

by David Mills

Writing the Holistic Brief: Making It More Than the Sum of Its Parts

Much ink has been spilled to improve basic legal writing, particularly with good emphasis on clarity and conciseness in crafting each section of a legal brief. It seems to me that law students and new lawyers are more and more cognizant of these “rules” for good writing. But sometimes the big picture gets forgotten in its individual parts. A compelling brief consists of more than just those well-written sections; it is a holistic document that tells your client’s story with a smooth flow, building persuasiveness from one section to the next. How do we capture that persuasive flow for the judge? We must continuously imagine what it is like for that busy judge to sit at his or her desk and pick up your brief (among perhaps 20 others that week) and assess your client’s story. Consider the following as you prepare your next brief.

Introduction

Many of us have learned that an introduction is a terrific section to add at the front of your brief (even if the court’s rules do not specifically call for it), right after the table of contents and authorities. But let me suggest that you not do what most lawyers do, which is to write a three- to five-page summary of the argument. That’s too long, and it’s also going to be repeated in the aptly named “Summary of the Argument” after the fact section. A judge will tire reading these points repeated a third time in the argument itself. Instead, capture the entire essence of your case in less than a single page (yes, even a double-spaced page). Use this place to put down what you would say to the judge if you had just 30 seconds to explain your position. You likely have one or two golden aspects of your case that favor your side—put them here and don’t clutter them with other points (those details are coming in just a few more pages). Remember, the judges and their clerks are likely reading hundreds of pages of briefing that same week—make it easy for them to engage in your case. True, many lawyers believe that a longer introduction is better because it is read when the judge is paying the most attention. My response: I’d rather hit home a super-short introduction that *still leaves some work for the judge to do*—that is, to read the rest of my (concise)

brief carefully and fully. A judge who has just read a synopsis of everything in the first five pages is not going to be very interested in reading it again (with some more details) 20 pages later.

Statement of the Issues

Noted legal-writing guru Bryan Garner has been among those who have led the way to creating clearer issue statements that are often broken down into multi-sentence syllogisms. But don’t simply write these issue statements as if there had been no introduction section. If you have captured some critical facts or legal principles in that introduction, they can be more quickly referenced in the statement of issues. Remember, the judge just saw them a few seconds ago; if you repeat those points in full, the judge may tend to gloss over them. In this sense, sometimes a one-sentence issue statement can still be quite effective.

Statement of the Case

This section should contain only the basic procedural history. Many lawyers make the mistake of being too detailed here—your statement of facts follows this section, and you don’t want to be repeating the same points. Indeed, a few years ago Judge Jeffrey Sutton of the Sixth Circuit noted that this entire section has caused redundancy in briefs and likely needs reconsideration.¹ Thus, keep this section as short as possible, briefly noting and citing to only those procedural events helpful to understanding your brief.

Statement of the Facts

You’ve already hit the reader at the very beginning of your brief with the heart of your case—now fill in the chronological story that shows what makes the essence of your argument right. But don’t just recite the facts. State them in a way that shows what your argument will be while keeping them 100 percent factual (not conclusory).

An underused but powerful technique is to include those facts that *did not occur* that may help your point. This may sound perplexing, but you’ll see what I mean. Suppose you represent a criminal defendant named Smith, and your argument section will contend that the trial judge did not sufficiently explain the basis for Smith’s

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sentence. You might say something like this, based on the facts you have in the record:

The judge mentioned only Smith's prior criminal history and noted that he was a "bad guy" when sentencing him.

Instead of simply stating what occurred, think about those facts that *should have occurred*. (Those are facts, too.) Thus, your fact statement could add language such as that italicized here:

that will follow in the argument section. Don't get too detailed, because the reader is about to read the same thing again. It is annoying to read the same thing again. It is tiresome to read the same basic point again. People want to stop reading when they see the same thing. See? Can you imagine if I repeated this point again in the next paragraph of this article, especially if you had to read 50 more articles today? Ugh.

Argument

This critical section shows exactly why your client should prevail. And the beauty of the approach I suggest here is that you will have



The judge mentioned only Smith's prior record and noted that he was a "bad guy" when sentencing him. *There was no statement about Smith's youthful age, no mention of Smith's charitable work, and no mention of Smith's minor role in the offense.*

The same technique works in other contexts, such as commercial disputes, where you wish to establish that the failure to take some action supports your legal position.

The broader lesson here is that your fact section, if built with the right sort of facts, will reveal your legal argument to the judge. What better way to credibly tell your client's story (again, with no exaggeration or overblown language) than by having the judge ascertain your client's legal argument through the objective facts of the case?

Summary of Argument

Keep this short as well—it just quickly tracks the main arguments

already set up this section through the previous sections—including the facts that have positioned the reader to know what the argument will be. Don't lose sight of this—the argument section is not a new starting point in the brief; it is a continuation of the story and flow you have carefully put into place, one piece at a time. Now use a simple structure to make airtight, logical points for each issue. I suggest the following as a basic starting point (it can be varied) for the framework of each issue: (1) Explain "how the world works" without discussing your particular facts (i.e., explain what legal principles control the issue generally); (2) consider whether illustrating a case enhances the judge's understanding of how the world works, if you will then be able to tie that case to your specific facts; (3) with this legal landscape in place, explain how your facts sit on that landscape; and (4) if necessary, explain the error in the counterarguments (or the lower court's contrary position)—this fits nicely at the end of this structure

Brief continued on page 67

mer Series can be found at <http://blogs.law.nyu.edu/lifeatnyulaw/nyu-law-students-in-d-c-the-guarini-government-summer-series/> (posted July 1, 2013)

⁴⁸Rhode, *supra* at 1070; Hernandez, *supra* at 68.

