PERSUADING QUICKLY: TIPS FOR WRITING AN EFFECTIVE APPELLATE BRIEF

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We write this article to guide the brief-writing advocate on how to make her brief more effective. Because we are a judge and her former law clerk, we think that we know what we're talking about.

The main goal when writing a brief is to persuade the judge that the advocate's argument is the correct one to resolve the parties' dispute. This persuasion must be done *quickly* because judges read mountains of briefs every year. For instance, each year an appellate judge on the Third Circuit will participate in six court sittings. For each sitting, the Third Circuit judge will have, at most, two months to study all the briefs.[1] For the twelve-month period ending on September 30, 2009, almost 58,000 appeals were filed in the thirteen federal courts of appeals.[2] In the Third Circuit alone, 3750 appeals were filed,[3]

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1. *See* United States Court of Appeals for the Third Circuit, *Internal Operating Procedures of the United States Court of Appeals for the Third Circuit* 1.1 (2010) (providing that "[b]riefs and appendices are distributed sufficiently in advance to afford at least four (4) full weeks' study in chambers prior to the panel sitting").

2. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial Caseload Profile—National Totals") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

3. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial

adding up to about 300,000 pages of briefs.[4] Indeed, Chief Judge Alex Kozinski of the Ninth Circuit estimates that he reads 3,500 pages of briefs per month.[5] Simply put, the appellate judge reads, writes, reads—and then repeats the cycle.

The furious pace of absorbing law in distinct areas for each sitting makes the life of an appellate judge similar to that of a law student, but with final exams *six* times a year. Advocates must therefore provide a concise, coherent brief that respects the judge's time constraints. They must appreciate the difference between their perspective and the judge's perspective: Advocates spend months researching and writing a brief, reading it multiple times during the editing process; the judge, by contrast, may read the brief only once. Because advocates usually view the process from their perspective, their briefs tend to be much longer than necessary. The Chief Justice himself has commented that almost every brief that he has encountered could have been shorter.[6] Chief Judge Kozinski made the point with asperity: "[W]hen judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief."[7] If advocates understand that the brief will persuade quickly only if it is written for the judge's perspective, they will more easily absorb our suggestions.

Caseload Profile—Third Circuit") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

4. *See* United States Court of Appeals for the Third Circuit, *Font and Page Length Requirements for Filing Briefs*, http://www.ca3.uscourts.gov/Rules/briefsamplefonts.pdf (listing page limits for each of the appellant's and appellee's briefs) (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

5. Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief* (1996), http://www.appellate.net/articles/gdaplbrf799.asp (appearing in section captioned "Organization above All") (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

6. LawProse, Interviews, Supreme Court, *Hon. John Roberts, Chief Justice of the United States*, Webcast (no individual date; general series date 2006–07), part 5 at 2:35–2:48 (available at http://www.lawprose.org/interviews/supreme_court.php) (recording the Chief Justice's comment that he has yet to put down a brief wishing that it had been longer and his further comment that most briefs would be better if they were shorter) (accessed Dec. 16, 2010; copy of main page on file with Journal of Appellate Practice and Process).

7. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 99 (Thomson/West 2008) (quoting Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 327) (alterations in original).

This article will, we hope, demonstrate how to write a brief that persuades *quickly*—and we hope that we can *quickly* persuade the reader of the merits of our point of view. In its first two sections, our article offers suggestions for achieving the goal. Section one gives tips on improving five parts of a brief: facts, standard of review, argument, summary of argument, and issues presented. Section two provides important brief-writing tips. Finally, section three presents legal principles that advocates should consider while preparing every brief. These principles do not relate to brief-writing, but they are, we submit, principles that may enhance a brief.

I. IMPROVING SPECIFIC SECTIONS

A. Facts

Many advocates dump facts haphazardly into the facts section, without a strategy. Those briefs are thus impotent from the start; they cannot persuade quickly because they have failed to even capture the judge's attention.

