, and binding the documents varies by jurisdiction. The process usually takes place shortly after the notice of appeal is filed to initiate the appeal.

You must include all legally material facts in the record, both favorable and unfavorable. Only facts in the record may be included in the statement of facts in an appellate brief. This means only the facts that were presented to, heard, or considered by the court or jury below can be described in the statement of facts. Thus, for example, a witness must have testified to a fact at trial, or a document containing a fact must have been presented to the court as an exhibit, in order for those facts to be used in the statement of facts. This is why we recommend drafting the statement of facts earlier on in the drafting process—to ensure that all the facts you intend to use in the discussion/argument section are included in the statement of facts and in the record that you designate on appeal.

In addition, every fact set forth in the statement of facts must be accompanied by a citation to the record that enables the person working up the appeal to look up testimony of a witness or review the document containing the facts described. Portions of the record on appeal are described and cited slightly differently depending on the jurisdiction. Often court rules tell attorneys what terms to use. For example, in some jurisdictions, documents filed with the trial court are contained in the “Clerk’s Transcript” on appeal, and witness testimony is contained in the “Reporter’s Transcript.” In other jurisdictions the documents filed with the trial court are contained in what is referred to as “the Record”, and witness testimony is contained in what is referred to as “the Transcript.” Be sure to use the terms the particular appellate court expects and to clearly indicate which portions of the appellate records you are referring to in your citations.

On appeal you should have a good idea of the material facts—those that pertain to the issues on appeal. These are facts that

support or undermine the appellant's grounds for appeal or that support or undermine the appellee's reasons for affirming the decision below. Any fact referred to in the discussion/argument section must be included in the statement of facts. Also, each side will want to include any background or shading facts that help convey the drafter's message.

As with briefs to the trial court, your goal is to emphasize favorable facts and to minimize or diffuse unfavorable facts. You should not omit unfavorable facts from the statement of facts. Not only is this misleading, but you can be sure that any facts unfavorable to your side will be included and emphasized in your opponent's brief. Drafters emphasize favorable facts and deemphasize unfavorable facts through (i) the overall organization of the statement of facts, (ii) placement of individual facts, and (iii) tone and treatment of individual facts.

i. Overall Organization

Tell the story in the order you want to tell it—the order that best conveys your message and places your positions in the most favorable light. This means a logical and persuasive order. Often in appellate briefs, different sets of facts go to different issues, and thus it makes sense to organize the statement of facts by issue. Which issue you begin with depends on your message and the impression you want the readers to have.

For example, in the appeal of the murder conviction addressed in the discussion of statements of the case above, there are two sets of underlying facts: (1) facts (evidence presented to the court) pertaining to police obtaining the suspect's statements, which are relevant to whether the trial court erred in admitting those statement, and (2) facts (evidence presented to the jury) pertaining to the underlying crime, which are relevant to whether any error in admitting the statements was reversible or harmless.

Counsel representing the appellant would probably begin with the facts regarding the police obtaining their client's statements and emphasize any police misconduct. Their goal would be to focus the attention of the readers on the actions of the police.

Counsel representing the appellee would probably begin with a description of the underlying crime using and citing evidence other than the appellant's statements and follow with the appellant's arrest and questioning by the police. Not only is this order chronological, it emphasizes the appellant's crime—which was stabbing the victim to death—and all the evidence against the appellant other than his statements.

Where facts are organized by issue or subject, it is usually best to break them up with short subheadings that describe the issue or subject the facts pertain to. Headings serve as useful sign posts and help make a longer or complex statement of facts easier to follow and easier on the eyes.

Note: The statement of the case should have already set out the nature of the case as well as the parties. However, the first paragraph in the statement of facts should still establish the context for the story that best delivers the drafter's message. In the above example, the appellant would make the context the police interrogation, while the appellee would make the context the underlying crime.

ii. Placement of Individual Facts

Drafters also promote their message in smaller scale organization by placing favorable facts in positions of emphasis, *e.g.*, at the beginning of a section, paragraph or sentence, or at the end with a solid build up. They de-emphasize damaging facts by placing them in the middle of the narrative or the middle of paragraphs or sentences. Sometimes, unfavorable facts can be de-emphasized by being joined or juxtaposed with favorable facts. However, be sure to test these sentences for overall impression to make sure favorable facts are not undermined in doing so.

iii. Treatment and Tone

Just as in briefs to the trial court, emphasize favorable facts by using the active voice, concrete subjects, and active predicates when describing them. In other words, employ all the sentence writing

techniques you have learned so far regarding clarity and getting and keeping the reader's attention.

