§ 4:1 Introduction

The main vehicle for advocacy in an appeal is the written brief. The brief's function is to marshal in one place the leading legal arguments for each side, along with the key supporting evidence. Given its central importance, it is not unusual for the drafting of an appellate brief to take scores or even hundreds of hours of work. It is definitely worth the investment of time and effort to compose the best brief possible.

Appellate briefs differ from other kinds of written advocacy in a few ways. Usually, they run longer: in most court systems, each side gets approximately fifty to sixty pages to make its case. They are also more focused. Whereas a typical trial-court brief may cover many different arguments, the most effective appellate briefs focus on two or three. Those arguments tend to be denser, with more supporting authority and more intricate reasoning. Finally, an appellate brief is usually more concerned with legal points than factual or equitable ones. By the time a case reaches the appellate court, the factual record is effectively settled and the court must take it as is, except where the lower court's findings are clearly erroneous.

This chapter assumes that you have already decided to bring your appeal (if you represent the appellant) and now are sitting down to write the brief (as appellant or appellee). It walks through the various stages of drafting, with a detailed guide to the sections of an appellate brief and advice concerning effective legal writing.

§ 4:2 Preliminaries to Writing

§ 4:2.1 Collecting Materials

Before beginning to draft the brief, collect all the primary materials you will need to read. At the least, that includes the decision under review, the relevant briefs below, and any transcripts of arguments before the lower court. It may also be helpful to collect the cases cited in the decision and the briefs. If there was a trial below, the materials to read may be more voluminous, including the trial exhibits.

§ 4:2.2 To Outline or Not to Outline

Many advocates have strong views on the subject of outlining. Some will not begin to write until they have outlined the entire brief; others start with a rough idea of the points they want to make, which

they sharpen and hone through the writing process. Neither approach is right or wrong—the question is what works for you. As you become a more experienced advocate, you will likely outline less. This author leans toward the second approach, usually at most sketching out a few of the points and their subpoints. If you do outline, remain flexible and open to adding or subtracting points, varying phraseology, or departing from the outline in other ways as you continue to work on the brief.

§ 4:2.3 Do Not Use the Brief Submitted Below Without Substantial Editing

While it is tempting simply to tweak the brief that was submitted below, that is not the best approach, even if you represent the appellee and your side won before the lower court. An appellate brief must either challenge the decision below (appellant) or defend it (appellee) and thus must be drafted with that decision in mind. Moreover, it is typically not possible at the trial level to zero in on the pertinent arguments as is necessary on appeal. Briefing before a trial court tends to be more scattershot; on appeal, more focused. An appellate judge will have a single encounter with your case, not a series of hearings and submissions, so you must convey more information in a tighter package. And of course, the case citations to trial-level decisions will need to be replaced with appellate decisions.

At a deeper level, writing an appellate brief requires a fresh rethinking of the entire case. It is easy for trial counsel to get caught up in a particular view of what is important, one influenced by early defeats or repeated frustrations. One of the most valuable things appellate counsel can provide is a fresh perspective and fresh judgment.

§ 4:2.4 Research Techniques

For the reasons just mentioned, unless the appeal involves an extremely familiar area of law, you will almost certainly need to do fresh legal research. Between updating the case citations, rebutting the lower court's reasons for ruling against you (as the appellant), and presenting a richer argument, legal research is almost inescapable.

Younger lawyers who draft briefs often leap straight into electronic research, almost before they know the arguments they intend to make. While computerized searches are a powerful tool, they are not the most cost-effective way to learn about an area of law. If a topic is unfamiliar, it is a better strategy to start with a treatise or hornbook or even a law-review article to get the lay of the land. Those sources can also help identify fruitful lines of investigation and creative arguments. Then electronic research can be used for targeted searches.

Once you find even a single case that is on point, finding the next one may be a simple matter of Shepardizing.

At risk of stating the obvious, read every case from start to finish, including separate opinions, concurring or dissenting. Sometimes the blurbs or headnotes provided by commercial services are not accurate. Double-check that the cases you intend to cite (and your adversary's cases) are still good law, especially lower-court decisions. Once every few years, this author discovers that one of the decisions cited by the other side was recently reversed. Needless to say, that is extremely damaging to that party's credibility.

