

# THE ADVOCATE



PREPARING FOR APPEAL



# BRIEF WRITING: MAKE YOURSELF USEFUL AS WELL AS ORNAMENTAL<sup>1</sup>

BY STEVEN K. HAYES & BRITTANI WILMORE ROLLEN, WITH SUGGESTIONS FROM JUSTICE SUE WALKER, DABNEY BASSEL, & CONSTANCE K. HALL.

**Y**OUR APPELLATE BRIEF SHOULD ARGUE YOUR CLIENT'S position to the court of appeals<sup>2</sup> in a way the court finds useful, as well as persuasive. Your facts should be so accurate, persuasive, and well sourced, and your legal analysis so persuasive and supported by such good authority, that the court can copy and paste entire portions of your brief into its opinion. The following suggestions will help you accomplish that.

## **Include all the items required by TRAP 38.**

TRAP 38.1 lists the items your brief must include, and the order in which they should appear. Use them to construct the template for your brief before drafting anything substantive.

## **Know your audience.**

Your audience is typically a three judge panel and their staff attorneys. These folks usually had significant experience in a law practice, and have significant experience handling an appellate docket. They face a never ending avalanche of cases.<sup>3</sup> Time is the enemy,<sup>4</sup> with each justice's office issuing the equivalent of a term paper a week. The courts of appeals were surveyed in 2009, and half the justices felt that most briefs were too long.<sup>5</sup> These dynamics mean that you need to shorten, clarify, and simplify your brief.

## **Write in the active voice.**

To make it as easy as possible for the court to follow your argument and rule for your client, write in the active voice. This shortens your brief and makes it more persuasive.

## **Write for your audience, not for yourself.**

Write for the court, not for yourself. You already believe your case—you need to make experienced jurists, who do not care which side wins, believe it as well. So get a second set of eyes to mercilessly critique your argument. Also have

them critique your grammar, style, content *and especially the "appropriate citations to authorities and the record"* required by TRAP 38(i). The court will mercilessly examine your citations to the record and authority, and you will lose credibility if you miscite either.

## **Do not just tell your story in the Facts and Argument—tell it in the Issues, the Table of Contents, and the Summary of the Argument.**

Your brief, working as an integrated whole, should tell your story in each of these five TRAP 38 requirements: the Table of Contents; the Issues Presented; the Statement of Facts; the Summary of the Argument; and the Argument. Here's how.

**The courts of appeals were surveyed in 2009, and half the justices felt that most briefs were too long. These dynamics mean that you need to shorten, clarify, and simplify your brief.**

Use headings and subheadings to divide your Statement of Facts and your Argument. Those visually divide the brief into bite-sized portions for the court, and help you ensure the logical progression of your brief. As more than half the Justices recommend, each major heading in your brief should either consist of an Issue, or expressly say

which Issue(s) it deals with, so that your Issues and Argument dovetail.<sup>6</sup>

In addition to reinforcing the Issues and making the brief manageable, those headings and subheadings will populate the Table of Contents with your central facts and arguments. Seventy percent of justices find the Table of Contents helpful, and another twenty-five percent emphasize that it should repeat headings from the Statement of Facts and Argument.<sup>7</sup> You can then draw your Summary of the Argument from the Table of Contents. No matter where the Justices go first in your brief, they see your story repeated.

You should also bookmark the headings and subheadings in

the pdf of your brief, allowing the court to go straight to a particular issue or argument (a useful tool you can enhance by appropriately hyperlinking sections of your brief to each other).<sup>8</sup>

Also, don't overlook the importance of the standard of review, on which you should build your argument. If the court can decide an issue as a matter of law—such as duty or causation—it has much more leeway than an abuse of discretion standard provides.

**Make all your Issues indisputable statements—and limit their number.**

More than ninety percent of justices expect a wise advocate to present them with five or fewer issues in an appeal of moderate complexity—and around half of those justices feel that four or fewer issues is appropriate.<sup>9</sup> Over seventy percent of justices prefer the issues be presented as positive statements—you might even consider stating them as “The trial court erred [or abused its discretion] in . . . .”<sup>10</sup> To the extent possible, make your Issues indisputable, and succinct. Ideally, they should be easily embraced talking points.

**Remove yourself from the dispute.**

If you tried the case, it may be difficult to write a succinct Statement of Facts. You may find it helpful to write the Argument first. You can then populate your Statement of Facts with facts important to your Argument.

**End with a Conclusion, and then a Prayer which gives the Court a roadmap.**

Nearly sixty percent of justices preferred the brief end with a conclusion and a prayer.<sup>11</sup> One justice requested that attorneys “state in your prayer the exact judgment you seek,”<sup>12</sup> a sentiment we have heard expressed by many justices.

**Even though you e-file, keep your Appendix as short as possible.**

TRAP 38.1(k)(1) tells you what items *must* be in your Appendix, and 38.1(k)(2) tells you what *can* be in your Appendix. Even with e-filing, keep your Appendix as short as the rules allow. A pdf brief containing 200+ pages of Appendix unnecessarily sends the wrong message. If only a few sentences or words of the contract/document governs, put just those in your Appendix—not the whole document. Many, if not most, justices use two computer screens, one open to the brief, the other open to the record and Westlaw/Lexis. It is less distracting for the Justices to use your brief citations to search the record or Westlaw/Lexis on another screen than to jump down and up from brief to Appendix.

Furthermore, automatic hyperlinking to Texas and Fifth Circuit authority created by the e-filing portal means you do not need to attach copies of Texas or Fifth Circuit cases or Texas or federal statutes. You can, and should, highlight the important words in cases and statutes by quoting them in your brief, which has the happy coincidence of underscoring your argument.