On the other hand, distance and minimize unfavorable facts with the passive voice. Although you do not want to couch unfavorable facts in confusing, hard-to-read sentences that will call attention to them , your sentences involving unfavorable facts can and should be dull—accurate, but not commanding attention.

Favorable facts should be set forth in vivid, specific terms that convey as much meaning as possible, without going overboard, *e.g.,* "the stabbing" versus "the incident." You may use your own words to characterize facts, including paraphrases of direct quotes, as long as your words are accurate. In treating unfavorable facts, use words that are as bland and general as possible, without being inaccurate. This is the time to use terms like "incident," "matter," etc. Also avoid terms that are used in cases that are unfavorable to your side.

Note, however, it is possible to be too artful in the placement and treatment of unfavorable facts. For example, burying an unfavorable fact so deeply that the drafter appears to be hiding something, like a fatal flaw in their position. Or describing a fact with so bland or vague a term that it becomes absurd, *e.g.*, referring to a fatal stabbing as a "contact." Also, when emphasizing favorable facts, be sure as a drafter to maintain a professional tone and not to stray into the realm of pulp fiction. To test your drafting for effective deemphasizing of unfavorable facts and emphasizing favorable facts, employ the "Will readers roll their eyes?" test. A court will not adopt your statement of facts in its opinion if the statement goes overboard.

iv. Final Words

In the statement of facts you are telling a story, a true one. It must be accurate and contain all legally material facts, but how you tell it depends on whose story it is. As in trial briefs, avoid simply summarizing the transcript or using a repetitious question and answer format. Also, do not pack your statement of facts with quotations. Use just your best quotes for special emphasis or to support a compelling statement or characterization you have made. Expect that the appellate court or its staff will read the transcript. Your goal is for the

court to read it with your narrative in mind. This is the case even if the appeal presents primarily questions of law in a court of last resort. The statement of facts will give the appeal context, and how you tell the story will still leave an impression with your readers. For further discussion regarding statements of fact see Chapter 6, section (c).

c. Appellate Brief Statement of Facts Drafting and Editing Guidelines

Examine the statement of facts for the following:

- Substance/Analysis
- Organization
- Sentence Structure, Word Choice, Tone
- Paragraph Structure
- Technical—Proofing, Grammar, *Bluebook*, etc.

i. Substance/Analysis

Does the statement of facts include all legally material facts as well as helpful or compelling factual background or shading of the facts? Does it contain all facts necessary to rule in your client's favor? Have any facts pertaining to any relevant legal issue, element, or factor been omitted?

Does the statement of facts provide enough information and context for an unfamiliar reader to understand what the case is about and what happened?

Does the statement of facts promote your message—your theory, theme, or pitch for reversing or affirming the judgment or order?

Does the statement of facts set up your analysis in the discussion or argument section? Is every fact you refer to in the discussion or arguments section set forth in the statement of facts?

Does the statement of facts provide clear citations to the appellate record for every fact set forth, described, or alluded to?

ii. Organization

Overall, is the story you have told as easy to follow and as compelling as the underlying facts allow?

First, make sure you have set forth the facts, including background facts so that the reader will understand what the case is about and what happened. Then confirm that you have told the story in the order that best promotes your message. Do you begin with facts that create the initial impression you want your readers to have? Are favorable facts put in positions of emphasis—at the beginning of the section, paragraph or sentence, or at the end with a solid build up? Check to see if unfavorable facts are de-emphasized or diffused —placed in the middle of the section, paragraphs, or sentences, or effectively joined or juxtaposed with favorable facts.

If complex, have you broken the statement of facts up with short, descriptive subheadings to aid the reader in finding topics and to provide some relief for the eyes?

iii. Sentence Structure, Word Choice, Tone

First check for sentences that are confusing or hard to read and understand. This is a detraction for both favorable and unfavorable facts. (Indeed, when dealing with an unfavorable fact, you do not want the reader to have to read your sentence more than once.) Then check to see if favorable facts are described using compelling,

specific, and descriptive words in sentences with concrete subjects and active predicates. This also goes for favorable/unfavorable rulings and reasons. Are unfavorable facts deemphasized by use of the passive voice, and flat, general terms?