§ 4:2.5 Write Toward the Page Limits

Before you begin writing, it is vital to know how many words or pages you are allotted. In most federal circuits, the word limit is 13,000 for an opening brief (some allow 14,000) and half that many for a reply brief.[1] State appellate courts vary.[2] You will save yourself much distress later if you draft the brief with that number as the target. It is fine for a first draft to run a thousand words or so overlength. Anything more, however, and you will spend a lot of time trying to cut the brief down to size before you can even worry about polishing and refining your prose.

If you do find yourself in a position where you need to cut a significant number of words, do not fall into the trap of shaving a few words here and a few words there, which can sacrifice clarity or grammar. Rather than eliminating one word in fifty different places, it is better to look for one fifty-word sentence to cut. Deleting footnotes is a good place to start. Look also for unnecessary summary sentences (e.g., "In sum, . . ." or "In addition to the jurisdictional defects highlighted above, Appellant's argument also fails because . . .") or other repetitive verbiage.[3]

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1. *See* FED. R. APP. P. 32(a)(7)(B)(i).
2. New York and California appellate courts allow 14,000. *See* N.Y. COMP. CODES R. & REGS. tit. 22, 1250.8(f)(2); CAL. CT. R. 8-204(c)(1). The Court of Appeals of Virginia permits 12,300 words. VA. SUP. CT. R. 5A:19.
3. A few other tips: hyphenated compounds such as phrasal adjectives (e.g., *summary-judgment motion, black-letter law*) count as only one word in Microsoft Word. When abbreviating citations to the appendix or other parts of the record, eliminate spaces to save words (e.g., "JA456" rather than "JA 456"). Use the ellipses provided by Word: "…" (one word) rather than ". . ." (three words). The newest edition of the *Bluebook* allows "closed" abbreviations in reporter names to conserve space, e.g., "F.Supp.2d" and "S.D.Cal." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. B6, at 9 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) [hereinafter BLUEBOOK].

§ 4:2.6 Leave Ample Time to "Sleep on" Your Arguments, As Well As to Edit and Revise Them

A good appellate brief cannot be written in a day or two. It is not simply the writing that takes time, but the process of thinking through the arguments and exploring different ways to frame and organize them. Your understanding of the issues and the persuasive force of your positions will evolve as you work on the brief. For that reason, you must build adequate time into the schedule to revise the brief from start to finish.

This is doubly true when a brief has been divvied up and written by a number of authors. Writing by committee is difficult to do well. If you are forced to write a brief that way, it is critical to leave time to harmonize the pieces and make sure they are consistently expressed with one tone. One person should revise the whole brief with those goals in mind.

§ 4:3 Detailed Analysis of the Main Sections of the Opening Brief

This portion of the chapter analyzes the main sections of an opening appellate brief in the order they normally appear. As in other areas, not every jurisdiction requires all of these sections, and some jurisdictions require additional sections not treated here. As always, you must check the rules for your own jurisdiction.

§ 4:3.1 Corporate Disclosure Statement

Many appellate courts require parties to disclose their corporate-ownership structures, mainly to enable the judges to identify potential conflicts.[4] Some courts want those disclosures to be filed at the outset of the appellate process; other courts prefer them included in the first brief for each side. Even where trial counsel previously filed a disclosure in the lower court, it is prudent to double-check that the disclosure remains accurate. That task should not be left for the day of filing, as it may take research or a series of phone calls with the client to be sure that all qualifying parent corporations and subsidiaries are identified.

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4. For example, the Federal Rules require: "Any nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene." FED. R. APP. P. 26.1(a).

§ 4:3.2 Table of Contents

The Table of Contents (informally called the "TOC") should list every heading and subheading of the brief in outline format and the page where the corresponding section begins. The task can be automated with software, but you should always check the final product by hand. If the Argument section is well organized, it should be possible to read through the headings and follow the overall flow of the brief.

§ 4:3.3 Table of Authorities

Every brief should include a table of authorities (also called the "TOA").[5] Although the TOA is fairly mundane, its creation requires care. One should make sure the TOA is correctly formatted and Bluebooked, especially if it is generated by a word processor rather than by hand. Double-check that the case citations do not include pinpoint cites. As with all rules, there are court-specific quirks. For example, the D.C. Circuit requires that the TOA list every page on which an authority appears; "*passim*"—a term indicating that a source appears on many pages—is not permitted.[6]