Having said that, a succinctly done Appendix can really help the Court. You cannot use it “to attempt to avoid the page [now word] limits of the brief” (TRAP 38.1(k)(2)) nor to sneak in facts not in the record, but you can use it for timelines which track your story, or diagrams which guide the court through the issues (i.e., if you rule against Appellant on X, you do not need to deal with Y and Z, etc.), or to highlight specific pertinent language from a document. For appropriate materials from the internet your brief cites, remember—some internet links expire. If you have the pdf in your Appendix, it is always available.

**A few other tips.**

**A picture is worth a thousand words, and does not count against your word limit.**

Over two thirds of justices find “graphs, charts, and pictures in the body of the brief” helpful.<sup>13</sup> The late Bob Burleson, a really great trial lawyer for whom Steve clerked, used to tell him to have fun with a brief—and in the pre-computer days of Liquid Paper® and Xerox® machines, would interlace his briefs with appropriate Peanuts® cartoons. Robert DuBose's recent paper has many excellent examples of this tool.<sup>14</sup>

**Quote authority from the Texas Supreme Court and the Court in which you file your brief.**

Eighty-five percent of justices prefer you cite authority from the Texas Supreme Court and authority from their court.<sup>15</sup> If you show them they have followed controlling Supreme Court precedent, they will do so, again, for you.

**Don't personally attack the trial court or opposing counsel—ever.**

Judicial panels perennially give this advice. One justice even said such personal attacks are so distracting that, when she encounters one, she puts the brief down, clears her mind, and restarts the brief at the next issue. So not only do you not make your point, you have shut down your input on the issue.

**After the Ball Is Over.<sup>16</sup>**

With appropriate leave of court, a *short* one paragraph or one-page post argument letter can be very useful—to respond

to a question that stumped you at oral argument, or to inform the court of new authority. Do not use these letters to just rehash old stuff, or, like the aging uncle in the song, you will rue the day you misused this opportunity. When facing another party's mandamus, you might consider sending the court a one-page letter which expressly reserves your right to fully respond, should the court desire—while pointing to the particularly glaring reason the mandamus should fail.

### Other Resources

Lengthier papers abound concerning brief writing—the SBOT Appellate Section makes literally dozens of such papers available to its members.<sup>17</sup> New papers surface regularly at CLE Courses run by the State Bar of Texas (e.g., Advanced Civil Appellate Seminar, Appellate Law 101 Seminar, Handling Your First (or Next) Appeal) and the University of Texas (e.g., Conference on State and Federal Appeals). You should also review the Surveys of the courts of appeals which this paper has referenced.

Hopefully, the foregoing will get you going on your brief in a way that makes you useful—to the courts and your clients—as well as ornamental.

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Court of Texas, at State Bar of Texas CLE PRACTICE BEFORE THE SUPREME COURT 2009, *Suggestions About Oral Argument*.

<sup>4</sup> Stacey Stanley, Staff Attorney, Sixth Court of Appeals, Texarkana; p. 24, *Rehearing Practice in the Courts of Appeals*, SBOT 24<sup>th</sup> Annual Advanced Civil Appellate Seminar (2010).

<sup>5</sup> P. 1, *Results of the 2009 Judicial Survey*, SBOT Appellate Section. A subsequent Judicial Survey was performed in 2012; as of the writing of this paper, that Survey was only available through UT Law CLE, and we do not link to it here. See P. 2, Rothenberg, Scott, Rutter, Kent, and Storey, JoAnn, *Results of the 2015 Judicial Survey*, 25<sup>th</sup> Annual Conference on State and Federal Appeals (2015).

<sup>6</sup> P. 3, 2009 Survey.

<sup>7</sup> P. 2, 2009 Survey.

<sup>8</sup> Bookmarking is surprisingly easy. See pp. 20-25, *Guide to Creating Electronic Briefs*, by Blake A. Hawthorne, Clerk of the Supreme Court of Texas, found on the Supreme Court's website.

<sup>9</sup> P. 2, 2009 Survey; P. 2, 2015 Survey.

<sup>10</sup> Pp. 2-3, 2009 Survey; P. 2, 2015 Survey.

<sup>11</sup> *Id.*; in 2015, nearly 70% felt this way. P. 4, 2015 Survey.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; in 2015, nearly 83% felt this way. P. 4, 2015 Survey.

<sup>14</sup> Dubose, Robert, *Briefing Visually*, 26<sup>th</sup> Annual UT Conference on State and Federal Appeals (2016).

<sup>15</sup> P. 2, 2009 Survey.

<sup>16</sup> Jane Hayes would sometimes sing the refrain to this song to her children when they were young, and not so young.

<sup>17</sup> For some recent papers, see: Baruch, Chad, *Legal Writing: Lessons from the Bestseller List*, and Dubose, Robert B., *Brief Structure, Format, and Design*, SBOT Handling Your First (or Next) Civil Appeal (2016); Dove, Christopher, *Selecting and Framing Issues on Appeals*, SBOT Civil Appellate Practice 101 (2015); Brister, Scott, and Gray, Kendall, *Extreme Brief Makeover*, UT Conference on State and Federal Appeals (2014); Hawthorne, Blake, and Cruse, Don, *Electronic Briefs Nuts and Bolts*, UT Conference on State and Federal Appeals (2011).

<sup>1</sup> Jane Hayes, the Mother of one of the authors, was fond of this general admonition, which applies to brief writing.

<sup>2</sup> We focus here on writing briefs in Texas courts of appeals. If writing for a different court, then adjust the advice given here to accommodate for different pertinent rules, and your audience.

<sup>3</sup> Comments of Scott Brister, former Justice of the Supreme