As with statements of facts in trial briefs, check that the tone is compelling, yet professional? Is it subtle in its partisanship? Detractions would be an overly emotional, angry, combative, smug, or partisan tone; or conversely a tone that is too flat, and seemingly uninvolved. Any tone that suggests the lawyer is putting herself in the place of the court or commanding the court is a detraction as well. Apply the "Will my readers roll their eyes?" test for treatment of both favorable and unfavorable facts.

iv. Paragraph Structure

The guidelines for critiquing paragraphs in the statement of facts are the same as with all legal writing only with an eye toward emphasizing favorable facts and deemphasizing unfavorable ones. Paragraphs should begin with a topic or transitional sentence. Every sentence in the paragraph should (1) relate to the topic/transitional sentence, and (2) relate to the sentences around it. The second requirement is accomplished by arranging the sentences in a logical progression, and, often, by using good transition words that signal where you are going with the sentence, *e.g.*, thus, accordingly, moreover, conversely, nevertheless.

Also check for effective placement of emphasis of favorable facts, and effective de-emphasis of unfavorable facts within the paragraphs.

As always, distractions include paragraphs without clear topic or transition sentences; sentences that do not relate to the topic identified; paragraphs that are choppy or disconnected because the sentences are not arranged smoothly and/or because transition words are needed.

v. Technical Aspects: Proofing, Grammar, etc.

This category involves attention to detail. Student drafters should avoid leaving points on the table because they have not had time to proofread thoroughly. The rule applies with the same force in the real world. A document that has proofing and citation errors is distracting to readers and reflects poorly on the drafter and his or her positions and arguments.

Some points on the technical editing checklist:

- Check for “widows and orphans”—opening and ending lines of paragraphs that are stranded, alone, on their own page. There should always be at least two sentences of a paragraph on a page. If not, change the page break.

- Check that pages are numbered consecutively.

- Examine the font size used. 12 point is standard, although 14 point is becoming increasingly the norm for federal appellate courts for ease of reading.

- Check margins (at least one-inch around); use defined terms where appropriate.

Finally, check that you have strictly complied with all requirements of local appellate court rules.

4. Discussion or Argument

a. Purpose and Goals

The purpose of the discussion or argument section in the appellate brief is to persuade a majority of the members of the court to reverse or affirm the judgment or order below. You are challenging or defending a decision or action that has already occurred—not starting with a clean slate. Thus, the discussion section should focus on identifying or refuting reversible error. This often means addressing what feels like just the tip of the iceberg and leaving out a variety of things you believe the court or the other side did wrong below. This is one of the reasons appellate courts require a statement of issues on appeal—to focus the attorneys on the issues that matter.

As with trial briefs, the goals of the discussion section in appellate briefs are to show the court *how* to rule in your favor and *why* it should. Showing the court how to rule in your favor involves making your points as clearly as possible, which usually means organizing complex information so that the readers can understand it as easily as possible. Although readers on the appellate level will generally have more time to spend with the briefs than readers at the trial court, you are still competing for your readers' time and attention. See Chapters 1 and 2 for methods of accomplishing this, including (1) putting context before details, (2) going from broad to narrow and general to specific, (3) linking new information with familiar information, and (4) having an explicit structure.

When drafting the discussion section, envision the opinion you would like the court to issue and *draft it like that*. The best thing that can happen to the drafter of an appellate brief is to find that their brief has been turned into the opinion issued by the court—make it easy for the court to do this by drafting an easy-to-follow, legally sound, persuasive brief.

The structure of the discussion section of an appellate brief, like that of a trial brief, is based on the CRAC format (Conclusion, Rule/Law, Application/Analysis, and Conclusion), which is designed to deliver information in the most straightforward manner. In some appeals, particularly those to courts of last resort, the emphasis is on the rule/law portion. For example, a decision regarding (1) which law applies, (2) the interpretation of existing law, (3) the articulation of a new law, or (4) the extension or reining in of the law, may dictate or heavily influence the resolution of the issue. In these situations, the

application section will be short and straightforward. Do not leave out it out, however—be sure to concisely connect the dots for the readers so they do not have to do so themselves. Issues on appeal may be factually intensive, as well. For example, whether an error in admitting certain evidence at trial is reversible depends on the harmless error standard applied and all the other evidence admitted at trial as compared to the evidence admitted in error. This will often entail a thorough, detailed application section.

