How to Write a Kick-Ass Brief

Supplemental Reading

CAFL Appellate Certification Training

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EFFECTIVE BRIEF WRITING

Andrew Cohen, Director of Appellate Panel
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I. WHAT IS A GOOD BRIEF?

A. It must follow technical rules contained in the Rules of Appellate Procedure.

B. It must be engaging and compelling.

II. TIPS FOR FOLLOWING TECHNICAL RULES

1. INCLUDE ALL REQUIRED SECTIONS – Mass. R. App. P. 16(a)

Rule specifies that you must include:

- Table of Contents
- Issues Presented
- Procedural History
- Statement of Facts
- Summary of Argument (if Argument over 24 pages)
- Argument
- Conclusion
- Prayer for Relief
- Rule 16(k) certification (as to compliance with Rules).

There is no rule against adding an "introduction" or subsections of Statement of Facts.

2. NO CREATIVITY IN FORMATTING – Mass. R. App. P. 20

Rules specify margins, typefaces, line spacing, color of cover.

Set up a template in your word-processing system with the right margins, spacing and font.

3. THE RECORD IS YOUR UNIVERSE – Mass. R. App. P. 16(e)

Every statement of fact made in brief (whether in Fact section or Argument section) must have a record citation.

If you've got a lot of facts in your sentence, cite them right away. Don't wait until the end of the sentence.

Conversely, don't add facts that are not in your record.

4. SHORT IS GOOD, SHORTER IS BETTER – Mass. R. App. P. 16(h)

50-page limit.

Try for shorter.

Judges love brevity.

Keep footnotes to an absolute minimum.

5. KEEP IT CONFIDENTIAL – Mass. R. App. P. 16(d)

No last names of any party. Instead use first names and last initials. Refer to mother as "Mother" or "Ms. J.", father as "Father" or "Mr. P.", and children by their first names.

Don't just use all initials – that's confusing.

Don't use fictitious names (unless you're "back" on appeal after remand and you're using the same fictitious names that the Appeals Court used in the prior appeal).

Put word "IMPOUNDED" on the cover.

6. FINDINGS AND STATUTES MUST BE ATTACHED AS ADDENDA – Mass. R. App. P. 16(a)(1)(6).

Paginate them just as they are in the record appendix, for easy reference.

While only the appellant is required to include the findings, appellees should do it, too. Why make the judge reach for your opponent's brief?

7. BLUEBOOKING

Judges and clerks notice. Sloppy cite forms and sloppy use of signals make a brief look . . . well, sloppy.

III. THE ONE RULE FOR WRITING A GOOD "STATEMENT OF CASE"

1. ONLY INCLUDE ESSENTIAL INFORMATION.

What's essential?

- When case filed
- Where case filed
- When trial held
- When appeal filed
- Other key procedural info if necessary to Argument

What's not? Procedural history that isn't implicated in your Argument. For example:

- The date counsel was appointed (unless you have an argument about the trial court's late appointment of counsel or denial or counsel, or about ineffective assistance of counsel)
- The date an guardian ad litem or investigator was appointed (unless you have an argument about that person's conduct or report)
- The dates of pretrial conferences or status hearings (unless something important took place at the hearing and you have an argument about it)

IV. TOP FIVE TIPS FOR WRITING A GOOD FACTS SECTION

1. DON'T WRITE BORING FACTS.

1. 90% of the time, the case is about the facts, not the law.
2. Get the judge to rely upon your Facts section by:
   - Being scrupulously accurate.
   - Citing to the record for every fact mentioned.

- Writing an interesting story that makes the judges want to read it. I you are bored by it, the judges will be bored, too.

3. Make your client a person.

   - Talk about the good things, not just problems.

   - You story should show how hard the parent has worked, how good her relationship is with her child, how DSS treated her poorly.

   - And, how fit she was at the time of trial to care for her child.

4. If writing for appellee-child, put up front how old the child is now and how long the child has been in care.

5. Write it as a short story – NOT a dry chronological rendering of the trial testimony.

   - Don't tell story chronologically. If necessary, use headings.

   - Use quotes.

Example of boring, chronological facts:

> Daryl was born on March 12, 2012. His mother is Martha S. The involvement of Daryl's family with the Department began on October 30, 2017. On that evening, Boston Police Officer Ed Gordon found Daryl wandering the streets of Boston all alone. It was cold and raining. Officer Gordon testified that Daryl was dressed only in a T-shirt and was shivering. On October 30, 2017, Martha S. called police looking for her son.

Would you rather read that, or this?

> Cold, wet and all alone, five-year-old Daryl wandered the rainy streets of Boston on the evening of October 30, 2017. Officer Ed Gordon spotted him huddled in a doorway. "He was shivering so hard he couldn't talk to me," Officer

Gordon said. "It was 40 degrees out and he had only a ripped t-shirt on." Seven days went by before Martha S., Daryl's mother, called police looking for him.

No rules prohibit you from making your facts a more engaging story. Just remember to cite to the record for each fact.

2. EDIT, EDIT, EDIT!

1. If your Facts are longer than your Argument, cut them down drastically.

2. Every fact belongs in your brief only if there is a reason.

- Favorable to your client's position
- Important background
- Difficult/damaging fact must be dealt with
- Needed for your argument

4. DO NOT ARGUE, EVALUATE OR OPINE IN THE FACTS SECTION

1. In the example, I could have written:

> "*Unbelievable as it may seem*, seven days went by before Martha S., Daryl's mother, *bothered* to call police looking for him. *Why?*"

That will just send the panel to your opponent's brief for the real facts.

> Better: "Seven days went by before Martha S., Daryl's mother, called police looking for him."

5. DEAL WITH DIFFICULT FACTS ARTFULLY

You must address bad facts, but you can lessen their impact by dealing with them artfully.

a. Less detail is good.

b. Pair a bad fact with a good fact.

Let's say bad fact is mother late for ten visits.

Example: "Although mother was late to ten of her visits, every one of her visits went well and the children were always happy to see her".

If you represent the appellee-child, and the "bad" fact is that Mother attended all 50 supervised visits scheduled by DSS.

Example: Mother attended supervised visitation.

Or

Example: While mother attended supervised visitation, she never provided drug screens or gave DSS her home address as required by her service plan.

c. Bury the bad fact in the middle of a sentence or, better yet, in the middle of a paragraph.

IV. FOUR TIPS FOR WRITING A GOOD ARGUMENT SECTION

1. BE CONCISE – CAN A JUDGE FOLLOW YOUR ARGUMENT IF SHE IS READING IT ON THE TRAIN HOME?

a. Short sentences, short paragraphs.

b. When in doubt, cut a complicated sentence into two or three smaller ones.

2. DON'T BE TOO "LEARNED"

a. No string cites for basic propositions. Judges gloss over string cites. Pick the key case (or a recent case) for your proposition.

b. If you must cite more than one case, use a parenthetical to explain why each cite is relevant and important for the judge to read.

c. No big blocks of boilerplate law. Do not cite to pages of "governing law" divorced from the facts of your case. Judges gloss over it. Instead, weave the law into your argument.

3. FOR APPELLEES, RESPOND TO EVERY ARGUMENT MADE BY APPELLANT.

a. Respond even to "stupid" arguments. You never know.

b. Re-write the appellant's argument if it isn't clear, then respond clearly to it. The judges will thank you.

c. Even if appellant-parent doesn't argue this, always include an argument that:

- judgment of the trial court is based upon clear and convincing evidence of parental unfitness, and
- termination of parental rights is in the child's best interests.

4. DON'T NEGLECT THE SUPPORTING CAST (Rule 16)

a. Make sure Table of Contents is accurate!

b. Write a descriptive, compelling Statement of Issues (see memo on Questions Presented)

c. Summary of the Argument

- Required if Argument longer than 24 pages.
- Include it anyway, even if don't have to. Some judges look at it first.
- Summary of Argument is not just a collection of your Argument headings. You should really summarize each part of your Argument. The Rules require that you include cites to the appropriate pages of the Argument that you are summarizing.

V. CONCLUSION and PRAYER FOR RELIEF

Specify what relief you are seeking, particularly if you are looking for something complicated. Don't put yourself in a position where, at oral argument, a judge has to ask you,

"Counsel, let's say we agree with you - what do you want us to do?" Make that clear in your brief.

Legal Writing in the Electronic Age

FDCC Winter Meeting
Charleston, South Carolina
March 6 - 10, 2017

Paper author and moderator:

Charlie Frazier
Alexander Dubose Jefferson & Townsend LLP
(Dallas, TX)

Panel members:

Honorable John Cannon Few
Associate Justice, South Carolina Supreme Court
(Columbia, S.C.)

Michael Aylward
Morrison Mahoney
(Boston, MA)

Bob Olson
Greines, Martin, Stein & Richland LLP
(Los Angeles, CA)

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Charlie Frazier

Charlie Frazier is a partner in the Dallas office of the appellate law firm of Alexander Dubose Jefferson & Townsend, LLP, with offices also in Austin and Houston. Charlie has been board certified in civil appellate law by the Texas Board of Legal Specialization since 1994. For over 27 years, his appellate and litigation-support practice has covered many areas of civil law, including substantial experience in complex commercial and contractual disputes, insurance-coverage and bad-faith disputes, and professional-liability claims.

Charlie successfully argued before the Supreme Court of the United States on behalf of ten psychiatrists who were sued by a former patient under RICO, claiming that a pattern of racketeering activity existed to keep him under hospitalization. *Rotella v. Wood*, 528 U.S. 549 (2000). The Court rejected the patient's argument that accrual of a civil RICO claim is postponed until the pattern was or should have been discovered, thereby holding that the patient's claim was time-barred.

Charlie received his B.A., magna cum laude, from Baylor University and his J.D. from the Baylor School of Law, where he was published in the *Baylor Law Review*, on which he held various editorial positions. In between college and law school, Charlie received the M.A. in International Relations from the University of Kent, in Canterbury, England, on a Rotary International Scholarship. He has been listed since 2009 in *Best Lawyers in America* in Appellate Law. Charlie is a Vice Chair of the Appellate Section of the FDCC, and has participated on panel presentations at the 2015 and 2016 Winter Meetings. He currently holds, and has held, several leadership positions in the Appellate Advocacy Committee of the DRI.