You, as an advocate, must provide only legally relevant facts and a strategic number of additional facts that add to the human interest of the story you tell in this section.[8] The legally relevant facts are those that are necessary for application later, in the argument section, to the governing law. For example, in an appeal concerning whether a party complied with the statute of limitations, you should provide the date of injury and the date the action was filed. The facts that add to the human interest are those that forcefully capture the judge's attention and remind her of the real lives affected by the parties' legal controversy.

You should provide those two types of facts while keeping in mind four specific goals: seize the story, summarize the story in the first paragraph, embrace the ugly, and be honest.

1. Seize the Story.

This is accomplished by skillfully presenting both types of

8. *See* Bryan A. Garner, *The Winning Brief* 180 (2d ed. Oxford U. Press 2004) (suggesting that advocates provide only facts that are "necessary to understanding the issues" and that "add human interest").

facts so that your client is perceived in a positive light; the client is the protagonist in the parties' dispute. Being the protagonist alone, of course, will not win the case on appeal, but it is important. We suspect that many judges are more inclined to go the advocate's way in a close case if her client is viewed as the "good guy." You should persuade the judge that, if the court endorses your argument, the right party wins and justice is achieved.

One way to seize the story is to start the facts section with a crisp one-liner that frames the entire dispute from the advocate's perspective. The one-liner can easily begin with "This is a case about . . ." or "This case involves . . ." [9]

Consider, for example, two hypothetical introductions from a case involving California's Sexually Violent Predator Act (SVPA), which allows the California State Department of Mental Health to take custody for an indeterminate term of an individual adjudicated as a sexually violent predator.[10] The confinement of a person detained under the SVPA must be reviewed at least once a year to determine whether further detention is warranted.[11] Under the SVPA, detainees awaiting adjudication are civil detainees who must be offered detention separate from inmates.[12] The case of John Doe arose after hospital officials transported him to the county jail to receive his bi-annual assessment. Doe contended that jail officials failed to offer separate housing and detained him with inmates. We suggest the following as examples of effective factual introductions for each side:

> For John Doe: This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication.

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9. If the appellate court allows for a section before the factual recitation (perhaps a statement of the case), the advocate should consider including the story-seizing one-liner there. In either section, though, its purpose is the same.

10. Cal. Welfare & Instns. Code § 6604 (West 2006).

11. *Id.* at §6605(a).

12. *See* Cal. Penal Code § 4002(b) (West 2002) (stating that detainees must be offered "separate and secure housing" that does not impinge upon any privileges other than those necessary to protect inmates and staff).

> For Pope, Head Jail Official: This appeal considers whether a convicted sexual predator, whose confinement was evaluated consonant with governing law, can make a claim of improper confinement based on unverified affidavits.

These introductions would shape the way in which the judge views the rest of the facts section, with each party's opening funneling the facts and arguments to the legal issue that it found dispositive.

Another way to seize the story is to tactfully include a vivid fact that will stick with the judge during the decisionmaking process. This tool works well in cases in which the advocate's opponent is the more sympathetic party and the advocate strives only to close the sympathy disparity between the parties. Take, for example, a medical-malpractice case in which the decedent's family claimed that the decedent's death resulted from improper monitoring by the physician after weight-reduction surgery. It is difficult to seize the story outright in such a case because the harm that befell the victim is tragic. The defense's theory was that the decedent willfully failed to follow medical advice—that he lacked will power and self-discipline—and so the tragic result flowed from the decedent's failures, not from the doctor's negligence.

To draw attention to the decedent's obesity, the defendant's brief included this vivid fact: Because of his extreme obesity, the decedent was not physically capable of wiping himself after using the toilet. That description created a palpable image of the decedent as lacking in personal discipline, which worked to narrow the sympathy gap between the doctor and the decedent.

2. Summarize the Story First.

Always recap the entire story quickly in the first paragraph and then move into a chronological presentation beginning in the second paragraph. This roadmap will provide the judge with context, signaling which facts will be legally relevant. Think of it as providing the same function as scanning the inside flap of a book jacket before beginning to read the book.