For further discussion regarding the CRAC structure and drafting arguments using this structure, see Chapter 1, section F and Chapter 6, section D (5).

b. Persuading the Appellate Court

Persuading the appellate court involves showing that your positions and arguments are (1) sound and well supported by authority, and (2) the better choice.

First and foremost, persuading the court involves drafting arguments that are clear and easy to follow. Even when the argument is complex, your job is to make it as easy as possible for the readers to grasp. Courts are reluctant to implement solutions they do not readily understand. As on the trial court level, showing the appellate court that your positions are sound and well supported requires thorough and sophisticated knowledge of the law and authorities and how they affect your case so that you (1) recognize strong points and arguments and make the most of them, (2) understand and overcome or minimize potential weaknesses in your positions, and (3) understand the hierarchy of your authorities and use them to your best advantage.

Showing the court that your positions and arguments are the better choice often starts with exposing and exploiting the weaknesses in the other side's arguments and showing they are incorrect, unsound, or not well supported. In other words you demonstrate that your position is better because it is correct and sound, while your opponent's is not.

Using policy to persuade:

Your audience will include at least several decision makers and you should assume that some will consider both positions tenable. Thus, showing that your positions are the better choice will involve making what are often referred to as "policy arguments." Unfortunately this term often leads law students and new lawyers to approach these arguments too abstractly, using lofty terms and phrases. This should not be the case. Policy arguments are concrete but larger reasons why the court should adopt a tenable legal position. They show the court that your position advances a particular goal and/or that the other side's position will undermine this goal or cause harm.

The policy goals could be furthering the underlying purpose of the statute or legislation at issue; promoting the efficient administration of the courts; encouraging safety; promoting freedom of alienation and property rights, and the like. Potential harms could be unknown, unintended consequences; foreclosing access to the courts; creating a "slippery slope;" creating a disincentive to free market behavior, and the like. Our point is that potential policy arguments are numerous and varied. Your mission as the drafter is to explore the various goals your positions may promote, and the potential harms the other side's positions may cause, and find the ones that best package your message, that best advance your purpose in persuading the court to affirm or reverse. This involves having solid knowledge and understanding of both positions and the authorities supporting them. Look for potential policy arguments in case law—in majority opinions, concurrences, and dissents (earlier dissents can become later majority opinions), and legislative history—particularly legislative comments to statutes. Once you have decided on the policy arguments you think you will use, research them further, finding law review articles or cases in other jurisdictions that further explain or promote them.

Often, beginning drafters will find an oft-stated policy their position would promote and simply chant it in their argument, *e.g.*, "This question is better left to Legislature." This is not enough. Rather, drafters should acquire thorough and sophisticated knowledge regarding the policies they use in their arguments so that they can clearly identify them and explain them, show why and how they are

valuable, and exactly how their position furthers those policies, or the other side harms them. It is often best to approach this process using the CRAC format. As the C—Conclusion—identify the policy and state that your position promotes it. In the R—Rule/Law section—explain how and why the policy you have identified is valuable using case law, legislative history, law review articles, etc. In the A—Application/Analysis section—tell why and show how your position promotes that policy. In the final C—Conclusion section—again identify the policy and how the drafter's position supports it.

Keep in mind in drafting the discussion section that your goal is to persuade a majority of the members of the court that affirming or reversing the decision below is the correct and best thing to do.

c. Organizing the Discussion and Using Point Headings

i. Main Sections

Each separate issue on appeal becomes a main section in the discussion section of the brief. Often reversible versus harmless error gets its own main section at the end of the brief.

The discussion in appellate briefs should begin with any threshold issues. These are issues that must be decided before the court can reach the merits of the appeal. Examples include whether one of the parties had standing to bring suit, whether there was personal jurisdiction over the parties at trial, or whether a matter is appealable. After any threshold issues, the discussion usually begins with the issue/section that contains the drafter's strongest and most persuasive argument for reversing or affirming the decision below, then the issue/section with the next strongest arguments, and so on.