Michael Aylward

Michael Aylward is a senior partner in the Boston office of Morrison Mahoney LLP where he chairs the firm's complex insurance claims resolution group. For nearly thirty years, Michael has represented insurers and reinsurers in coverage disputes around the country concerning the application of liability insurance policies to commercial claims involving intellectual property disputes, environmental and mass tort claims and construction defect litigation. He also consults frequently on bad faith and ethics disputes and has served as an arbitrator and testified as an expert in various matters involving coverage and reinsurance issues arising out of such claims.

In addition to his trial and appellate practice, Michael often testifies as an expert on insurance-related issues. He is also an AAA-certified neutral and has served as a party-appointed arbitrator in a number of large insurance disputes.

Michael is a prolific author and speaker on insurance coverage issues. He is a contributing author to several leading insurance treatises, including two chapters in the New Appleman Insurance Law Practice Guide (2008) and a chapter in the 2012 ABA treatise on environmental liability and insurance coverage disputes. He also publishes an e-newsletter that is sent each week to over a thousand claims professional and in-house counsel. For the past five years, he has also served as one of the contributing editors of the Insurance Law Forum, a leading insurance coverage blog.

Michael has chaired the FDCC Reinsurance, Excess and Surplus Lines Committee, and has held leadership positions in the DRI, International Association of Defense Counsel, and the Insurance Committee of the ABA Litigation Section.

Bob Olson

Bob Olson is a partner in Greines, Martin, Stein & Richland, LLP, in Los Angeles. Both he and his firm specialize in appellate proceedings in state and federal courts, including appeals, petitions for extraordinary writs, amicus briefs, and petitions for review and certiorari, as well as related law and motion in trial courts. The firm devotes its practice exclusively to appellate law and is one of the nation's leading appellate law firms.

In addition to being a member of the FDCC, Robert is a past president of the Association of Southern California Defense Counsel, a fellow of the American Academy of Appellate Lawyers, a past president of the California Academy of Appellate Lawyers, a member of the Claims Litigation Management Alliance. He is certified as an Appellate Law Specialist by the State Bar of California Board of Legal Specialization.

Robert has taught Appellate Advocacy as an adjunct professor at Loyola Law School. He has been repeatedly named to the "Best Lawyers in America" and Southern California "Superlawyers" lists. He obtained his law degree from Stanford University where he was elected to Order of the Coif. After receiving his law degree, he clerked for United States Court of Appeals for the Ninth Circuit Judge, now United States Supreme Court Justice, Anthony M. Kennedy.

The Honorable John Cannon Few

Justice John Cannon Few is Associate Justice of the South Carolina Supreme Court. He was elected on February 3, 2016, and sworn in on February 9, 2016. Born in Anderson, South Carolina, Justice Few grew up in Greenwood, South Carolina. After earning a Bachelor of Arts degree in English and Economics at Duke University, he earned his J.D. degree from the University of South Carolina School of Law, where he was a member of

The Order of Wig and Robe and The Order of the Coif, and served as Student Works Editor of the *South Carolina Law Review*. Justice Few is admitted to practice in South Carolina, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

Justice Few began his legal career as law clerk to The Honorable G. Ross Anderson, Jr., United States District Judge. He practiced law in Greenville from 1989 to 2000, and then served as a judge on the Circuit Court of South Carolina for almost ten years. On February 3, 2010, he became Chief Judge of the South Carolina Court of Appeals, a position he held until February 2016, when he was elected to the South Carolina Supreme Court.

Justice Few is a frequent public speaker. In 1996, he gave a speech entitled "Citizen Participation in the Legal System," for which he was awarded first place in the ABA's nationwide Edward R. Finch Law Day speech contest. He has given numerous speeches to bar associations and civic groups throughout the country, and has delivered commencement addresses to the graduates of Lander University and the Charleston School of Law, where he delivered "What it Means to be a Lawyer." His most frequent speech is entitled "The Courage of a Lawyer," which he has delivered to legal associations in South Carolina, North Carolina, Georgia, Florida, Arizona, and California, and which was published in the 2013 Winter edition of the ABA's *Litigation* journal.

Justice Few has served on the faculty of the National Judicial College in Reno, Nevada, as Adjunct Professor of Law and later a Distinguished Visiting Professor at the Charleston School of Law, and most recently as Adjunct Professor of Law at the University of South Carolina School of Law. He has also given or moderated over 125 continuing legal education seminars in South Carolina and numerous other states.

Justice Few is a Fellow in Liberty Fellowship, and as a part of Liberty Fellowship is currently undergoing moderator training through The Aspen Institute. He completed the Diversity Leaders Initiative through The Riley Institute at Furman University in 2010. In December 2012, the Charleston School of Law awarded him the degree Doctor of Laws, honoris causa.

Justice Few is the proud father of daughters Reed and Anna, and son Cannon.

I. Introduction: the judiciary is going electronic

Over the past 20 years, a shift from paper filing to electronic filing has occurred in appellate courts across the United States, and the rate is increasing. From 2010 to 2014, the number of state appellate courts requiring or allowing e-filing increased from 15 to 33. ABA Council of Appellate Lawyers, *The Leap from E-Filing to E-Briefing* at 3 (2017) ("CAL Rpt."), http://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf. It is not a stretch to expect that "all or nearly all jurisdictions will have appellate e-filing within the decade." *Id.*

With the advent of e-filing has been the introduction of electronic-document management, allowing judges and court staff to access documents by computer instead of paper files. Currently, *every* federal circuit court of appeals issues iPads to their judges (judges in the D.C. Circuit may choose the tablet type), and over 50% of state appellate courts do the same (usually iPad or Surface). CAL Rpt. at 8-11. *See* Tab A. However, not every appellate judge uses them to read briefs. Surveys show judges often read on a PC screen and in print when in the office. But the number of judges reading on paper decreases each year. It seems likely that nearly all judges and court staff will eventually read arguments on screens, not paper.

What effect, if any, will the change in the way judges read legal arguments have on the way attorneys present arguments in appellate briefs and motions? Will legal writing have to change along with the medium that is used to read it? Yes: If attorneys wish to effectively communicate to the electronic reader, they must reassess how they write and consider additional ways of communicating their arguments.

To support this conclusion, this article summarizes the results of various studies by cognitive scientists, educators, and website designers showing that screen readers read and retain differently than paper readers. The article then proposes ways attorneys can structure legal arguments and present them more effectively and persuasively to the screen reader, and how to utilize the electronic tools available to them.[1]

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[1] The author wishes to thank Robert Dubose, partner in the Houston office of Alexander Dubose Jefferson & Townsend, LLP, for his permission to use as a source for this paper his book, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD (ALM 2010) (cited as "Dubose").

II. How screens have changed reading

Research has revealed that people read and retain information differently when reading electronic texts because there are material differences between the reading environment of digital and print media.

> Because we literally and physiologically can read in multiple ways, how we read—and what we absorb from our reading—will be influenced by both the content of our reading and the medium we use.

Maryanne Wolf, *Our "Deep Reading" Brain: Its Digital Evolution Poses Questions*, Nieman Reports (Summer 2010), *quoted in* Anne Niccoli, *Paper or Tablet? Reading Recall and Comprehension*, Educause Review at 3 (Sept. 28, 2015), http://er.educause.edu/articles/2015/9/paper-or-tabletreading-recall-and-comprehension/.

A. Screen reading occurs in a different environment than paper reading.

I recently observed readers at a large bookstore across from a mall, and then later that day readers at a Starbucks next door to a university. The readers in the bookstore read in an open lounge area between the book displays and a Starbucks counter. They were quietly engrossed in their books, sipping their coffee or tea as they casually flipped the pages. Some were listening to something on their earphones, but most weren't. There was little distraction.

In contrast, the readers at the other Starbucks were reading from a screen; nearly all had earphones tapped into the reading device or a phone. While not knowing the screen content (I couldn't read it if I wanted to), I noticed the screens changing at a fairly quick pace. Between scrolling through screens, constantly checking their phones, and encountered occasional interruptions by other patrons, I couldn't imagine the readers being able to concentrate on the screen content. There was one brave paper reader who, despite the activity surrounding him, appeared as engrossed in his book as the bookstore readers. The age of the readers at the two venues were surprisingly similar.

Admittedly, a busy Starbucks and a placid bookstore reading area present two contrasting *external* environments. But the differences I noticed between the paper and screen readers likely were an accurate reflection of the different *internal* reading environments between the two media. Below are several material differences between paper and screen environment.

1. Our electronic devices create an environment of distraction.

Back when lawyers read on paper at their office desk, they had a limited amount of information immediately available to them: their papers, client files, a few books, periodicals, and journals.

The amount of information lawyers now available in their offices is virtually unlimited. As Mitch Kapor, the founder of Lotus, once said, "Getting information off the Internet is like taking a drink from a fire hydrant." When we sit at a computer, or carry a smart phone, tablet, or laptop, we have a limitless supply of information.

And not only is the available information unlimited, it is *always* available—the ever-present siren call leading us to us "check in." We are never without our smart phones, and a tablet, laptop, or PC is almost always within reach. These devices not only wake us up and tell us our schedule for the day, they constantly communicate with us, distracting us from our reading. Unless the "notifications" function is turned off, we can potentially receive interruptions from (1) social media (Twitter, Facebook, Instagram, Snapchat, GroupMe, SoundCloud, Houseparty), (2) subscriptions (newsmagazines, bank and credit-card activity, weather updates, Uber and Lyft, news alerts), and (3) other messages (calendar alters, Amber alerts, software updates). The distractions are endless.

The result? Our electronic readers do not have the same focus and sustained attention as our readers had 25 years ago. As technology writer John Freeman concludes, our readers "work in the most distraction-prone workplace in the history of mankind." JOHN FREEMAN, THE TYRANNY OF E-MAIL: THE FOUR-THOUSAND-YEAR JOURNEY TO YOUR INBOX 140 (2009).

