Effective Brief-Writing for California Appellate Courts

S. ERIC OTTESEN*

Writing a successful appellate brief requires compliance with the court's technical requirements as well as clear and effective writing. This article suggests an approach to appellate brief-writing which will insure compliance with the rules of court and a clear expression of the advocate's position in the issues.

INTRODUCTION

> We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is: "(1) wordy; (2) unclear; (3) pompous, and (4) dull."[1]

Almost without exception, there exists a direct connection between the quality of an appellate brief and the chances of success on appeal. Regrettably, a substantial number of unsuccessful appeals result simply because lawyers, whether due to inexperience, imprecision, or just plain poor writing, are unable to compose effective appellate briefs. In fact, the problem has become so troublesome that it has, on several occasions, provoked stern words from our time-conscious appellate judges.[2] Perhaps the judge in *Schulz v. Wul-*

* Law Clerk to Chief Justice H. Vern Payne of the New Mexico Supreme Court (1982-1983). Law Clerk to Chief Judge Manuel L. Real, United States District Court for the Central District of California (1983-1984).

1. WYDICK, PLAIN ENGLISH FOR LAWYERS 3 (1979).

2. *See, e.g.*, People v. Dougherty, 138 Cal. App. 3d 278, 188 Cal. Rptr. 123 (1982); *In re* Marriage of Fink, 25 Cal. 3d 877, 603 P.2d 881, 160 Cal. Rptr. 516 (1979); Haynes v. Gwynn, 248 Cal. App. 2d 149, 56 Cal. Rptr. 82 (1967); Schulz v. Wulfing, 251 Cal. App. 2d 776, 60 Cal. Rptr. 53 (1967).

fing[3] said it best when, after noting numerous substantive and procedural deficiencies in appellant's opening brief, dismissed the appeal concluding: "We do not even attempt to appraise the loss to the taxpayers reflected by the value of the wasted time of the members and staff of this court in attempting to review an appeal which, under court rules, is deemed unintelligible."[4]

This article describes both specific techniques of effective brief-writing and the technical format[5] used in writing briefs for California appellate courts. Implementing these techniques and adhering to the required format may prevent the kind of judicial consternation expressed in *Schulz* and significantly improve the quality of appellate practice in our state. This article is not an academic work; rather, it is intended to be a practical tool which the appellate practitioner may use on a regular basis.

Effective Appellate Brief Writing

General Considerations

A well-written, effective appellate brief can have significant impact upon an appellate court. To help the judge, your brief need not be profoundly eloquent or persuasive. It is probably sufficient that it furnish ready access to the record, authorities, and reasoning by which your client is to prevail. Before suggesting in greater detail how briefs may perform this function most effectively, I should emphasize that perhaps the easiest way to write an excellent brief and to determine what a judge wants to read is to simply put yourself in the judge's position. As you write your brief, try to visualize how the judge will use your brief to decide the case. Keep in mind what the judge's approach to the problem might be, what is of interest, and what will be ignored. Remember that your brief will not be fed into

---

3. 251 Cal. App. 2d 776, 60 Cal. Rptr. 53 (1967).
4. *Id.* at 779, 60 Cal. Rptr. at 55.
5. The format for appellate brief-writing in California is detailed in CAL. R. CT. 3-18 (West 1981 & Supp. 1983). Although in suggesting a format, this article occasionally addresses style, it is not intended to be a style manual. For a detailed treatment of style, see FORMICHI, CALIFORNIA STYLE MANUAL: A HANDBOOK OF LEGAL STYLE FOR CALIFORNIA COURTS AND LAWYERS (2d ed. 1977) (In 1967, this manual was adopted by the California Supreme Court as the official organ for style to be used in the publication of the official reports. *Id.* at iv.) [hereinafter cited as CALIFORNIA STYLE MANUAL].

Although California appellate courts generally adhere solely to the Appellate Rules with respect to brief writing format, there is a trend in some appellate districts to formulate separate local rules. At least two courts, the Third and Fourth District Courts of Appeal, have recently published separate sets of local appellate rules. Because of this trend, it is good appellate practice to check with the court clerk for particular format or filing requirements before beginning work on your brief. For the reader's convenience, the author has organized a basic check list for use in preparing appellate briefs which, when used in conjunction with the applicable Appellate Rules of Court, may serve as a concise, valuable source of reference. *See infra* Appendix.

an impersonal machine; rather, it will be read, studied, and researched by people like you.