An exception might be if the strongest arguments will have the smallest consequence, for example an argument that would result in the appellant's lengthy criminal sentence being reduced by one month, or that would result in a small change in the award of damages. These types of arguments usually go at the end of the brief.

Which section contains the most persuasive arguments may be obvious as you review the decision or action below, the record, and the authority cited to and relied on by the court. Sometimes this hierarchy may not be clear until you have tested your arguments in the drafting and revision stages.

If you have more than one section that you think contain arguments of equal strength, lead with the one that is most consequential—that would give you the most relief. Thus, on appeal a section regarding an error that would require automatic reversal of the entire judgment would come before an alleged error subject to a harmless error analysis and that would lead to reversal of only a portion of the judgment, *e.g.,* an adjustment in the award of damages.

ii. Subsections

Each separate issue on appeal may have sub-issues that each merit discussion, *i.e.*, that each gets its own CRAC and a subheading. If, for example, several elements of a test must be established to show that a court did or did not err, each element deserves its own subsection where it can be separately addressed. Or for clarity's sake you may need to divide a complex argument with several types of legal support into subsections, each with its own CRAC and subheading. Division of an argument into subsections may be obvious from the beginning. Or, while you are drafting the discussion, you may find that you need to break up a long argument into subsections.

In general, if a matter merits a paragraph or more of discussion of the law, followed by a paragraph or more application of the law to your facts, it should become a subsection and get its own heading and a separate CRAC. On the other hand, be careful not to subdivide your argument unnecessarily or excessively. Too many subsections and headings can break up the flow of an argument. Also, a short subsection may look skimpy or flimsy on its own, which could undermine the overall point you are making. If you use subsections, do not have a main argument with just one subsection under it. A single, standalone subsection is not a subsection at all.

As with trial briefs, ordering your subsections requires balancing clarity with strength. Ideally, the subsection with the strongest arguments goes first. If this interrupts the flow or logic of the main argument, or if your strongest argument is dependent on one in another subsection, the strongest material may have to come later in the discussion. A discussion that is quickly and easily understood is most important. In order to be persuaded by an argument, a court must first understand it. Also remember the basic rules regarding organization in ordering your subsections: general to specific, broad to narrow.

If a main section contains subsections, it is usual to put a mini summary argument after the main section heading and before the first subheading that sets forth your overall conclusion on the main argument, supported by your conclusion for each of the subsections, in the order you discuss them, with citations to authority for each.

iii. Explicit Structure

Before you start to draft the discussion, decide what your main arguments are and have a plan regarding in what order to place them. Also have an idea of which arguments should be divided into subsections and in what order those subsections should appear. This all may change as you draft and revise, but it is important to start with a structure in mind. Then, make that structure explicit with headings, subheadings, CRAC, well organized paragraphs, sentences, and appropriate transitions.

iv. Drafting Headings and Subheadings

Headings flag the issues discussed in the sections and subsections in a way that summarizes and advances the main point made in each. Each heading and subheading serves as the “C” in the CRAC format. The heading should tell the court what you want it to do or the conclusion you want it to reach, and the essential reason why. Headings should be a maximum of three lines of text, and ideally shorter. Readers tend to skip over lengthy headings. Thus do

not try to pack in too much information in your headings or you will frustrate their purpose.

Headings are a good way to test the logic and flow of the discussion section. Indeed, they form the table of contents and serve as an outline for the discussion. After you have drafted them, arrange your headings in order in a separate document—headings with subheadings, etc. Do the headings make sense when read together? Would an unfamiliar reader be able to easily grasp your basic arguments from reading the headings? Does it appear that your strongest section and your strongest arguments come first and go in descending order? Do the headings easily and effectively deliver your message?

Also, your headings should be formatted so that they are easy to read. Traditionally main point headings have been set single spaced using all caps, which can be difficult to read. Also single spaced, underlined text appears cramped and is often difficult to read. Using italics is usually better. In other words, beware of cluttering up your headings with too many word processing tools—*e.g.*, the bold, all-caps, underlined heading. For further discussion regarding persuasive headings see Chapter 6, section D(5).

d. Statements of the Standard of Review

Each main section of the discussion should contain a statement of the standard of review that applies to the type of error addressed. If the standard of review is undisputed, this portion can and should be short: State the standard and include a citation to authority, then briefly describe what it is. If representing the appellant, describe the standard using terms found in case law in which the standard was met and cite those cases. If representing the appellant, describe cases in which the standard was not met and cite those cases. Often, the same standard of review will be described slightly differently depending on whether the court concluded it was met or not.