2. Readers expect information instantly.

Like our paper readers in the bookstore lounge, reading in the past was a process of discovery that required time (and quietness) to find information. Now, search engines like Google, Yahoo, Safari, Westlaw, and LEXIS have trained readers to expect information quickly. Searching is relatively easy—it requires very little thinking or time to find information. *See* Nicholas Carr, *Is Google Making Us Stupid?*, The Atlantic (July/August 2008), http://www.theatlantic.com/doc/200807/google.

Because readers have become so accustomed to quickly obtaining information electronically, many now also expect to extract information from written documents, including legal filings, with the same ease and speed. When readers now approach a document, they expect to locate the necessary information in it as quickly and easily as they locate information through an Internet search. ROBERT DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD 22 (2010).

3. Because screen reading is more challenging, readers tend to skim screen text.

Studies have shown that screens are more difficult to read than paper. *See infra* Section B.1. When we read word-for-word, we read 10 to 30 percent more slowly on screens than paper. Sri H. Kurniawan & Panayiotis Zaphiris, Reading Online or on Paper: Which is Faster? (Aug. 2001), http://users.soe.ucsc.edu/~srikur/files/HCII_reading.pdf.

Why is this so? Technology writer John Freeman suggests the difference has to do with *light*. Freeman at 15. He notes that the human eye evolved to see the world by *reflected* light—it is not designed to look directly *at* a light source. Thus, we see most of the world using reflected light. An electronic device presents a relatively new exception. A computer screen shines light directly into our eyes. *Id.* It dries the eyes, increases blink rate, and creates headaches. *Id.*

It is therefore unsurprising that readers compensate for this more challenging reading environment by skimming screen text to more quickly gather information. Dubose at 40-41.

4. Multiple Window screens fosters multitasking.

The Windows-type operating system of course enables users to run more than one program at one time. *Id.* at 24-26. Today, most computer devices enable multitasking, turning readers into multitaskers as they move from one window to another. This ability is further enhanced by large screens or the use of multiple monitors at the office.

Yet, as with the constant electronic notifications, multiple windows compete for our attention and disrupt our concentration.

Freeman says multitaskers are capable of rote, mechanical tasks, but their performance declines in higher areas of thought, such as memory and learning. Freeman at 141. A Stanford University study found that people who are regularly bombarded with several streams of electronic information have a lower attention span, less memory control, or cannot switch between jobs as well as those who tackle one task at a time. Adam Gorlick, *Media Multitaskers Pay Mental Price, Stanford Study Shows*, *Stanford University News* (Aug. 24, 2009), http://news.stanford.edu/2009/08/24/multitask-research-study-082409/.

Multitasking actually slows our thinking because it "forces us to chop competing tasks into pieces, set them in different piles, then hunt for the pile we're interested in, pick up its pieces, review the rules for putting the pieces back together, and then attempt to do so, often quite awkwardly." Walter Kirn, *The Autumn of the Multitaskers*, The Atlantic (November

2007), http://www.theatlantic.com/ (search for "autumn multitaskers"; then follow hyperlink to "The Autumn of the Multitaskers").

These distractions present a challenge for legal writers. Electronic readers of our legal documents will most likely be bombarded with these distractions as they attempt to absorb and understand what we have written. Dubose at 26-28. The challenge to communicate complex legal information to the screen reader is therefore higher than ever.

B. Studies reveal that screen readers read differently—and in some cases comprehend less—than print readers.

1. The low "physicality" of screens makes navigating long texts more difficult.

Studies show that "'[t]here is physicality in reading.'" Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper Versus Screens*, SCIENTIFIC AMERICAN at 3 (Apr. 11, 2013) (quoting Maryanne Wolf), https://www.scienticamerican.com/article/reading-paper-screens/. The brain perceives the entirety of a text "as kind of physical landscape," and readers often locate particular information that they have read by recalling where it was located in the text. *Id. at 4-5.* It not unlike remembering the location of a certain productive pool in a trout stream by recalling it was located directly opposite a large buffalo jump.

Paper readers, especially when reading books, are reading in a clear, physical domain: two pages, eight corners, and a "feel" for the paper, which the reader leaves for a new vista by turning the page. *Id.* at 5. Paper readers read left-to-right, down the page, concentrating on one text at a time, doing only one task: reading. *Id.*

Screens, on the other hand, "interfere with intuitive navigation of a text and inhibit people from mapping the journey in their minds." *Id.* The screen only displays one virtual page, disappearing as the reader clicks for the next screen, or scrolls or jumps to another part of the text. Even with page numbers and headers, "it is difficult to see any one passage in the context of the entire text." *Id.*

The relative ease in navigating paper texts enables better absorption and therefore higher comprehension than reading screen texts. Studies have shown that the "spatio-temporal markers" that paper provides—touching paper and turning pages—"aids the memory, making it easier to remember where you read something." Caroline Myrberg & Ninna Wiberg, *Screen vs. paper: what is the difference for reading and learning?*, Insights, 28(2) at 49-54 (2015), http://insights.uksg.org/articles/10.1629/uksg.236/. The necessity of scrolling on a computer screen makes it more difficult to recall the substance of the text. *Id.*

In addition to Freeman's study on the effect of light from a screen, other studies have suggested that the low "physicality" of the screen increases the effort required to read screen text, especially if it is long. For example, one Swedish study revealed that screen readers reported higher levels of stress and tiredness, resulting in lower comprehension. Jabr at 8. Another study found that readers who had to scroll through continuous text recalled less than readers who flipped pages. *Id.* at 9. Again, researchers reasoned that scrolling requires more mental reserves because scrolling demands that the reader focus on the text and how she is moving it; in contrast, turning or clicking a page "are simpler and more automatic gestures." *Id.*

Why would the physical qualities of paper matter? Some researchers have concluded that qualities of words on a physical page help readers remember and find their location and content better. The four corners of a page "make it easier to form a coherent mental map of the text." *Id.* And others who read on a Kindle found that "people who read on paper were much better at reconstructing the plot of the story." Annie Sneed, *Everything Science Knows about Reading On Screens, Fast Company*, at 6 (July 8, 2015), https://www.fastcodesign.com/3048297/evidence/everything-science-knows-about-reading-on-screens. The researcher who conducted the study hypothesized that the tactile feedback of paper may help people process certain information when they read.

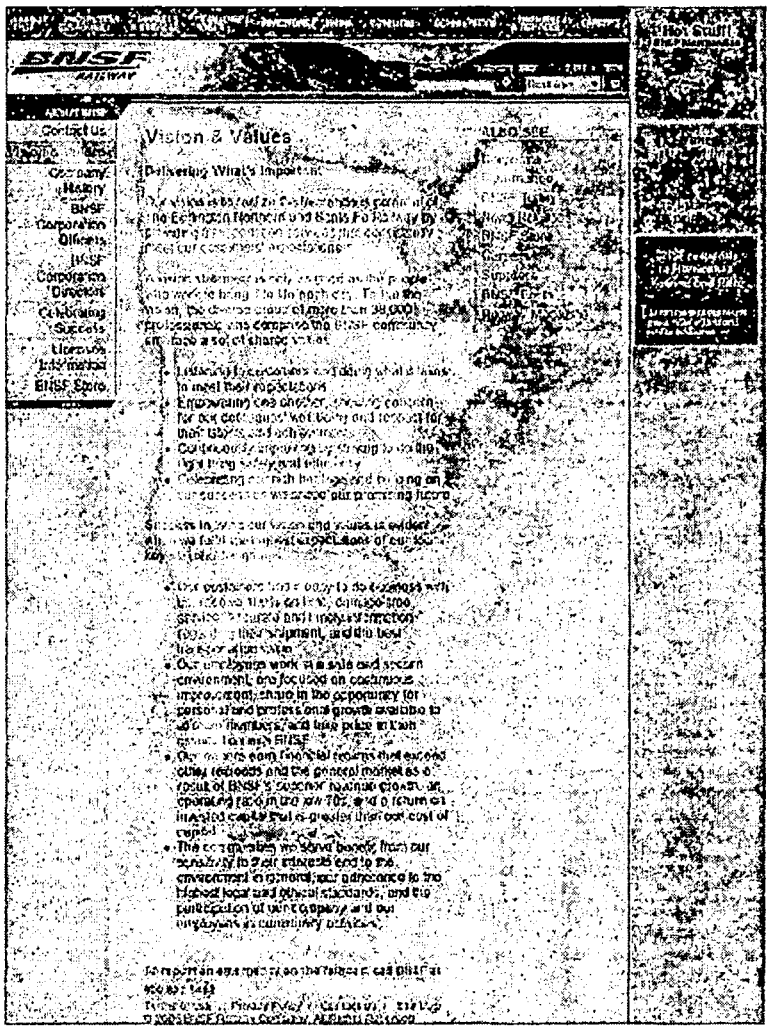
2. Screen readers skim over text—they don't read it.

Studies have shown that reading from a screen has changed the very mechanics of reading. Screen readers spend more time "browsing and scanning, keyword spotting, one-time reading, non-linear reading, and reading more selectively." Sneed at 1. They don't read every word; they *skim* the text, focusing on only a portion of the page to gather what they want. Dubose at 40-41.

Eye-tracking studies have shown that screen readers are more likely to focus on certain portions of the page—typically:

- the top of the page,
- headings,
- the first line or two of paragraphs, and
- the text in a narrow band on the left side of the page running from top to bottom.

Because this reading pattern is shaped like an "E" or an "F," web designers refer to it as the "F-Pattern," which is demonstrated below:



Jakob Nielsen, *F-Shaped Pattern For Reading Web Content*, Nielsen Norman Group (Apr. 17, 2006), https://www.nngroup.com/articles/f-shaped-pattern-reading-web-content/.

The red and yellow areas of the page around the top left are the portions that test subjects looked at most. Blue areas had fewer views. Some words on the page were not read by any subjects. Studies have found the same sort of pattern not only in the way people read websites, but also in the way they read other types of online texts, such as newsletters.

Web designers have learned that a visible text structure takes advantage of these patterns and enables rapid-information gathering. For legal writers, the lesson is that visible structure is crucial for our readers to

understand our primary arguments and quickly see the structure of an argument's logic

The F-pattern suggests that screen readers are more likely to:

- **Look for headings and summaries** of content;
- **Read the first paragraph** of a text more thoroughly than the rest of the text;
- **Read the first sentence** of a paragraph, but skim the rest of the paragraph; and
- **Look for structural cues** down the left side of the page.