Returning to the sexual predator, John Doe, after the one-sentence opening, Doe's advocate should finish the paragraph

with a summary, so that the first part of the presentation reads something like this:

> This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication. In January 2002, Doe was transferred from a hospital to the county jail for a determination of his mental health under the SVPA. Both the hospital and jail officials acted properly during the transfer. But from February 2002 until December 2002, jail officials forced Doe to be housed and treated with criminal convicts, in violation of the express language of the SVPA. During that time, he was treated just like a criminal convict: He was denied access to showers, exercise, telephone calls, religious services, and the library. He was released back to the mental hospital in December 2002. His 42 U.S.C. § 1983 claim involves the legally improper treatment during those eleven months.

Then, in the next paragraph, Doe's advocate would start at the chronological beginning of the story.

3. Embrace the Ugly.

You, as an advocate, should not let your opponent expose a weak fact. Instead, you should acknowledge and explain the weak facts of your case. If you do not, your credibility (and that of your arguments) will suffer. If possible, you should explain why the unpleasant fact is not legally relevant. Acknowledgement is better than the alternative: letting the opponent exploit the mistake by describing it in the worst possible way and branding the advocate as deceptive to boot.

The case of John Doe is again instructive. The advocate representing Doe must address the ugly: Doe was, after all, a sexually violent predator. After presenting this fact, however, the advocate should focus on the facts establishing the jail officials' improper confinement of a civil detainee. By embracing the unpleasant fact, the advocate has explained it on her terms and obviated her opponent's opportunity to vilify Doe.

4. Be Honest.

This mandate is a truism, yet lawyers (sadly) do not always follow it. Never—we repeat, never—make inaccurate

representations to a court. Your task in the brief is to persuade and you cannot do that if the judge does not believe you. The judge (or her crack law clerk) will discover the statement's falsity in the record and then view your entire brief under a cloud of suspicion.

B. Standard of Review

This is the section that can most often be improved because the standard of review may constrain the judge to the point that the standard dictates the decision. For instance, under an abuse-of-discretion standard, it does not matter if the judge believes that an advocate's argument is ultimately right. The advocate's argument, instead, is a legal winner (or a loser) if the lower court simply did not get it wrong enough. By contrast, a judge is unconstrained under a de novo standard, under which the appellate judge does not have to defer to the lower court's decision.[13]

To improve the standard-of-review section, then, you must first understand that the standard of review controls the argument. If there is any room for leeway, you must argue for the standard that best supports your argument. Too many advocates set out a standard of review without thinking critically about what they are doing. Even worse, an advocate may uncritically accept her opponent's characterization of it. Either course of action will undermine the advocate's chances of success in the appeal.

Next, you must develop your arguments, in the argument section, within that standard. A favorable standard of review is like the home stadium in a football game: It does not mean that the advocate is going to win, but that she is advantaged. The advocate must argue within the review standard's framework, be it abuse of discretion or de novo review.

For example in *In re W.R. Grace & Co.*,[14] the appellants contended that the bankruptcy court abused its discretion by not

13. *See e.g. Cybor Corp. v. FAS Techs.*, 138 F.3d 1448, 1464 (Fed. Cir. 1998) (en banc) (Mayer, C.J., & Newman, J., concurring in the judgment) (stating that "[w]e review the denial of a motion for judgment as a matter of law de novo by reapplying the same standard").

14. 316 Fed. Appx. 134 (3d Cir. 2009).

allowing them to conduct discovery and present evidence on their status as "known creditors."[15] But in the Third Circuit, an abuse of discretion occurs only if "there has been an interference with a substantial right" or the ruling "result[s] in fundamental unfairness in the trial of the case."[16] That standard is almost insurmountable; an advocate who asserts an argument prescribed by an abuse-of-discretion review must persuade the judge that the lower court was not merely wrong, but egregiously wrong, and that its result caused fundamental unfairness. The appellants in *W.R. Grace* failed to show such an egregiously wrong ruling and fundamentally unfair result in the trial court, instead pressing the court to enter what they perceived to be the right decision as if it were free to do so even in the absence of the required showing. And they lost.[17]

But the advocate representing the appellants in *W.R. Grace* could have introduced the argument in the following way:

> The bankruptcy court abused its discretion by limiting discovery. That is, its decision resulted in fundamental unfairness in the trial of the case. Admittedly, most discovery rulings do not constitute abuses of discretion, but the decision here violated that standard in three ways.