Sometimes the standard of review on an issue will be contested, in which case, this portion will require its own CRAC. C—Conclusion: set forth the standard you want the court to adopt. R—Rule/Law: Set forth and explain the two different standards including the type of

issues and situations to which they apply and why, and A—Application/Analysis: tell why and show how the error at issue is the type that requires or merits the standard of review you advocate.

5. Summary of the Argument

Most appellate courts allow, and many require, that the discussion or argument portion of the brief begin with a summary of the argument. Drafters should always include one if allowed. The summary will help readers to better follow the discussion section, and it will deliver your essential messages to the readers before they tackle the details. They are similar in purpose to the preliminary statements in trial briefs discussed in Chapter 6, section C (1).

Begin the summary with a request of the relief you want and state why you're entitled to it, *e.g.*, The judgment should be reversed/affirmed because (1) and (2). This is your essential pitch—what the court should do and why. Also be sure to include citation to the strongest authorities supporting each point. Then, in the same order as your discussion or arguments section, set forth your supporting reasons with citations to authority for each reason. It is often best to draft the summary of the argument toward the end—after you have drafted and revised the main discussion/argument and tested it with a heading and topic sentence outline.

G. Heading and Topic Sentence Outline

As with trial briefs, after you have completed a first or second draft of your appellate brief test its overall substance and organization by creating and reviewing a heading and topic sentence outline as described in Chapter 6, section F.

H. Appellate Brief Discussion/Argument Drafting and Reviewing Guidelines

Examine your Discussion or Argument section for:

(1) Substance/Analysis
(2) Organization
(3) Paragraph Structure
(4) Sentence Structure, Word Choice, Tone
(5) Technical—Proofing, Grammar, *Bluebook*, etc.

1. Substance/Analysis

In this category, look at content and persuasiveness. Do you demonstrate that your positions are sound and well supported? Have you addressed the rules, tests, factors, and cases necessary to enable a court to rule your favor? Are the cases used effectively to highlight and focus the reader's attention on favorable facts? Are the facts used effectively to persuade the court? Is adverse authority effectively distinguished or used to legally assail adverse cases? Are policy arguments used effectively to show that your positions are the better choices? Are the headings informative, compelling, and easy to read? Does the argument promote the theory of the case, theme, or pitch? Have you made it easy for a court to adopt your discussion in its opinion? Do headings clearly identify the issue and main point made in each section and subsection?

The ultimate question is: would a reader conclude that my positions are (1) sound and well supported, and (2) the better choice?

Also assess your citations to the cases. Every rule, test, factor, and fact you describe must be accompanied by a pinpoint citation to the case from which it came, so that readers can go to the exact page of that case or exact subsection of the statute and see for themselves. In addition, when analogizing or distinguishing the facts of your case with those of a particular judicial opinion, you must cite to the exact pages of the opinion where those facts are stated or discussed.

Detractions include:

(A) Omission of important rules, factors, or cases;
(B) Not recognizing or highlighting useful cases, rules, tests, factors, facts from the cases, or client specific facts;
(C) Not distinguishing or critically analyzing flaws in adverse cases;
(D) Spending too much time on weaker points;
(E) Dull, lengthy recitation of the facts in the cases, or dull lengthy mechanical application of the law;
(F) Sequential analysis and application of the cases—you should synthesize the cases and highlight significant favorable factors and facts;
(G) Policy arguments that are undeveloped, abstract, or hard to quickly grasp.
(H) Headings that are too long or difficult to follow.

2. Organization

First, check if you have organized the discussion or argument in a logical manner that is easy to follow. Do the sections/arguments follow the theory of the case? If there is more than one main argument, are the arguments set forth in a compelling and logical order? If an argument is divided into subsections, does this help your understanding, or is the flow interrupted? Do general, overarching rules come first, followed by discussion of factors and facts from the cases? Do the paragraphs logically follow each other, with informative topic or transitional sentences? Are the headings effective signposts that make the discussion section easy to follow?