See id.

Another lesson of the F-pattern is that screen readers usually do not read thoroughly. In the study, almost none of the readers read all of the words on the screen. When words are located toward the end of a paragraph, further down the page, or further to the right, they are less likely to be read. *Id.*

This switch to skimming results from the nature of the computer reading environment. Computer readers are in a hurry. STEVE KRUG, DON'T MAKE ME THINK 22 (2d ed., 2006). As discussed, the Internet provides an unlimited amount of information at a click, and readers simply do not have enough time to read it all. Skimming is not caused by laziness. It is a necessary adaptation to handle the information explosion and the demands of screen reading. Dubose at 41.

3. Screen readers have lower attention spans and want information quickly.

Because of the massive amount of available information on a screen and the lack of sufficient time to actually see it, "[w]eb users are impatient and insist on instant gratification." Vitaly Friedman, *10 Principles of Effective Web Design*, Smashing Magazine (Jan. 31, 2008), http://www.smashingmagazine.com/ (search "effective web design"; then follow hyperlink under "10 Principles of Effective Web Design").

Steve Krug's landmark book on web design is named for the key principle for writing to the new reader: "Don't Make Me Think". Krug explains that when a user looks at a web page:

> [I]t should be self-evident. Obvious. Self-explanatory. I should be able to "get it"—what it is and how to use it—without expending any effort thinking about it.

Krug at 11. Rather than an attack on the intelligence of screen readers (which is generally high), this statement recognizes that they are simply busy, bombarded with multiple sources of information, and therefore eager to get the crux of the text without significant effort. Their reading method is on the other side of the spectrum from the method of "deep" reading.

So it is with this impatient screen reader, in a non-physical, distracting screen environment that legal writers must more than ever communicate. But persuasively conveying a complex legal argument is a daunting challenge for the legal writer—that is, if the manner in which the message is conveyed does not change.

III. Suggestions for structuring an effective and persuasive legal argument to the screen reader.

The foregoing studies reveal that traditional legal writing may not be compatible with screen reading and rapid-information gathering. From law school and through years of practice, we have traditionally written in long paragraphs, using long sentences and lengthy argument development with little visible structure. This method of communicating demands more effort and focus than the new reader is able, or wants, to give.

So how can we better communicate complex legal concepts and arguments in a more screen-friendly format? Thankfully, a large body of research exists on how to write for the new style of reading. This research comes from the school of web design known as "usability." As Dubose explains:

> Usability tools are web design tools that have proven effective for making programs and websites easier to use. Many of these tools are as useful in legal writing as they are in web design. They help readers locate information. And they help readers to get the point quickly.

Dubose at 52. The following is a summary of several usability principles that Dubose recommends legal writers employ to more effectively communicate with the new screen reader, which also enhances communication with the paper reader. *See id.* at 51-52.

A. Use visible structures.

As the F-pattern demonstrates, screen readers need structure to process information rapidly. Recall that the study revealed that screen readers spend as much time looking up and down the left-hand side of the screen as they do reading text from left to right. Therefore, they look for signs of structure.

Dubose recommends using the following structural tools:

- **Frequent headings.** Headings enable the screen (and paper) reader to see the overall structure of the argument, serve as sign posts to help him recall where he is in the argument, and enable comprehension by skimming. The smaller the screen, the more necessary headings are.

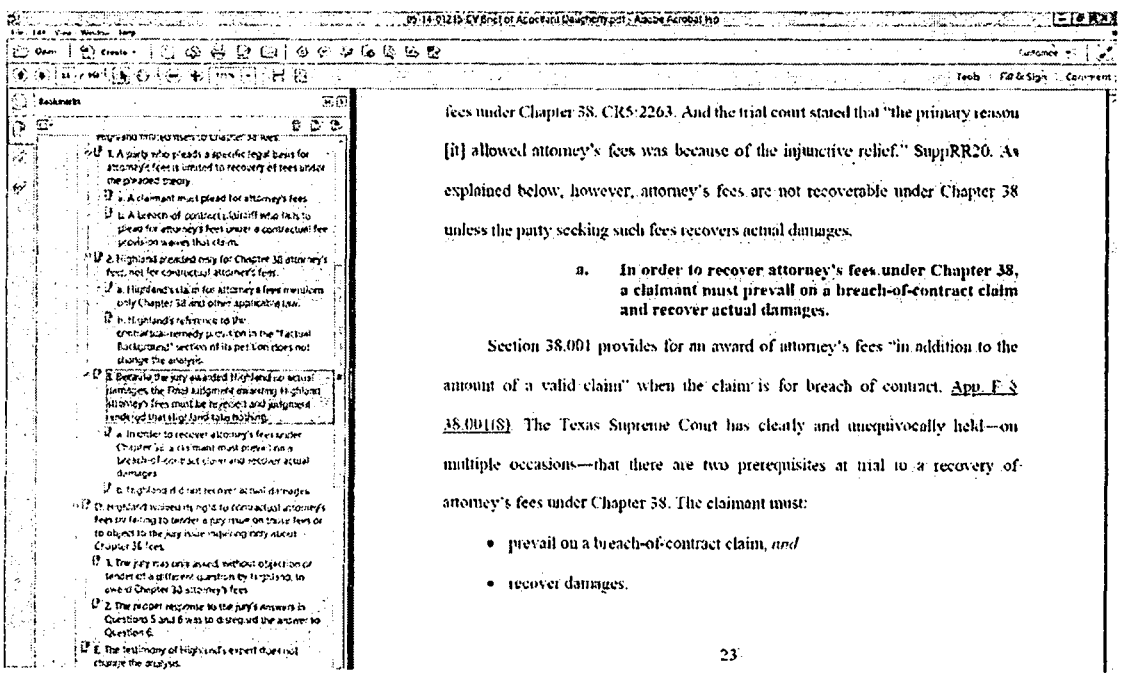
- **Outlines.** Outlines help show the overall structure of the argument.

- **Topic sentences.** The F-pattern shows that screen readers are more likely to read the *first sentence* of paragraphs. Thus, the first sentence should persuasively summarize the topic of the paragraph.

- **Lists.** Lists can effectively delineate separate arguments. They also concisely reveal how many points support an argument and where each new point begins and ends.

- **Bullets.** Like lists, bullets delineate examples or support where the number of points is not important.

See id. at 61-64, 72-76, 78-79, 92. The following section of an appellate brief, taken from a PC screen, demonstrates how the legal writer can employ some of these structural tools to provide the reader a roadmap of the argument: using an outline in the bookmark pane on the left side of the screen, and headings and bullet points in the text:



fees under Chapter 38. CR5:2263. And the trial court stated that "the primary reason [it] allowed attorney's fees was because of the injunctive relief." SuppRR20. As explained below, however, attorney's fees are not recoverable under Chapter 38 unless the party seeking such fees recovers actual damages.

a. In order to recover attorney's fees under Chapter 38, a claimant must prevail on a breach-of-contract claim and recover actual damages.

Section 38.001 provides for an award of attorney's fees "in addition to the amount of a valid claim" when the claim is for breach of contract. App. F § 38.001(8). The Texas Supreme Court has clearly and unequivocally held—on multiple occasions—that there are two prerequisites at trial to a recovery of attorney's fees under Chapter 38. The claimant must:

- prevail on a breach-of-contract claim, *and*
- recover damages.

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Utilizing bookmarks that state or summarize headings and other "road markers" greatly help the screen reader to navigate long documents. *See infra* Section G.1.

B. Use summaries.

Summaries are not new to the legal writer, and most appellate courts require them. They are essential for writing to the screen reader. Dubose notes that summaries at the beginning of a document more quickly convey the main points of an argument, which in turn assist readers to recall and absorb each point as they read. If your best argument does not appear until the end, screen readers will likely miss it because they read less carefully as they progress through a long document, as paper readers often do. Dubose at 87.

Thus, an effective summary of a legal document does three things:

(1) provides a roadmap of the document;

(2) gives the most persuasive details; and

(3) does it quickly.

Id. at 88. Most of our summaries fulfill only the first point. But the second and third points are essential in communicating with the screen reader, who wants the information now, and reads more text at the beginning of a document and skims the remainder.

To persuade readers, Dubose recommend a concise summary that provides two or three specific, persuasive reasons supporting the primary proposition. If possible, the summary should include the most important facts and legal points of the argument, rather than just general concepts or conclusions. *Id.* at 89.

C. Use white space.

White space is any blank part of a page. It is a break in the text that provides the reader a brief rest. Thoughtful use of white space enhances readability. Note the difference between these two versions of the same table of contents.

Compare:

With:

As the foregoing shows, white space gives the eyes and brain a break, a pause, without which the reader tires more quickly. The CAL Report addresses the effect of "text density," and recommends line spacing and margin settings that provide more white space. CAL Rpt. at 25-28.

We have already seen why screen reading is more taxing than paper reading. So the use of white space is essential for communicating with the screen reader, particularly those reading from a small tablet screen.

D. "Chunk" complex information.

Another usability tool is "chunking." Chunking is a memory-enhancement strategy that organizes "pieces of information into a smaller number of meaningful units (or chunks)—a process that frees up space in working memory." https://psychlopedia.wikispaces.com/Chunking. This is most commonly done by breaking a long list of numbers, such as 4409275553040, into chunks, (44) (0) 927-555-3040.

Chunking can also be used to break down a long sentence full of information into separate, short points. Compare the ability to read and recall the elements of the following equitable doctrine:

> Under the doctrine of virtual representation, a party not named in the trial court is deemed a party in the appellate proceeding where that party is bound by the judgment, its privity of interest appears from the record, there is an identity of interest between the litigant and a named party to the judgment, and if equitable considerations do not weigh against allowing [the movant] to participate on appeal.

> Under the doctrine of virtual representation, a party not named in the trial court is deemed a party in the appellate proceeding where –
>
> 1. that party is bound by the judgment,
> 2. its privity of interest appears from the record,
> 3. there is an identity of interest between the litigant and a named party to the judgment, and
> 4. if equitable considerations do not weigh against allowing [the movant] to participate on appeal.