§ 4:3.4 Preliminary Statement or Introduction

[A] Strategy and Approach

Although the Federal Rules and many state rules do not expressly provide for a Preliminary Statement or Introduction, most appellate advocates believe that it is the most important section of the brief besides the Argument. Because the Preliminary Statement comes at the beginning of the brief, it is usually the first thing the judge or law clerk will read. It therefore offers you the opportunity to introduce the topics, facts, and legal authorities on which the rest of your brief is built. Relatedly, the Preliminary Statement allows you to present your main arguments in an intuitive and direct manner, without much of the "clutter" (case citations, quotations from authority, and the like) typically present in the rest of the brief. For these reasons and others, in all but the most perfunctory filings before appellate courts, a Preliminary Statement is indispensable.[7]

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5. The Federal Rules require "a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited." FED. R. APP. P. 28(a)(3).
6. D.C. CIR. R. 28(a)(2).
7. Some courts limit the maximum length of preliminary statements. *See* N.J. CT. R. 2:6-2(a)(7) (limiting optional preliminary statement to three pages and prohibiting footnotes or, to the extent practicable, citations).

An effective Preliminary Statement should do several things. First, it should contain your "elevator speech"—a tight, succinct statement why you should win. It should be different from the Summary of the Argument section required under the Federal Rules, which is more of a road map of the Argument section.[8] By contrast, the Preliminary Statement should be more holistic and more incisive. Without delving into the minutia of the case, it should offer a streamlined, persuasive account for your side. Where the rules of the jurisdiction do not provide for a separate Summary of the Argument, as in many state appellate courts, then the Preliminary Statement can take on more of the character of an ordinary summary.[9]

Second, the Preliminary Statement should introduce the basic facts and issues in the case. Since, in virtually all appellate briefs, there will be a separate Statement of Facts, it is unnecessary (and redundant) to summarize the facts at the outset. Nevertheless, it is often necessary to provide just enough facts to make the Preliminary Statement comprehensible and persuasive—for example, to explain who was harmed, in what manner, and why your adversary is to blame. It should be possible to summarize nearly all the significant facts needed for that purpose in two or three paragraphs at most.

Third, the Preliminary Statement should express some of the "emotional" or "intuitive" force of your case. Most of the Argument section of the brief, understandably, is devoted to precise, sometimes technical legal reasoning, supported by judicial and other authority. While those are the nuts and bolts of written advocacy, at times they can feel somewhat bloodless and cold. The Preliminary Statement affords the opportunity to explain the unfairness (or, depending on your side, the fairness) of the ruling below and the considerations based on common sense or equity that often get lost in a longer, more rigorous treatment.

To these ends, an effective strategy is to write the Preliminary Statement in as clean and uncluttered a manner as possible. Do not begin with a long recitation of the parties' names and titles. Avoid footnotes, which are distracting to the eye. Mention as few legal authorities and precedents as possible, except where a case is truly central to your argument. The point, again, is not to summarize all the twists and turns of your substantive argument; it is to give a short, forceful introduction to your brief, akin to an opening statement before a jury. If you have a particular fact or quote that is exceedingly helpful, make sure to put it here. That will draw interest in your argument and entice the reader onward.

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8. FED. R. APP. P. 28(a)(7); *see* section 4:3.8, *infra*.
9. *See, e.g.*, CAL. R. CT. 8.204(a) (no requirement of summary of argument); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.13(a) (same); OHIO R. APP. 16(A) (same).

Although the Preliminary Statement comes first, it should be written last. That is because until all the arguments have gelled, it is difficult to know how to strike the right tone or emphasis. For an appellate brief of 14,000 words, the Preliminary Statement should typically run about 500 to 1,000 words.

[B] An Example with Commentary

The following is an example of a Preliminary Statement drawn from a brief filed by this author on behalf of T-Mobile. The appeal challenged a ruling by the National Labor Relations Board that four workplace policies in T-Mobile's employee handbook chilled speech and therefore violated federal labor law.[10]

PRELIMINARY STATEMENT

T-Mobile maintains four common-sense and unremarkable employee policies that encourage its workforce to act in a professional manner, promote a positive work environment, restrict video and audio recordings of co-workers, and protect confidential information—all salutary goals in a modern, sophisticated workplace. The National Labor Relations Board conceded that T-Mobile neither developed these policies in response to union activity, nor deployed them to discourage the exercise of collective activity protected by the National Labor Relations Act. Nevertheless, the Board concluded that because employees supposedly *might* misconstrue the policies as discouraging such activity, they violated federal law, and the Board ordered T-Mobile to cease and desist from maintaining them.