Next assess whether the arguments are arranged persuasively? Are the most helpful cases in positions of emphasis? Are the client facts placed or woven in strategically, so that the reader can easily see how they meet or fail to meet any applicable test or rule? Are unfavorable facts and cases put in positions of de-emphasis, *e.g.*, in the middle of the argument or paragraph?

The ultimate questions: Will unfamiliar readers understand the discussion or argument? Will they be persuaded by it?

3. Paragraph Structure

The well-written, persuasive paragraph is the key component of the discussion or argument. Make sure the paragraphs begin with an informative and compelling topic or transition sentence that clearly identifies the point the writer is advancing. Then every sentence in the paragraph should (1) relate and support the topic/transition sentence and (2) relate to the sentences around it. The second element is accomplished by arranging the sentences in a logical progression, and often, by using good transition words that signal where you are going with the sentence, *e.g.,* thus, accordingly, moreover, conversely, nevertheless.

Detractions include paragraphs without clear, compelling topic or transition sentences; sentences that do not relate to the topic identified; and paragraphs that are choppy or disconnected because the sentences are not arranged smoothly and/or because transition words are needed. And, of course, paragraphs that fail to effectively emphasize favorable facts or law, or that emphasize or fail to minimize unfavorable facts or law are also detractions.

4. Sentence, Word Choice, and Tone

As with any legal document, first check for sentences that are confusing or hard to read and understand. Then check to see that favorable rules, tests, factors, and cases are set forth using compelling, specific and descriptive words, in active sentences with concrete subjects and active predicates. Also see if unfavorable facts, tests, factors, or cases are effectively de-emphasized by use of the passive voice and flat general terms.

Assess the tone: is it compelling, persuasive, yet professional? Keep in mind that an overarching goal is for the court to adopt your language in its opinion. Apply the “would readers be likely to roll their eyes?” test. Detractions include an overly emotional, angry, combative, smug, or partisan tone or, conversely, a tone that is too flat, and seemingly uninvolved. Any tone that suggests the lawyer is

putting herself in the place of the court or commanding the court is detraction as well.

5. Technical: Proofing, Grammar, *Bluebook*, etc.

This category assesses attention to detail. Student drafters should avoid leaving points on the table because they have not had time to proofread thoroughly or ensure their cites are in perfect *Bluebook* form. Drafters in the real world should also not let these distractions undermine the substance of their appellate brief and their credibility as an attorney. See section (c) (v) of this chapter for a proofing checklist.

Appellate Brief Final Editing Checklist

Overall Tone: Check throughout. Look for an engaged and professional tone. Every articulation of a rule, rule explanation, or case illustration should be put in a way that advances the author's side. Avoid words and sentences that appear bossy, caustic, or over the top, *e.g.*, "obviously."
Overall Sentence/Word Choice: Check throughout. Mark any sentences that are hard to follow. Then note long sentences for unnecessary words—chaff. Watch for jumps between past and present tense. Past tense is usually best, and is required for events, like testimony that has already occurred.
Style: Check for use of full names/titles with a defined term at first reference; record cites, proper citation of authorities.
Identify or Refute Error:

1. Appellant: Have you shown (a) that the decision below was incorrect under the applicable standard of review and (b) that the error was not harmless?

2. Respondent: Have you shown (a) that the decision below was correct or at least not incorrect, under the applicable standard of review and (b) even if there was error, that error was harmless.

   Remember: With rare exceptions, an appeal is not about re-trying the case below. It is, at best, about error correction. In some courts like the United States Supreme Court, it is usually not even that, it is almost solely about policy.

Checkpoints

- The purpose of an appellate brief is to persuade a court to reverse or affirm a judgment or order below. An appellate brief should not attempt to retry the case below.

- The audience for the appellate brief will be an intermediate appellate court or a court of last resort. Both these courts include more than one decision maker (judges or justices) and you will need to persuade a majority of them to reverse or affirm.

- The vast majority of appeals are to intermediate appellate courts, whose focus in mainly on error correction. Intermediate appellate courts are much more likely to reverse and judgment or order from the trial court than reverse it. Appeals to intermediate appellate courts are usually heard by three judge panels.

- Courts of last resort also correct errors, but in addition make policy, make new law, and extend or clarify existing law much more than intermediate appellate courts. Courts of last resort are less likely to affirm than intermediate appellate courts.