The "chunked" explanation is easier to remember because our brains find it much easier to process multiple bits of information when they are broken into these distinct chunks. No wonder our phone numbers, social security numbers, and credit card numbers are separated by hyphens.

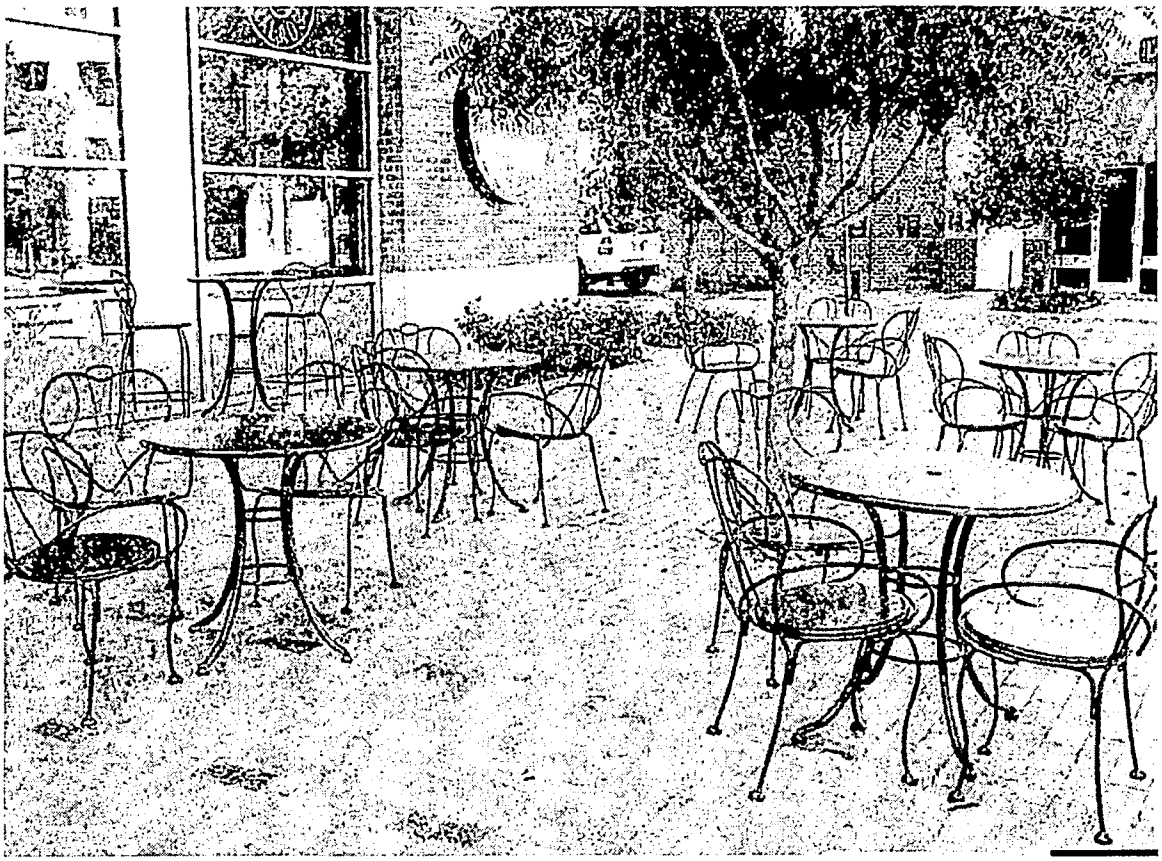
E. Write visually.

Visuals convey information in ways that words cannot. They can often be recalled more easily than words. Although frequently used in jury trials, lawyers rarely use visuals in written documents. In 2007, Dubose surveyed briefs filed with the Texas Supreme Court during a six-month period. Only five percent of the briefs used any visuals—mostly charts—and none used photos. Dubose at 123. Thus, 95% of the briefs presented the entire argument with only words. This soon may change: The CAL Report recommends that courts "[a]dopt rules or guidelines for embedding visual images in briefs, such as videos, photos, and maps. CAL Rpt. at 22.

Yet inserting or creating visuals in legal documents is easier than most of us think it is. It usually involves only copying a photo or graph and pasting it into the body of the document. "[M]ost fixed images (such as photos) display reliably across different reading platforms." *Id.* at 23. And most word-processing packages provide the ability to create tables, graphs, and other images in documents.

Consider how the photograph below adds clarity to the following text:

The sidewalk outside Crew's Burgers & Shakes and the other establishments is a common area, and belongs to and is operated, managed, and maintained by landlord ABC Property, L.P. The sidewalk faces the park, is wide, and has tables and chairs down the sidewalk. The tables are open to the general public and any patron of the establishments in Maple Town Square, not just Crew's. Crew's owns the tables and chairs located in front of the restaurant, and had joint responsibility with ABC Property to keep the area clean, but it did not serve its patrons on the sidewalk area and had no right of control over it. Nearly all of the people that crowded the sidewalk area to listen to the concert at the park were not patrons of Crew's.



One of the issues in that case was whether or not Crew's was liable for injuries that occurred in this sidewalk area caused by a fight initiated by an intoxicated man during a concert. The photograph helps explain that the incident occurred in a common area.

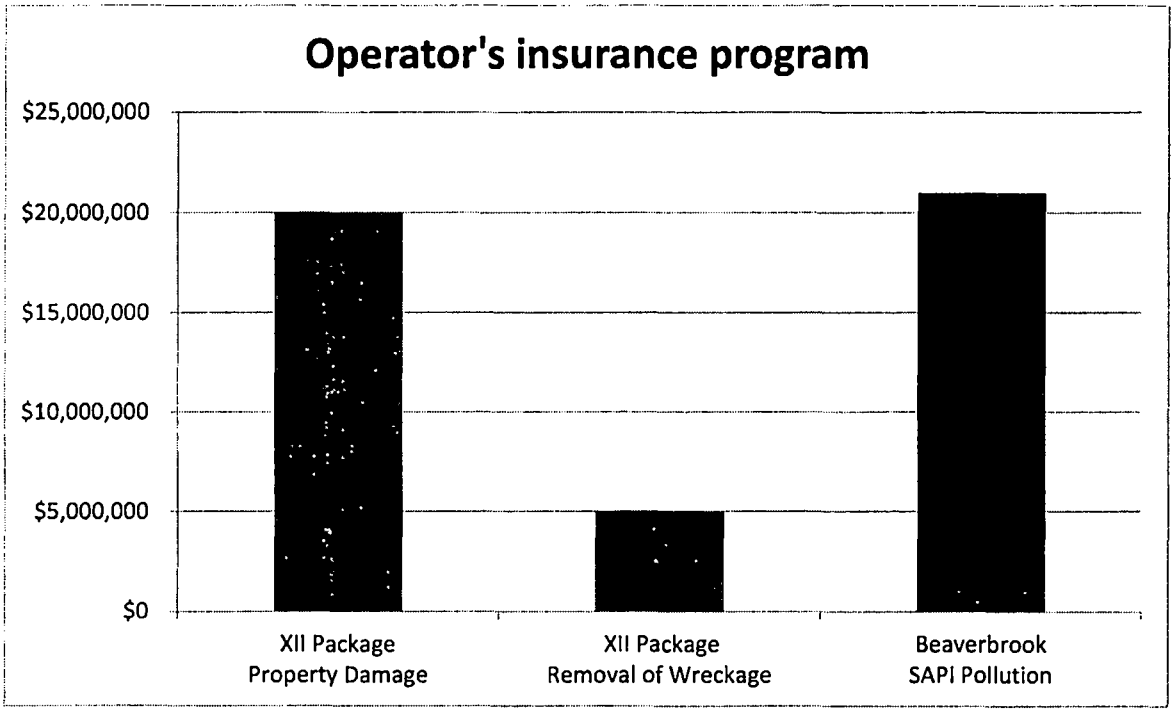
Visuals also help can readers comprehend complex information. For instance, in a recent brief, I explained the insurance packages under which the insured operator was seeking coverage after a storm damaged its oil and gas production facilities. The written explanation was less than clear:

> Operator had an Energy Package Policy from XII Insurance Company that included $20 million in coverage for property damage and $5 million for removal of wreckage.
>
> Operator also had two insurance policies issued by Beaverbrook Insurance Company—a Commercial General Liability policy ("primary") and an Umbrella Excess Liability ("excess") policy. The primary policy provided $1 million in coverage for "covered pollution clean-up costs that result from a sudden and accidental pollution incident," as defined in the policy. The excess policy provided $20 million of coverage above the primary policy limits for pollution clean-up costs that "would have been

covered by the primary policy but are not because the primary limit is exhausted." The primary policy responds to covered pollution clean-up costs that Operator "voluntarily incur[s]" or "is legally required to pay." The excess policy only responds to covered pollution clean-up costs that Operator "is legally required to pay."

The Beaverbrook policies were liability policies that included a narrow grant of coverage for certain pollution clean-up costs, as described more fully in the next section.

This insurance program is much more easily explained with a visual:



Visuals are common on the Internet. They often communicate information more quickly, and with less work for the reader, than the same information in paragraph form.

F. Simplify the presentation.

One of the best lessons from Internet usability is the success of the most widely used web page ever—Google. It continues to dominate the search-engine market.

Dubose notes that the key to Google's success is simplicity. Google's homepage has few words. Dubose at 103. No sentences. Most of the screen is white. Users find any information they want by typing a few words into a box and pressing "Search."

The executive responsible for keeping Google's home page simple for many years was Marissa Mayer. She explained why the page is so effective:

> Google has the functionality of a really complicated Swiss Army knife, but the home page is our way of approaching it closed. It's simple, it's elegant, you can slip it in your pocket, but it's got the great doodad when you need it. A lot of our competitors are like a Swiss Army knife open – and that can be intimidating and occasionally harmful.

Quoted in RICKY W. GRIFFIN, FUNDAMENTALS OF MANAGEMENT 1 (5th ed. 2007).

Similarly, the electronic writer must design legal documents with the same goal as Google's design to make the document useful to the screen reader. A brief usually addresses a complex subject. It may involve technical or scientific information. It may need to be long. It may seek alternative relief. Nevertheless, the brief must be approachable to the electronic reader such that he can navigate it without requiring too much thought about how to locate key information in the document.