In reaching that conclusion, the Board committed several serious errors. It ignored its own precedent requiring it to consider the realities of the workplace and an employer's legitimate interests in maintaining a proper, secure, and decent working environment. It also adopted a hyper-technical approach to analyzing workplace policies that speculated about whether an employee *might* view a policy as restricting rights, instead of whether a reasonable employee *would* so view it. As a result, it issued decisions that are not only detrimental to American business, but counterproductive for workers as well.

For example, two of T-Mobile's policies encouraged employees to "maintain a positive work environment" and to avoid "failing to treat others with respect." The Company promulgated these guidelines to promote inclusive and civil working environments, and to avoid potentially harmful or illegal conduct. Common sense says that

10. *See* T-Mobile USA, Inc. v. NLRB, 865 F.3d 265 (5th Cir. 2017). In some examples in this chapter, footnotes and citations to the record have been omitted.

> workers would welcome the adoption of such policies. But to the Board, the policies were traps for workers, because union-related discussions could become "heated," and therefore the workers might be afraid to engage in them. Reviewing a similar decision by the Board a few years ago, the D.C. Circuit called that ruling "not 'reasonably defensible'"—indeed, "not even close." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25–26 (D.C. Cir. 2001).
>
> [. . .]
>
> The Board's decisions are so counterintuitive and so contrary to common sense that they have provoked ridicule. It cannot be the law that an employer is forbidden to promote teamwork and camaraderie. Nor can it be the law that a company cannot craft policies to protect the confidentiality of customer and employee information. If the Board's rationale holds, many important, commonplace workplace policies regarding subjects such as civility and the proper treatment of confidential information will disappear. The Board has ignored the realities of the workplace and its own decisions upholding similar policies in the past. The petition should be granted, allowing T-Mobile to protect trade secrets and data it is legally obligated to protect, and to run a professional, competitive workplace.

The first paragraph summarizes the essence of the dispute. Note that there is no stage-setting: The first paragraph does not begin with a recitation of party names (although it is obvious from context), nor does it quote the actual employment policies at issue (that will wait until the third paragraph). Throughout the Preliminary Statement, there are no citations to the record, few quotations, and only one mention of a key precedent. Since the primary goal of the appeal is to attack the Board's given reasons for invalidating these rules, the Preliminary Statement begins by distilling the Board's logic into a single sentence. By the time the reader has finished the first paragraph, she already knows what the case is about and who the parties are, and probably has a good sense how the Board got it wrong.

The second paragraph examines the Board's reasoning, although still at a fairly high level. A sparing use of italics draws the key distinction between how a reasonable employee possibly *might* interpret the policies (the incorrect standard) and how one likely *would* interpret them (the correct standard).

The third paragraph considers two of the handbook rules in more detail. (A paragraph examining the other two rules is omitted from this excerpt.) It sets forth both the common-sense justifications for those rules, and the tenuous reasons of the Board for rejecting them. While it criticizes the Board, the tone is not over the top. It also gives one salient detail: the precise reason the Board gave for rejecting two

of the workplace policies—that union-related discussions tend to become heated—was emphatically rejected by a sister court, the D.C. Circuit. That is a pointed enough rebuff to be worth citing and even quoting.

The last paragraph turns to the larger equities of the case, stressing the intuitive view that an employer must be allowed to promulgate rules of this sort, and the consequences that would follow if it were not. At this point, the reader already has a strong sense of the arguments being made and the common-sense force of the employer's argument.

§ 4:3.5 Jurisdictional Statement

The jurisdictional statement serves a discrete role: to establish clearly that the appellate court has jurisdiction over the appeal.[11] Unless jurisdiction is a contested matter, the statement ought to be short and to the point. Thus, a typical jurisdictional statement reads as follows:

JURISDICTIONAL STATEMENT

> The district court had subject-matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1332(a) because: (i) P Corp. is a corporation incorporated under the laws of Nevada with its principal places of business in Virginia; (ii) D Corp. is a corporation incorporated under the laws of Illinois with its principal place of business in Illinois; and (iii) the controversy exceeds the sum of $75,000, exclusive of interest and costs. On September 18, 2018, the district court entered an order and a final judgment denying P Corp.'s motion to vacate the arbitral award pursuant to 9 U.S.C. § 10, granting D Corp.'s amended motion to confirm that award pursuant to 9 U.S.C. § 9, and confirming the award. On January 1, 2020, P Corp. timely filed a notice of appeal. Thus, this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a).

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11. The Federal Rules require four points to be covered:

> (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (C) the filing dates establishing the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis.
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> FED. R. APP. P. 28(a)(4).