Without exception, briefs have become increasingly important in the California appellate system because court case loads have necessitated severe restrictions on the length of time allotted to oral argument.[6] Additionally, appellate courts are now burdened with a nearly unmanageable volume of cases. For example, in less than two decades, the total number of filings has increased 176% in the Supreme Court[7] and 438% in the Courts of Appeal,[8] yet, there has been no like increase in the number of judges.[9] Increases in filing during the same period have been even more dramatic in several of our sister states.[10] To handle this burgeoning number of cases and motions, judges must read more material and read it more quickly. A concise, well-written brief is no longer desirable; it is essential.

The appellate brief represents the attorney's first opportunity to speak to the court because the judge will read it prior to oral argument. Arguably, the brief "speaks" from the time counsel files it through oral argument, conference, and opinion-writing. Because of the passage of time between oral argument and the writing of the court's opinion, the written word remains available to the court long after the impact of oral argument may have faded. Generally, judges and their clerks read appellate briefs many times. As a method of making a lasting impression on the court, the importance of an effective brief cannot be overestimated.

Perhaps the most overlooked virtue of an effective appellate brief is that it is often the primary resource for the opinion. It is not uncommon for the time-conscious opinion writer to lift entire sentences

---

6. Generally, counsel for each party is allowed only 30 minutes for oral argument. However, counsel may reserve the right to apportion the allotted time between opening, rebuttal, and closing. *See* CAL. R. CT. 22 (West 1981).

7. This figure is based on the percentage increase in filings from January 1, 1961 (1,403) to January 1, 1981 (3,864). Filings are comprised of all appeals, original proceedings, motions to dismiss, and petitions for rehearing. 1972 JUD. COUNCIL OF CAL. ANN. REP. 65; 1982 JUD. COUNCIL OF CAL. ANN. REP. 47.

8. This figure is based on the percentage increase in filings from January 1, 1961 (2,874) to January 1, 1981 (15,446). 1972 JUD. COUNCIL OF CAL. ANN. REP. 68; 1982 JUD. COUNCIL OF CAL. ANN. REP. 51.

9. During this period, the number of Supreme Court justices remained the same, consisting of one Chief Justice and six Associate Justices. However, the number of judges on the Courts of Appeal almost doubled during the same period, from 32 to 61.

10. For example, the total filings in the Arizona Supreme Court increased from 321 to 1,083 (238%) over the same period. Likewise, the number of filings in the New Mexico Supreme Court increased from 194 to 1,254 (547%). In both Arizona and New Mexico, the number of appellate justices remained the same. (information available from the administrative office of the courts in each state).

and paragraphs from a well-written brief in preparing the opinion of the court. Conscious of this possibility, the effective brief writer should strive to make the brief so reliable that the judge could write the entire opinion without reading anything but the brief. Any outside research the judge does should only confirm what is already in the brief. Such a brief will stand out from among the hundreds of others the appellate judge reads.[11]

The Effective Opening Brief: Form, Size, and Length Requirements

According to California Appellate Rules of Court, the opening brief must be printed on 8½ x 11 inch paper[12] and contain a statement of the case setting forth a summary of material facts and proceedings and the judgment of the trial court.[13] The Appellate Rules of Court also specifically state that the contents of the opening brief be "accurate and confined to matters in the record on appeal."[14] In addition to a requirement that the brief be printed and bound in book or pamphlet form,[15] a one-inch margin should be maintained at the top and bottom of each printed page.[16] Although there is no one format for the cover, it must at least contain the title of the case, the name of the trial judge and county, and the name, address, and telephone number of the attorney filing the brief.[17] Effective January 1,

---

11. In fairness, however, it should be pointed out that despite the importance of the brief, you will not *always* win or lose solely on the strength of your written brief. In some situations, the law is so clear that you will win or lose in spite of your brief. However, clear-cut cases are not often appealed, and even in those rare appeals where the law is crystal clear, a well-written brief may persuade the judge to initiate a change in the law.

12. CAL. R. CT. 15(b)(1) (West 1981); *see also* CAL. R. CT. 18 (West 1981), which gives the courts a means to deal with briefs that fail to conform to the rules.