This might have given the court an opening, a chance to decide the case using a standard that favored the appellants' position.

C. Argument—Legal Science

Although the argument section of a brief comes after the issues presented and the summary of argument, the latter two sections cannot be written until the advocate is thoroughly familiar with the arguments she is making. The advocate must understand the issues that she will argue and the manner in which she will present them before she can competently describe the issues raised or summarize the argument. We therefore put this section before the sections on summary of

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15. *Id.* at 136–37.

16. *Public Loan Co. v. Fed. Deposit Ins. Corp.*, 803 F.2d 82, 86 (3d Cir. 1986) (internal quotation marks omitted).

17. *See W.R. Grace*, 316 Fed. Appx. at 137 (holding that "[t]he Bankruptcy Court did not err in disallowing claimants' claims as untimely, and the District Court did not err in affirming the Bankruptcy Court's decision").

argument and issues presented. You should do the same in writing your brief—block out your arguments before you attempt to summarize them or to finalize the issues presented.

A good argument section is a manual for the judge on how to decide the issue. The advocate should lay it out following the form that a judicial opinion will take; that is, the legal rule, an explanation of it, and then application. We will explain.

Each argument heading should represent the holding you want from the court in order to resolve that issue. For example, the heading for an argument in which an advocate contends that the lower court did not have subject-matter jurisdiction might read: "The District Court erred in resolving the merits because it did not have subject-matter jurisdiction." The advocate hopes that the judge will find this statement opportune and adopt it as the holding. This may seem straightforward, but many advocates fail to see it.

After developing the argument heading, you should provide a brief one-paragraph roadmap of that argument before turning to the subarguments. The roadmap outlines how the judge can reason to reach the proposed holding. For example:

> I. The District Court erred in resolving the merits because it did not have subject-matter jurisdiction.
>
> The District Court relied on 28 U.S.C. § 1332 as its basis for subject-matter jurisdiction. That section confers jurisdiction if two requirements are met. First, the parties must be completely diverse. *E.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990). Second, the plaintiff must seek, as the amount in controversy, at least $75,000. *E.g.*, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 n. 10 (2006). Here, neither requirement was satisfied. Accordingly, this Court should reverse; indeed, it can end its analysis after finding the first requirement unsatisfied.

Next, each sub-argument should explain and apply the steps of reasoning necessary to reach the proposed holding. Back to our example, here is an effective introduction for the sub-argument: "The first requirement—complete diversity between the parties—does not exist." Then, in the body of this

subsection, you must state the governing rule to measure complete diversity, provide an explanation of why that is the rule, and then apply it to the facts.

This process is legal science—a direct linear progression from rule to explanation to application. So for each argument you should (1) clearly identify the argument, *viz.*, the proposed holding, (2) state the steps of the argument in a roadmap, (3) clearly identify the sub-arguments, and (4) scientifically apply the rule to the relevant facts. Those are the elements of a legal-science argument; we will now explain the steps needed to produce it.

First, you must spend as much time as possible researching and understanding the case law. No matter how time-consuming and challenging, this step is indispensible. You should analyze the cases with the intent to distill a rule, not to present a case-by-case rehash. An advocate who gives research short shrift should not proceed to step two.

Second, distill the rule from the body of cases and state it clearly. If a rule is not evident from the cases, you should present an honest, clear extrapolation of what the rule seems to be and then an explanation of why the cases suggest that rule. Take, for example, the following issue: When does the stock-price test apply in securities cases involving § 10(b) of the 1933 Securities Act? You may find that the courts in your state or circuit have not explicitly stated a rule. You must then synthesize the cases and offer your view of when the court applies the test. Naturally, the less clear the court has been with stating a rule, the more explanation the advocate must present. For example:

> The stock-price test applies only when a plaintiff alleges an efficient market. Though the Court has not explicitly stated a rule triggering the stock-price test, it has applied the stock-price test only when a plaintiff alleges an efficient market. There are three relevant cases. [Provide brief explanations of those cases.] The rule that those cases establishes is this: A plaintiff can plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test.