Dubose suggests the following to make a document simpler:

- **Follow conventions**. Some documents, such as letters, memoranda, most appellate briefs, have certain formats and order of content. Stick to these ingrained conventions.

- **Use parallel structures.** For instance, when a series of sentences repeats the same words, readers can follow the structure more easily of those words appear in the same location in each sentence.

- **Avoid unusual fonts or fancy formatting.** THEY ONLY DISTRACT

  YOUR

  READERS.

  See CAL Rpt. at 29-30 (recommending font sizes and types).

- **Use ordinary capitalization; avoid underlining.** Sentences, including headings, are harder to read when a writer USES ALL CAPS, Capitalizes The First Letter Of Every Word, or UNDERLINES THE ENTIRE SENTENCE. *See id.* at 33-35.

- **Use simple sentence structure.** A long sentence with a simple structure is harder to read than a short sentence with an easy structure.

- **Avoid unnecessary words.** When readers have to read unnecessary words—and they *will* recognize them—they resent having to work harder to understand your point.

See Dubose at 103-115. Knowing that screens readers do not want to work hard to get your point, and want to get it quickly, the simpler we make our documents, the more persuasive they will be.

G. Utilize available electronic navigating tools.

Electronic writers should periodically investigate new tools and programs that will enhance the reading experience for the screen reader. Remember, the easier and quicker it is for a screen reader to "use" our legal documents, the more likely the reader will understand our arguments and be persuaded by them. Multiple programs and apps exist to assist with electronic writing and editing, and more are created seemingly every month. Those features are beyond the scope of this paper.

Three tools facilitate navigation of an electronic document. Those tools are bookmarks, internal hyperlinking, and external hyperlinking.

1. Bookmarks.

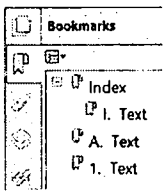
A bookmark is a text link that appears in the Bookmarks Panel of Adobe Reader and Adobe Acrobat on the left side of the screen. The content of the bookmark in a brief or motion usually consists of the headings—or a summary of the headings—in the document and a concise description of items included in an appendix attached to the document.

Readers use bookmarks to quickly navigate to different sections of the document and the appendix. *See supra* Section III.A (photo of screen showing bookmark panel). In some jurisdictions, like California and Texas, bookmarks are required for any items contained in an appendix. CAL. R. CT. 3.1110(f)(4); TEX. R. APP. P. 9.4(h). California also requires bookmarking of all exhibits in e-filed motion papers in the trial courts. CAL. R. CT. 3.1110(f)(4). Unsurprisingly, the ABA Council of Appellate Lawyers recommends that courts encourage or require bookmarks "so that readers may see an outline of the brief in a side panel and jump to a particular section." *See* CAL Rpt. at 38-40.

The following provide the steps to set up a bookmark in Adobe Reader or Adobe Acrobat PDF that is not created using Word Styles:

- Select the heading in the text to bookmark.

- Click on the bookmark symbol ____.
- Edit the heading by typing in the bookmark box, if necessary.
- To create a hierarchy, click and drag bookmarks under headings.



2. Internal hyperlinking.

A hyperlink is a word, phrase, or image that the screen reader can click to jump to a new section within the document or to another document. Virtually all web pages contain hyperlinks, which is how you can jump to other portions of the Internet link that you are on or to a completely different web page. This discussion addresses hyperlinking to documents attached to a brief or motion, such as cases, key portions of the appellate record, or summary-judgment evidence.

Unlike bookmarks, which appear on the left margin of the screen, a hyperlink appears in the text, and is marked in a way that informs the screen reader that it is a hyperlink. Briefs filed in Texas appellate courts usually mark the hyperlink like this (blue custom color number 255 really stands out).

This document contains an Appendix, which the curious reader may already have accessed by the hyperlink on page 1, citing App. A. Appendix A contains the chart from the ABA Counsel of Appellate Lawyers article on electronic filing address in the Introduction. So if you are wondering whether the state in which you practice issues tablets to the appellate judges or justices of the state, clicking on App.A immediately takes you there.

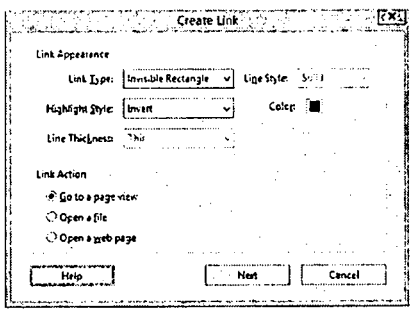
Many states require appellate briefs to contain an appendix with certain documents, such as judgment of the lower court(s), jury verdict, findings of fact, the text of statutes at issue in the appeal, and the text of contracts or other documents that are critical to the argument. *E.g.*; TEX. R. APP. P. 38.1(k), 53.2(k); MASS. R. APP. P. 18. If the rules permit optional materials, then the advocate should also include—and hyperlink to—seminal cases, excerpts of key testimony that is too long to quote in the brief, "smoking gun" exhibits, etc.

Hyperlinking is a fabulous tool to bring the screen reader immediately (and easily) to the very piece of information that may persuade

the reader to agree with your argument. Judges and court staff have frequently commented that they like hyperlinked briefs. And the CAL Report recommends that courts "[e]ncourage internal hyperlinking within briefs." CAL Rpt. at 40.

To create hyperlinks from the main document to a document in the appendix (you must have Adobe Acrobat installed):

- Open the Bookmarks panel.
- Highlight and change the color (see above) of the word or citation you want to hyperlink.
- Right click and choose *Create Link*.
- In the Create Link dialogue box, choose how you want the link to look:



- Press *Next*
- Navigate to the target view
- Press *Set Link*

3. External hyperlinking.

As its name provides, an external hyperlink takes the reader out of the document to an outside Internet site. Please note that some courts do not allow, or disapprove of, external hyperlinks out of concern for potential malicious websites. In fact, the CAL Report recommends that courts prohibit hyperlinking briefs to the Internet, or require that a copy of the cited material be included in an appendix to the brief. CAL Rpt. at 50.

To hyperlink to an external Internet site, the reader of course must be connected to the Internet. Because most homes, business establishments, and now airplanes have WiFi available, the Internet is almost always available. Most smart phones can become WiFi "hot spots," enabling access to the Internet. Several cell phone providers sell personal

portable WiFi devices through which the purchaser can set up her own secure WiFi network.

The most practical use of external hyperlinking in appellate documents is hyperlinking to every legal authority cited in the brief. That enables the judge and court staff to instantly read the specific portion of the case cited in the brief without having to separately log on to Westlaw or LEXIS. The CAL Report recommends that courts encourage brief filers to hyperlink to legal citations on Westlaw or LEXIS. CAL Rpt. at 41-45.

This paper contains several external hyperlinks to cited studies on screen reading that are available on the Internet. As the balloon states when your cursor hovers over the link cite, just simultaneously hit the "Control" key and click your mouse or pad, and the article will appear in a separate window on the Internet.

Here is how to create an external hyperlink:

1. Go to the website to which you want to hyperlink from the document.

2. Highlight and copy the website address in the url bar at the top of the page.

3. Return to the document and go to the place where you want the website address to appear.

4. Paste the address there.

5. Then hit the "Enter" key.

6. The website address will turn a light blue, indicating the hyperlink has been created.

The use of bookmarks and hyperlinking are extremely helpful to the electronic reader. Although they are not difficult to set up, your brief will likely stand out from others, as many advocates choose not to utilize them.

While not a "tool," another way to enhance navigation of an e-brief that is converted to a PDF (as most courts require) is to begin pagination with the first page of the document, so that the pagination of the brief corresponds to the pagination of the PDF. *See* CAL Rpt. at 36-37. Most California appellate courts require that all e-filed briefs require this matching pagination. CAL. R. CT. 3.1110(c).

IV. Conclusion

The reading habits of our audience have been changing over the past 25 years, and will continue to change at a higher rate as the legal community moves toward a completely electronic environment. So we advocates must change the way we write. The first step is to develop a better understanding of *how* our audience is now reading. Then we must become aware of *methods of communicating* more effectively and persuasively to the electronic reader. And then we should learn to use *electronic tools* to create a more navigable legal document. It is then that we will have adapted to make legal writing usable for the screen (and paper) reader.

The following are additional resources for creating electronic appellate briefs:

- ABA Council of Appellate Lawyers, *The Leap from E-Filing to E-Briefing* (2017), http://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf.

- *Guide to Creating Electronic Appellate Briefs, Appendices, and Hyperlinking* (2016), http://www.courts.ca.gov/documents/DCA-Guide-To-Electronic-Appellate-Documents.pdf.

- Blake A. Hawthorne, *Guide to Creating Electronic Appellate Briefs* (2014), http://www.txcourts.gov/media/124903/guidetocreatingelectronicappellatebriefs.pdf.

- *How to Build Electronic Briefs* (ABA 2010), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_acrobat_electronic_brief.html.