- An appellate brief should show:
    - that there was or was not error below—that the decision below was incorrect or correct under the applicable standard of review; and
    - that the error requires reversal because the error was not harmless or does not require reversal because the error was or was not harmless error.

- An overarching goal in drafting an appellate brief is for the court to adopt it in large part as its opinion.

- The standard of review is the filter through which the decision below is evaluated.

- Although there are many different articulations of standards of review, the human mind generally applies one of two: either deferential or non-deferential to the decision or action below.

- The four basic standard of review are
    - *De Novo* (the decision below must merely be wrong).
    - Clearly Erroneous *(*the decision below must very wrong).
    - Substantial Evidence *(*the decision below must very wrong).
    - Abuse of Discretion (the decision below must very, very wrong).

- There are many other permutations and articulations of standards of review among the jurisdictions, and it is important to articulate the correct standard.

- If the appellant successfully convinces the court there was error below, the court then determines if the error requires reversal of the judgment or error below.

- Certain errors, such as factual findings that are clearly erroneous or not supported by substantial evidence or structural errors, require automatic reversal. Otherwise the court will engage in a harmless error analysis to determine whether and how much the error affected the result at the hearing or trial.

- Thus, it is possible to win the battle (convince the court there was error) and lose the war (fail to convince the court that the error requires reversal) and vice versa.

- An appellate brief is comprised of separate components, usually prescribed by local rules of procedure. Typical components include a statement of issues on appeal, tables of contents and authorities, statement of the case, statement of facts, summary of the argument, summary of the argument, discussion or argument with headings and subheadings, and a conclusion.

- The tables of contents and authorities should be drafted or generated last. Lawyers vary in the order in which they draft the other components. What is important is to approach the drafting process as a series of discrete tasks rather than one giant job.

- The statement of issues on appeal should specifically identify the alleged error or lack of error below. We recommend using the whether/when format.

- The statement of the case should set out the nature of the case, the relevant procedural history of the case, and should also contain the essential reasons why the decisions below should be reversed or affirmed. The statement of the case is the drafter's first opportunity to deliver their message. Accurate citations to the record for each fact or document are essential.

- The statement of facts should tell an accurate story that will make the reader want to adopt your legal positions and that gives them enough information to be able to do so.

- The purpose of the discussion or argument section is to show the reader how to rule in your client's favor and why it should do so. This involves making your points as clearly as possible, which usually means organizing complex information so that the reader can understand it as easily as possible.

- When drafting the discussion section, envision the opinion you would like the court to issue and *draft it like that*.

- Persuading the appellate court involves showing that your positions are (1) sound and well supported by authority, and (2) the better choice.

- Showing the court that your arguments are sound and well supported requires thorough and sophisticated knowledge of the law and authorities and how they affect the facts in the record.

- Showing that your positions and arguments are the better choice involves:
    - exposing and exploiting the weaknesses of the other side's arguments, and
    - using policy arguments.

- Policy arguments are concrete but larger reasons why the court should adopt a tenable legal position. They show the court that your position advances a particular goal and/or the other side's positions will undermine this goal or cause harm.

- Each separate issue on appeal becomes a main section is the discussion section of both the appellant's and the appellee's brief. Often reversible versus harmless error gets its own section at the end of the brief.

- The structure of the discussion section is based on the CRAC (Conclusion, Rule/Law, Application/Analysis, Conclusion) format and is comprised of a series of CRACs. With some issues on appeal the focus will be on the rule/law portion, *e.g.*, if the issue is which law applies, or whether a particular law is valid. On the other hand, other issues on appeal may be factually intensive, such as whether a factual finding is clearly erroneous.

- Before you begin to draft have an idea of what your main arguments are and where they should go. Also have an idea of which arguments should be divided into subsections with their own point headings and CRAC format. This may change as you draft and revise, but it is best to begin with a structure in mind.

- Test your appellate brief for overall substance and organization by creating and reviewing a heading and topic sentence outline, described in Chapter 6, section F.

- Once you have a complete quality draft, thoroughly assess the appellate brief using the statement of facts and discussion/argument guidelines set out in this chapter.

- Make time to print and proofread your appellate brief separately before filing it or turning it in.