Third, apply that rule to your set of facts. Signpost your application section with "here" or "in this case" or something similar. For our example:

> Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market. [Cite Record.] They are thus entitled to the stock-price test. The District Court erred in holding otherwise.

You can only scientifically apply the rule to the relevant facts if you have presented as clear a rule as possible along with its attendant explanation. If the three steps are done properly, you have taken the busy judge through the argument linearly, as if you were progressing through a scientific or mathematical formula.

The Chief Justice believes, in fact, that a brief is likely to be effective only if a layperson—or a lawyer with no expertise in the area of law at issue in the case—can understand it after reading it only once.[18] Sticking to the scientific approach allows the advocate to satisfy the Chief Justice's advice because the advocate's presentation starts with a clear rule distilled from cases, not a sprawling discussion of cases, and then moves to a brief explanation of the rule and culminates in a clear application of the rule to the facts. Furthermore, presenting the argument in this way allows the judge to evaluate the argument on the merits during her first read without wasting time figuring out what the argument is.

We finish this section with a few tips that, though bedrock tenets, deserve comment because some briefs are lacking. First, never misstate the law. This is a cardinal sin. You will lose credibility. Second, lead with the best argument; this will get the judge believing in your theory of the case quickly. Finally, limit the number of arguments. The advocate should eschew quantity in favor of presenting only the arguments that are viable.

D. Summary of Argument

Once the argument section is completed, the advocate can turn to the summary. The summary should be presented succinctly. If the judge can understand what the advocate is arguing from the summary of argument, the points presented in it will be reinforced when she reads the argument itself. The advocate cannot include every nuance of the argument in the

18. Chief Justice Interview, *supra* n. 6 (part 3 at 9:54–10:30).

summary, but it is important to include all important points and to acknowledge weaknesses if there are any.

The summary aids the judge because, when she knows where the argument is going, she can follow its development. The summary section should furnish a sharp exposition of rule and application. It is a taut presentation of legal science and is similar to the roadmap within the argument section. For example, consider this summary of argument for the appeal involving the stock-price test:

> The District Court erred in precluding plaintiffs from using the stock-price test to measure materiality for their §10(b) claim. The Third Circuit has only applied the stock-price test when plaintiffs allege an efficient market. A plaintiff can thus plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test. Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market.

E. Issues Presented

The advocate should limit the number of issues. We do not suggest a magic number, but we believe that a limited set of issues presenting only viable arguments is best. Our suggestion here corresponds directly to our suggestion about limiting the number of arguments. To do so, you should, during your research, narrow the possible list of arguments in light of their viability and the relative favorability of their concomitant standards of review.

Occasionally, an advocate will present ten or fifteen issues in her brief. This is an automatic warning flag that the advocate does not understand what the case is about or that she hopes to hide the weakness of the appeal under a flurry of words.

II. IMPORTANT WRITING TIPS

A. Remember that Judges Are Generalists.

Appellate judges are busy and are, for the most part, generalists. So if the advocate is a specialist, she should be

cognizant of that and explain the overall function of the doctrines or the statutory scheme at issue before diving into the details. She should avoid forcing the judge to trudge through hefty treatises to understand basic background principles and jargon.