⁴⁹O'Reilly, *supra* at 51; Motzenbecker, *supra* at 22.

⁵⁰McMurry, *supra* at 18.

⁵¹Information available at www.nextgen.com.

⁵²Amy Messigan et al., "Young Lawyer's Perspective on Rainmaking: A Timeline for Success," in *THE YOUNG LITIGATOR* (American Bar Association 2011) at 20.

⁵³Busse, *supra* at 69.

⁵⁴Michael Ellsberg, *The Power of Eye Contact* (HarperCollins 2010) at 118.

⁵⁵Ellsberg, *id.*; see also Nick Corcodilos, *The Right Way to Get Coached*, www.asktheheadhunter.com/hagetcoached.htm.

⁵⁶Ballinger, *supra* at 114.

⁵⁷Hamilton *supra* at 120-121.

⁵⁸Busse, *supra* at 58, 68.

⁵⁹I appear to be in the distinct minority as "informational interview" is widely and effectively used in career-services-speak. See Busse and Joiner, *supra* at 66. It's fine to think of your get togethers as informational interviews, but it's much more fun to grab coffee and chat. Just saying.

⁶⁰Recent Grad Interview.

⁶¹Randall Ryder, "Don't Suck at Networking Lunches," *LAWYERIST* (posted April 16, 2013).

⁶²Ballinger, *supra* at 52.

⁶³Sotomayor, *supra* at 176.

⁶⁴Sotomayor, *supra* at 72.

⁶⁵Terrence O'Donnell, *Federal Court Practitioners Serve as Mentors to Newly Admitted Attorneys: The Supreme Court of Ohio's Lawyer to Lawyer Mentoring Program*, 57 *FED. LAWYER* 28, 29 (August 2010) (describing Ohio's formal bar mentoring program). For more information on the GovLoop Mentors Program, see www.govloop.com/page/govloop-mentors-program.

⁶⁶Steven Keeva, "Good Act to Follow," 81 *A.B.A. JOURNAL* 74, 77 (March 1995).

⁶⁷Oseid, *supra* at 399.

⁶⁸Binns, *supra*.

⁶⁹Hamilton, *supra* at 119-21.

⁷⁰See, e.g., Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 *ALB. L. REV.* 623, 623 (2008).; Keeva, *supra* at 76.

⁷¹Peppers, *supra* at 637.

⁷²Oseid, *supra* at 407.

⁷³Oseid, *supra* at 407.

⁷⁴Amy Messigan et al., "A Mentoring Checklist To Help Make the Mentoring Relationship More Productive," in *THE YOUNG LITIGATOR* (American Bar Association 2011) at 52-58 (example checklist of questions to ask a mentor, tailored for a law firm setting).

⁷⁵Erin Binns, "Navigating the Mentor-Mentee Relationship," *STUDENT LAWYER* (February 2013).

⁷⁶Hamilton, *supra* at 107-119.

⁷⁷Hamilton, *supra* at 107.

⁷⁸Kay, *supra* at 77 (2009).

⁷⁹Schipani, *supra* at 5; Oseid, *supra* at 407.

⁸⁰Email interview with the Hon. Jeanne J. Graham, U.S. magistrate judge, April 2, 2013, on file with the author.

⁸¹*Id.*

⁸²Remarks at the Access to Leadership Conference, April 25, 2013, confirmed by email with Kimberly Nelson dated May 2, 2013, on file with the author.

⁸³Nick Corcodilos, *The Right Way to Get Coached*, *supra*.

⁸⁴Recent Grad Interview, *supra*.

⁸⁵Beem, *supra* at 58.

⁸⁶Recent Grad Interview, *supra*.

⁸⁷Recent Grad Interview, *supra*.

⁸⁸Carolyn Young et al., *What Students Don't Know Will Hurt Them: A Frank View From the Field on How to Better Prepare our Clinic and Externship Students*, 14 *CLIN. L. REV.* 105, 118 (2007-2008) (surveying skills reported to be most lacking in student interns).

⁸⁹Laurie A. Lewis, *Clerkship-Ready: First-Year Law Faculty Are Uniquely Poised to Mentor Stellar Students for Elbow Employment with Judges*, 12 *APP. L. J.* 1, 6 (2012).

⁹⁰Peppers, *supra* at 633-34 (2008).

⁹¹Kavanagh, *supra* at 353.

⁹²Louise A. LaMothe, *Where Have All the Mentors Gone?* 19 *LITIGATION* 1, 5 (Winter 1993).

BRIEF continued from page 59

and will be easy to do because the judge already understands "how the world works." As you move on to other issues, remember what the judge now knows—you may be able to rely on that knowledge to make further arguments even more concise.

Conclusion

Keep this short and sweet, but also recognize the opportunity to bring the brief full circle and quickly tie it back to the main essence you established in the introduction. Scriptwriters employ this technique for blockbuster movies: tie the ending theme to the opening scene. But keep it to just a few sentences, and end with your request for exactly what the court should do (e.g., affirm, reverse, etc.). And don't tell the judges that they "must" do anything; just say that they

"should." Your facts and flow will indicate to them whether they must take the action you suggest.

By taking this holistic approach to the brief, you will continuously be mindful of the judge's view as he or she learns your client's story, one section at a time. That can blend the nice brushstrokes of your work into a single masterpiece. ☺

Endnote

¹ABA COUNCIL OF APPELLATE LAWYERS COMMENTS ON PROPOSED AMENDMENTS TO FED. R. APP. P. 28 & 28.1: MERGING STATEMENTS OF THE CASE AND FACTS, www.uscourts.gov/uscourts/RulesAndPolicies/rules/AP%20Comments%202011/11-AP-004-Comment-Finnell%20ABA%20Council%20of%20Appellate%20Lawyers.pdf.