- *Attorney Guide to Hyperlinking in the Federal Courts*, http://federalcourthyperlinking.org/attorney-guide-to-hyperlinking/

- *Electronic Filing at the Appeals Court*, http://www.mass.gov/courts/court-info/appealscourt/efiling-appeals-faq-gen.ht

INDEX

APPENDIX A

Tablets and annotation software issued to judges in federal and state appellate courts, 2016

Federal Appellate Courts		
	Standard Tablet	**Standard Software**
First Circuit	iPad	Documents by Readdle PDF Expert
Second Circuit	iPad	PDF Expert iAnnotate PDF
Third Circuit	iPad	Good Reader
Fourth Circuit	iPad	Good Reader
Fifth Circuit	iPad	Adobe Acrobat Reader iAnnotate PDF
Sixth Circuit	iPad	Good Reader
Seventh Circuit	none	none
Eighth Circuit	iPad	Adobe Acrobat Reader
Ninth Circuit	iPad (most common) Surface	GoodReader (preferred) Adobe Acrobat Reader
Tenth Circuit	iPad (most common) Surface	GoodReader WPD Reader
Eleventh Circuit	iPad	Adobe Acrobat Reader GoodReader PDF Reader
D.C. Circuit	judge's choice	unknown
Federal Circuit	iPad	Adobe Acrobat Reader
Armed Forces	none	none
State Appellate Courts		
	Standard Tablet	**Standard Software**
Alabama	none	none
Alaska	none	none

Arizona	iPad Android Surface	Adobe Acrobat Reader iAnnotate PDF GoodReader
Arkansas	unknown	unknown
California	iPad Surface	Adobe Acrobat Reader Adobe Acrobat Pro iAnnotate PDF GoodReader
Colorado	iPad	GoodReader
Connecticut	none	none
Delaware	judge's choice	unknown
District of Columbia	none	none
Florida	iPad	Adobe Acrobat Reader
Georgia	none	none
Hawaii	none	none
Idaho	none	none
Illinois	iPad	Adobe Acrobat Reader
Indiana	Revolve iPad Pro	Adobe Acrobat Reader
Iowa	judge's choice	unknown
Kansas	none	none
Kentucky	none (coming soon)	none
Louisiana	none	none
Maine	none	none
Maryland	iPad	Adobe Acrobat Reader PDF Reader GoodReader
Massachusetts	Surface	Adobe Acrobat Reader PDF Reader
Michigan	Surface	Adobe Acrobat Reader iAnnotate PDF GoodReader

Minnesota	Surface Pro iPad Pro	Adobe Acrobat Reader iAnnotate PDF GoodReader
Mississippi	iPad	none
Missouri	iPad	Adobe Acrobat Reader EzPDF Reader iAnnotate PDF PDF Reader
Montana	Surface	unknown
Nebraska	iPad	unknown
Nevada	none	none
New Hampshire	none	none
New Jersey	none	none
New Mexico	none	none
New York	none	none
North Carolina	Helix	Adobe Acrobat Reader iAnnotate PDF PDF Reader
North Dakota	iPad	Adobe Acrobat Reader iAnnotate GoodReader PDF Reader
Ohio	none	none
Oklahoma	none	none
Oregon	iPad	Good Reader iAnnotate PDF PDF Expert Acronis Access (future)
Pennsylvania	iPad	Acronis Editor
Rhode Island	none	none
South Carolina	iPad	GoodReader
South Dakota	iPad	West Drafting Assistant Adobe Acrobat Reader

Tennessee	iPad	Adobe Acrobat Reader iAnnotate PDF
Texas	iPad	Adobe Acrobat Reader iAnnotate PDF GoodReader
Utah	iPad	none
Vermont	none	none
Virgin Islands	iPad	Adobe Acrobat Reader
Virginia	Surface	Adobe Acrobat Reader GoodReader
Washington	iPad Surface (pilot)	Adobe Acrobat Reader
West Virginia	none	none
Wisconsin	none	none
Wyoming	iPad	unknown

The "Facts" Section of the Child Welfare Appellate Brief

Andrew Cohen, Direct of Appellate Panel, CPCS

Facts

Everybody likes stories. We want to be entertained; we want to identify with the main characters; we pull for the underdog; we want justice done. Appellate judges are like that, too. And while they have to follow the law, they also want to read briefs with stories that interest them, with characters they can identify with, and with injustices they can rectify. Child welfare appellate attorneys are fortunate in this regard, because our cases are narratively rich, populated with underdogs, and rife with injustice.

Parents have their stories, the children have their stories, the DCF social worker has his or her story, and the trial proceedings themselves are a story. Some of these stories are independent, but many are shared. But the sharing does not mean they are the same. In Akira Kurosawa's film *Rashomon*, the same terrible incident is told from the perspective of each of the major characters. Each sees what happened – and the importance of what happened – differently. Our cases are like that, too.

Many Facts sections fail to tell a story. Instead, they work through the case chronologically, pull out select details, reiterate witness testimony, or re-state the judge's findings. There are three problems with these methods. First, a chronology or finding-by-finding report does not tell a compelling story. Second, to the extent it does tell a story, it is the story of how your client *lost*, which is not the story you want to tell on appeal. Third, it is not consistent with, and does not further, your theory of the case. The story you tell in the Facts

section must be the story of why your client should have won, or was treated unfairly, consistent with your theory of the case.

Basic Rules. There are some important rules for telling your story. Following these rules is crucial to maintaining your credibility and keeping you out of trouble. For example, you must cite to the record for each factual reference in your brief. *See, e.g.*, Mass. R. App. P. 16(e). Even where it isn't required, it's good practice. Liberally citing to the record proves to the court that you aren't making anything up; it also permits the judges to easily verify the information.

You must be scrupulously faithful to the record. You must not lie about, misstate, or "fudge" any of the evidence. While you can give the evidence a "spin" consistent with your story, any spin must be supportable. You cannot hide important bad facts (although, as set forth below, you don't need to include every detail about every bad fact). When in doubt, err on the side of disclosure. Your credibility and integrity are essential. The appellate judges may not buy into your theory of the case, but they must never believe that you are misleading the court. Section _ below suggests some appropriate ways to address bad facts in ways that further your client's story.

Your Facts section should never be longer than your Argument, however many years the case lasted at the trial level. A fact belongs in your brief only if there is a reason: it helps you tell your client's positive story; it is important background necessary to your story; it is a difficult or damaging fact you must deal with; or it is needed for your Argument.

Never argue in the Facts section; save that for the Argument. There is often a gray area between narrative spin and argument. Stay out of that gray area. If the Appeals Court believes you are arguing in the Facts section, your story will lose credibility.

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The "Facts" Section of the Child Welfare Appellate Brief

Andrew Cohen, Direct of Appellate Panel, CPCS

Facts

Everybody likes stories. We want to be entertained; we want to identify with the main characters; we pull for the underdog; we want justice done. Appellate judges are like that, too. And while they have to follow the law, they also want to read briefs with stories that interest them, with characters they can identify with, and with injustices they can rectify. Child welfare appellate attorneys are fortunate in this regard, because our cases are narratively rich, populated with underdogs, and rife with injustice.

Parents have their stories, the children have their stories, the DCF social worker has his or her story, and the trial proceedings themselves are a story. Some of these stories are independent, but many are shared. But the sharing does not mean they are the same. In Akira Kurosawa's film *Rashomon*, the same terrible incident is told from the perspective of each of the major characters. Each sees what happened – and the importance of what happened – differently. Our cases are like that, too.

Many Facts sections fail to tell a story. Instead, they work through the case chronologically, pull out select details, reiterate witness testimony, or re-state the judge's findings. There are three problems with these methods. First, a chronology or finding-by-finding report does not tell a compelling story. Second, to the extent it does tell a story, it is the story of how your client *lost*, which is not the story you want to tell on appeal. Third, it is not consistent with, and does not further, your theory of the case. The story you tell in the Facts

section must be the story of why your client should have won, or was treated unfairly, consistent with your theory of the case.

Basic Rules. There are some important rules for telling your story. Following these rules is crucial to maintaining your credibility and keeping you out of trouble. For example, you must cite to the record for each factual reference in your brief. See, e.g., Mass. R. App. P. 16(e). Even where it isn't required, it's good practice. Liberally citing to the record proves to the court that you aren't making anything up; it also permits the judges to easily verify the information.

You must be scrupulously faithful to the record. You must not lie about, misstate, or "fudge" any of the evidence. While you can give the evidence a "spin" consistent with your story, any spin must be supportable. You cannot hide important bad facts (although, as set forth below, you don't need to include every detail about every bad fact). When in doubt, err on the side of disclosure. Your credibility and integrity are essential. The appellate judges may not buy into your theory of the case, but they must never believe that you are misleading the court. Section _ below suggests some appropriate ways to address bad facts in ways that further your client's story.

Your Facts section should never be longer than your Argument, however many years the case lasted at the trial level. A fact belongs in your brief only if there is a reason: it helps you tell your client's positive story; it is important background necessary to your story; it is a difficult or damaging fact you must deal with; or it is needed for your Argument.

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CPCS CRIMINAL APPELLATE BRIEF WRITING WORKSHOP

March 30, 2017

DRAFTING HEADINGS AND TABLES OF CONTENTS

By Murray Kohn

The table of contents to a brief and the headings that comprise it are extremely important parts of the brief, because they provide the Judges with information they need in order to understand an argument, and a judge must understand your argument before she can be persuaded by it. Readers assimilate information best when they are introduced to information in general terms before they read the details, and when they are provided with a focus for the information so that they can understand its significance as they read it. The table of contents and headings provide this information. To understand an argument, the judge also needs to understand its overall structure and how it is organized. A table of contents, which is composed in the form of an outline, make the overall structure explicit. Readers assimilate information best when it is presented to them in well-defined sections. The outline form of the table of contents divides the argument into these discrete sections, which are defined by the headings and subheadings. Because of this, the table of contents and headings are not extraneous, but essential.

This kind of information is referred to as "meta-information." which is information about information. Meta-information makes explicit the organization and significance of the information to which it refers. In a brief, the table of contents and headings constitute this meta-information. Because meta-information is so important to a reader's understanding, it is invariably the first thing that the judges read when they open up a brief. Hence the table of contents leaves the judges with their first impression of the case Because first impressions are very powerful, the brief writer wants the judge's first impression of the case to be favorable. So the table of contents and headings must not only orient the judge, provide a focus, and demonstrate the significance of the information in the argument, they must also *persuade.* In order to be effective, the brief writer must draft the headings and organize the table of contents in order to accomplish these goals.

Below is a discussion of how to draft headings so that they both orient and persuade the reader. The first section concerns drafting to persuade. The second section concerns writing techniques to use in drafting.

Persuasive headings: Conclusion and premise

In order to persuade a judge, he must be presented with *facts.* Headings that constitute mere statements of law do not have a persuasive quality because they do not provide the judge with

grounds for deciding the issue. To be persuasive a heading should follow a logical structure known as "conclusion and premise." The conclusion is a proposition the writer wants the reader to accept as true. It is followed by and one or more premises, which are statements that the reader can be expected to accept as true. The information should be organized so that if the reader accepts the premises, she must accept the conclusion. This is a powerful technique for persuasion because this is the way people think in order to make decisions.