For example, Judge Roth sat on a panel that analyzed an appellant's claim under the Individuals with Disabilities Education Act.[19] The Act prescribes a complicated statutory scheme, offering substantive and procedural protections to individuals who qualify. The Act, moreover, and the cases interpreting it, use acronyms for several terms—e.g., Individualized Education Plan (IEP); Free Appropriate Public Education (FAPE); and Evaluation Report (ER). Counsel for the parties were experts in this area of law and jumped straight into the specific provision in dispute without explaining the Act's overall function. They also littered their briefs with those acronyms. This was understandable given that they are experts in the field. Because the judge (and her clerk) were not as familiar with this area of law, though, they had to spend considerable time familiarizing themselves with the relevant statutory provisions and the acronyms commonly used in the field. Counsel could thus have improved their briefs' persuasiveness simply by explaining the relevant provisions of this statute and giving the court a guide to the acronyms.

B. Keep it Short.

We hope, by now, it is clear: Judges read lots of briefs every month, so you should keep your sentences and paragraphs short. You should measure every sentence of your brief to determine whether it advances your goal of persuading quickly. If the sentence does not, excise it. Whatever does not help, hurts.

C. Avoid Lengthy Quotes.

The advocate should avoid the electronic-database crutch of copying and pasting clunky quote after quote into the brief to provide background law. Presenting analysis that way hinders

19. 20 U.S.C. § 1400 *et seq.* (2007) (available at http://uscode.house.gov).

clarity and adds bulk, which slows reading. This relates to what we have said about researching and then synthesizing; the advocate should do the heavy lifting and provide the rule in a cogent way so that the judge can follow quickly.

You should also avoid string citations with quotations. Although this tactic appears to be employed more and more frequently, a more persuasive argument will set out the legal precepts in a discussion of the relevant law and then apply them to the case at hand. To promote the flow of the argument, the citations, supporting the points being made, can very effectively be put in footnotes.

D. Avoid Personal-Attack Arguments.

Do not personally attack opposing counsel; attack only their arguments. Stay above the fray. Attacking opposing counsel will result in the judge questioning the advocate's judgment and character, which distracts her focus from the brief. Moreover, if you are arguing that previous panel made an incorrect decision, you should refrain from labeling it as a "conservative" or "liberal" decision.

E. Be Readable.

Use understandable, clear language: Eschew legalese and Latin. Because you are aiming to make your argument persuasive after only one read by the judge, you should keep the language as readable as possible.

F. Humanize the Client.

If the client is a person, you should call him by name. If the client is a corporation, a city, or some other impersonal organization, you should not just call it X Company or the City of Y; you should, as much as possible, refer by name to the persons, managers, officers, or policemen involved in the action. Don't let the judge consider a party to be an impersonal institution. A lawsuit is about *people*. If your client is considered to be a *person*—or a group of people—you should be able to generate more sympathy for him or for them.

G. Choose Your Language Carefully.

Remember that the words you use to describe your client and the actions that brought about the lawsuit can influence the outcome. You should use the vocabulary that will portray your client in the best light and your opponent in the worst. Returning to John Doe, his attorney described his situation as that of a civil detainee confined like a criminal convict. The Head Jail Official described him as a sexual predator whose confinement was evaluated consonant with governing law. This choice of language leads the reader in the direction that each advocate wishes.

H. Use Timelines and Charts.

Particularly when an appeal involves complicated facts or complex legal issues, charts and diagrams clarify the picture for the judge. A timeline is helpful to establish a sequence of events when that is important. A chart can summarize vital points when the material is voluminous. A diagram of relevant parts of two documents can demonstrate the difference (or similarity) of language that the advocate deems crucial to the case. Helping the judge understand intricate or convoluted facts or legal points will give the advocate a better chance of convincing the judge that the advocate's position is the meritorious one. Indeed, judges are apt to think that the advocate is trying to hide something if the facts are difficult to understand.

I. Do Not Let Your Opponent Lead You Astray.

You should ask yourself the following questions as you review your opponent's brief: Are the issues really as stated by the other side? Is my opponent hiding a weak point in a haystack or directing the court's attention to a red herring?

You can determine the answers to these questions only by reviewing the case so thoroughly that you will know when the other side is misrepresenting facts or misstating a precedent. The advocate who skips detailed preparation may regrettably be led astray. If your opponent is attempting to obfuscate, you must

refrain from personal attacks but proceed patiently to present the law accurately.

For example, Judge Roth was recently on the panel in a case in which appellants' counsel attempted to persuade the court that the elements required in one type of securities case were also required in an entirely different area, even though binding case law explicitly acknowledged the difference between the two types of claims. Specifically, appellants' counsel argued that appellees had failed to adduce any evidence of reliance or causation and thus had failed to present a prima facie claim under section 11 of the Securities Act of 1933.[20] Appellants' briefs were well written and facially persuasive. Only upon careful review did it become evident that case law—both from the Supreme Court and from the Third Circuit—unambiguously impugned appellants' argument.[21] Section 11 claims do not require those elements. Appellees' response exemplified the proper reaction. They were not led astray by appellants' slick mischaracterization. Instead, they persuasively explained what the law actually was and how the court should apply it. Had they not carefully studied the claim at issue, they might have adopted appellants' characterization. Furthermore, appellees refrained from personal attacks; they stuck to attacking appellants' arguments. Appellants, of course, lost their appeal. At the same time, the lawyers who represented them lost credibility with the court.

III. LEGAL PRINCIPLES THAT THE ADVOCATE SHOULD CONSIDER

Taking advantage of every opportunity to include any of the following three principles will improve the substance of any brief.

A. Waiver

Many advocates would benefit from wielding this weapon

20. 15 U.S.C. § 77k (available at http://uscode.house.gov).

21. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *In re Supreme Specialties, Inc. Secs. Litig.*, 438 F.3d 257, 269 (3d Cir. 2006).

in appropriate situations, which occur more often than you may believe. A party can waive its argument on appeal in either of two ways. First, a party can waive an argument if it has not been raised in the court below.[22] Second, a party can waive an argument by not arguing it in its opening brief.[23] To raise an issue, a party must "present it with sufficient specificity to allow the court to pass on it."[24] A party typically raises an issue before the district court in its pleadings or papers, so be on the lookout as you review the other side's papers for opportunities to argue waiver.

B. Harmless Error

This tool allows the advocate to concede error in the court below but argue that it was harmless. An error is harmless if it is "highly probable that [it] did not affect the outcome of the case."[25] If correcting the flaw in the lower court's proceeding would not change the decision, the appellate court will affirm. Remember that this doctrine applies in both criminal and civil appeals.[26]

C. Judicial Estoppel

This is the tool to use against a party arguing a different position on appeal. You can assert that your opponent is estopped from arguing that issue because a party cannot adopt

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22. *See e.g. DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007) ("It is well established that arguments not raised before the District Court are waived on appeal."); *see also e.g. London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("It has long been the rule in this circuit that a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint.").

23. *See e.g. U.S. v. Hoffecker*, 530 F.3d 137, 159 (3d Cir. 2008) (citing *U.S. v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (noting that "It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal")); *U.S. v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006) (quoting *Laborers' Intl. Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994): "An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court.").

24. *See e.g. In re Teleglobe Commun. Corp.*, 493 F.3d 345, 376 (3d Cir. 2007).

25. *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 180, 205 (3d Cir. 2000).

26. *See McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 927 (3d Cir. 1985) (listing "three compelling reasons that the standards should be the same").

conflicting positions during different stages of the same proceeding.[27] Similarly, you can argue, if relevant, that the other party is estopped from presenting an argument because it argued the converse in a different proceeding. For example, Roe cannot sue Wade, the Attorney General of Texas, seeking a declaratory judgment that the Texas criminal abortion statues are unconstitutional and then sue Smith, the attorney general of another state, asking for a ruling that will uphold the criminal abortion statues of that state.

IV. CONCLUSION

Writing an appellate brief can be a daunting experience. If you follow our suggestions, however, you will have a formula for persuading the judges quickly and thus increasing your chances of winning on appeal.

27. *See e.g. In re Teleglobe*, 493 F.3d 345, 377 ("Judicial estoppel prevents a party from 'playing fast and loose with the courts' by adopting conflicting positions in different legal proceedings (or different stages of the same proceeding)." (parenthesis in original) (citation omitted)).