Indeed, we use the conclusion / premise form every day: "You should buy that car (conclusion) because it is a good deal and in good mechanical shape (premises)." Similarly, , in legal argument the premise must consist of facts. "The search warrant was not supported by probable cause because the confidential informant had never been to the premises before and had no history of providing accurate information." Grammatically, a heading constructed in the conclusion / premise formation will be bisected by the term "because." The term "because" tells the reader that she has just read the conclusion and is now going to be given the premises that support the conclusion. In other words, "because." indicates that what follows constitutes facts that show why the proposition at the beginning of the sentence is true.

In logic and in legal argument the premises themselves become conclusions that must be supported by more detailed premises. In the example above, the premise "it is a good deal," becomes a conclusion supported by the premise "because it is below market value." But that premise will not be persuasive unless and until it is supported by facts: "the asking price is $3000 and the market price is $7000" If the reader accepts those facts, they will reach the conclusion that the car is below market value, and so is a good deal, the ultimate conclusion you want him to reach.

The search and seizure example is more challenging, because the conclusion consists of "negative facts," in other words, things that *did not* happen. To support a negative fact" conclusion, the writer should study the case law for facts that would *defeat* her argument, and then show that those facts were absent in her case. For example. In the search and seizure example, the premise supporting "the confidential informant had never been to the premises before," could be "no police officer had ever seen him go into or come out of the apartment and no witness had told the police that he had been in the apartment." (Because the Commonwealth has the burden of proof in so many areas of criminal law, it is often necessary to provide premises that support conclusion based on negative facts.)

This conclusion / premise form, where a premise becomes a conclusion that must be supported by a new premise and so forth, is reflected in the headings, subheadings, and sub-subheadings that make up a table of contents and, indeed, the structure of the brief itself. Identifying these steps is an important part of composing an argument, which will then be reflected in the headings and subheadings of the table of contents.

This is a good place to point out that table of contents and its headings can only be as good as the argument they point to. If the argument is disorganized, illogical, or incomplete, so will be the table of contents. One way to avoid this is to work from an outline, so that your argument is logical and well organized. The outline and its topics will eventually become the table of contents and it's headings.

Using subheadings

Subheadings are a very important part of a table of contents. The more detailed the table of contents is, the more meta information the judge will have to orient her and provide the necessary focus, and the more information the writer can provide in order to make the table of contents persuasive. An argument that consists of only a single main heading does not provide the judge with enough meta-information. Some writers try to solve this problem by loading up the main heading with information. But, in order for meta-information to be effective, the reader must be able to absorb it quickly and easily. If the Judge gets bogged down in reading the heading, it will not help her understand the detailed information to follow. Similarly, a heading that contains too little of the necessary information is also unhelpful. Headings that are too concise, as for example, "The judge erred in denying the motion to suppress", do not provide the reader with enough information to understand the detailed information to follow. Likewise, long detailed headings that contain extensive statements of law and facts are also unhelpful because they are so difficult to understand, particularly when presented in the form of incomprehensible run-on sentences.[1] In other words, the information shouldn't be too little, and shouldn't be too much.

One very effective way to approach composing the headings to avoid these problems is to place the conclusion in the main heading and the premises in the subheadings Because it is often difficult if not impossible to include all the necessary information in the main heading and still keep the main heading short, detailed premises that support the general proposition contained in main heading can be placed in the subheading. Using subheadings, and sub-subheadings if necessary, allows you to distribute the premises to the particular sections to which they apply, and so keep the headings to a length that is easy to understand.

Here are some examples that illustrate these principles.

[1]Such headings, however, when broken down to grammatical sentences, can work well as introductions when placed at the beginning of the argument.

Commonwealth v. Lupercio Paiva

THE JUDGE VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING EVIDENCE THAT THE DEFENDANT'S SISTER OBSERVED THE DEFENDANT'S DRUG DEPENDENT BEHAVIOR.

A. The defendant had the right to introduce evidence of his drug dependency because it was relevant to his defense that he possessed the drugs for his own personal use and not for distribution.

B. The judge erred in excluding the sister's testimony on grounds that she was not an expert because lay witnesses may testify to a physical condition they have observed and the sister observed defendant using drugs, intoxicated, and in withdrawal, behavior consistent with drug dependency.

C. The exclusion of his sister's testimony was prejudicial and not harmless because the Commonwealth offered neither direct observations of distribution nor seized items that supported an inference of distribution.

Note that the heading and subheadings when combined could be reformatted into a single paragraph that could be read as an introductory paragraph to the argument. This is a good test to see how complete and cogent an outline is.

Commonwealth v. Eduardo Cardoza (*The issue raised in the original case is modified in this example.)*

THE JUDGE ERRED BY EXCLUDING DNA EVIDENCE OF A HAIR FOUND IN THE RAPE VICTIM'S PUBIC AREA THAT BELONGED NEITHER TO THE VICTIM NOR THE DEFENDANT BECAUSE THE EVIDENCE WAS RELEVANT TO THE DEFENSE WAS MISIDENTIFICATION.

A. The exclusion violated the defendant's Constitutional right to present a complete defense because the government's DNA testing of the hair tended to prove that another person committed the crime.

B. The Rape Shield Statute does not bar introduction of the foreign public hair because the evidence was not offered as evidence of the victim's sexual history, but to prove that the defendant had been misidentified.

C. The judge's ruling was not harmless because there was no corroborating evidence to support the victim's single eyewitness identification and the victim was intoxicated at the time of the incident.

CPCS Children & Family Law Division
Appellate Brief Checklist

This form is intended to be filled out by the brief author *or* the mentor *or* CAFL staff. It is a tool to help the author write a better brief, not necessarily to evaluate the brief or a draft of the brief. If this checklist is used by a mentor to provide feedback to a brief draft, this tool should be paired with a conversation with the mentee.

Case: _____

Client: _____

Type of brief/application: _____
(appellant/appellee/reply/FAR/etc.)

BRIEF CRITERIA	**COMMENTS**
Introduction: • *Uses an Introduction that establishes theory of appeal or sets compelling tone (may be first part of Statement of Case)*	
Issue Statement/Question Presented: • *Not the same as the Argument headers* • *Uses Garner 3-sentence syllogism or, if not, uses sufficient facts to beg answer favorable to your position*	
Statement of Case: Nature of the Case: • *Concisely and persuasively introduces (a) who is appealing what, and (b) the type of case being appealed.* • *Contains a thematic Introduction (if there is no separate Introduction section)* Procedural History: • *Information is relevant and important* • *Short and concise* • *Contains citations to the record*	
Statement of Facts: • *Contains headers* • *Headers are not argumentative* • *Tells a compelling narrative (engaging story, considers primacy and recency)*	

• *Includes all relevant facts (excludes irrelevant information, notes but minimizes bad facts, provides details of good facts)* • *Includes citations to record* • *Is not argumentative* • *Is shorter than Argument*	
Summary of Argument: • *Included if Argument more than 20 pp. per Rule 16(a)(8)* • *Contains page references to Argument* • *Not a restatement of Argument headers*	

Argument:
 	
• *Good choice of legal issues*
  o *Trial court errors are, in fact, errors*
  o *Issues were preserved at trial level*
  o *Errors were harmful*
  o *If issues not preserved, "substantial miscarriage or similar standard cited*
  o *If no prejudice, issues are structural*
• *Argument headers are:*
  o *Phrased to advocate for client's position*
  o *Each a single, complete sentence*
  o *Not the same as Issues Presented*
• *Includes citations to record for all facts*
• *Does not include "new" facts (all facts are from Facts section)*
• *Does not include large sections of boilerplate law, especially to begin Argument or any section of Argument*
• *Argument cites to relevant law.*
• *Cases/other law cited are correct and current.*
• *Cases and other law are properly cited (Bluebook, other)*
• *Uses non-Mass. cases where appropriate*
• *Argument is not unduly repetitive*
• *No unnecessary string cites or block quotes*
• *Argument does not "cut and paste" facts from Facts section*
• *Argument organized logically with headers and sub-headers that, read alone, summarize the Argument.*	

<u>Conclusion</u>: • *Contains brief thematic statement – one or two paragraphs – about why client should win (final mention of theory of appeal, public policy, etc.)* • *Contains specific request for relief*	
<u>Mechanics/style</u>: • *Reads easily* • *Sentences and paragraphs not too long; length of each is varied* • *No over-use of passive voice* • *No dangling participles or unnecessary nominalizations* • *Few, if any, spelling or grammar errors; well-proofread generally*	
<u>Format</u>: • *The brief and RA are saved as searchable PDFs.* • *Correct caption ("Adoption of Mary S." or "Care and Protection of the S. Children," <u>not</u> DCF v. Mother)* • *Cover includes word "Impounded"* • *Table of Contents properly formatted (includes argument headers/sub-headers w/ page references to all sections)* • *Table of Authorities properly formatted* • *Correct margins (at least 1.5" on left & right; max 5.5" lines of text or at least 1" margins if using work count & prop. spaced font, like Times New Roman)* • *12-pt. Courier New font (or proper word count if prop. spaced font used, such as Times New Roman, in 14-pt font)* • *Footnotes same font and margins as text* • *No full names used* • *Proper attorney information on cover & signature block (name, address, telephone #, BBO #, and email address)* • *The RA has high quality copies of documents in correct order per Rule18(a)(1)(A).* • *Addendum contains all required docs (including table of contents, findings, statutes/rules, Rule 1:28 decisions) per Rule 16(a)(13)*	

• *Pages are numbered correctly (cover is page 1, table starts at page 2, etc.)*	
<u>Certificates of Compliance & Service</u>: • *The certificate of service is part of brief, not separate document, and includes all info. required by Rule 13(e)(2)* • *Brief has Rule 16(k) certification that specifies how compliance with the space or word limits was ascertained. (Example: "This brief complies with the length and typeface limitations in Rule 20(a)(2) and 20(a)(4) because it is in the proportional font Times New Roman at size 14, and contains 9,429 words in the parts of the brief requiring a word-count per Rule 16(a)(3)-(9), as counted using the word-count feature of Microsoft Word 2013."]*	
<u>Overall Impression/Additional Comments</u>:	