13. CAL. R. CT. 13 (West 1981). Violation of this requirement could result in the disposition of an appeal without a consideration of the merits of the case. *See* Copfer v. Golden, 135 Cal. App. 2d 623, 288 P.2d 90 (1955). *See also* CAL. R. CT. 18 (West 1981).

14. CAL. R. CT. 13 (West 1981). Any matter outside the record will not be considered on appeal. People v. Perkins, 223 Cal. App. 2d 20, 35 Cal. Rptr. 589 (1963) (court rejected defendants' arguments on appeal on the ground that because they were outside the record, they could not be considered on appeal); *see also* Duggan v. Moss, 98 Cal. App. 3d 735, 159 Cal. Rptr. 425 (1979) (affidavits submitted on appeal which were not part of the record below were disregarded). In addition, any statement in the record must be supported by specific reference to the record. CAL. R. CT. 15a (West 1981).

15. CAL. R. CT. 15(b) (1) (West 1981 & Supp. 1983). In many metropolitan areas, commercial printers are very popular. However, briefs may be typewritten if they fall within the requirements of Appellate Rules 15(c) and (d). For purpose of printing briefs, Appellate Rule of Court 15 distinguishes between three specialized types of briefs: (1) "printed briefs," (2) briefs produced by "other processes of duplication," and (3) "typewritten briefs." CAL. R. CT. 15 (West 1981 & Supp. 1983). For a concise but fully comprehensive explanation of these three briefs, see CEB, California Civil Appellate Practice §14.7 (1983 Supp.).

16. CAL. R. CT. 15(b)(3) (West 1981).

17. CAL. R. CT. 15(b)(4) (West 1981). Although not specifically required by the

1983, the Appellate Rules of Court were amended to impose a forty-page limit for printed briefs and a fifty-page limit for briefs produced by other processes.[18]

These and the other rules of court must be scrupulously followed. Failure to comply with the rules demonstrates either ignorance of the rules or contempt for the court.[19] Presumably these rules were promulgated because briefs submitted in this form are helpful to the judges. Unless you have committed the pertinent court rules to memory, consult them before preparing each brief. Even experienced appellate practitioners should periodically refresh their memories.

According to generally accepted practice, the essential components of appellant's opening brief are the (1) topical index, (2) table of authorities, (3) statement of issues or questions presented, (4) statement of the case, (5) headnotes or points, (6) statement of facts, (7) argument, and (8) conclusion.

Topical Index

A topical index is required for the opening brief, but the rules do not dictate what types of headings should appear in the table. As a matter of style, however, topics should include the major divisions of the brief (i.e., Table of Authorities, Statement of Issues, Statement of the Case, Statement of Facts, Arguments and Conclusion). The topical index is usually the first page read by the reviewing judge. For that reason, you should carefully draft it to be consistent with the quality demonstrated throughout the remainder of your brief.

Table of Authorities[20]

The table of authorities should contain a list of all cases cited in the brief, organized alphabetically, giving each page in the brief where the case is cited. Only the official citation is necessary, using only the first page of the case. Similar treatment should be given to

---

California Appellate Rules of Court, it is customary to use different colored covers to designate the particular brief: green for the appellant's opening brief, yellow for the respondent's reply brief, and beige or tan for appellant's reply brief.

18. CAL. R. CT. 15(e) (West Supp. 1983). A brief may be longer if specially permitted by the Chief Justice or presiding justice. Counsel may prefer to have a lengthy brief printed because more words can be put on each page.

19. *See* People v. Dougherty, 138 Cal. App. 3d 278, 188 Cal. Rptr. 123 (1982) (the court deemed the entire case inadequate for review because of numerous procedural defects in appellant's opening brief).

20. The accepted nomenclature is "Table of Authorities" rather than "Table of Citations." CAL. R. CT. 15(a) (West 1981).

all statutes, regulations, and rules. Finally, the table of authorities should list citations of miscellaneous sources, including legislative histories, law review publications, treatises, and other secondary sources, categorizing them where appropriate.[21]

Statement of Issues

One extremely useful aid for the court is a listing of all issues which will be raised on appeal. Although court rules do not require that appellate briefs contain statements of issues, such statements can be extremely helpful to the reviewing court. When framing the issues, attorneys have the opportunity to inform the court of the questions which they believe the court should address. Very often, the statement of issues is nothing more than headnotes of the brief which are re-cast in the form of questions. Care should be taken to present each issue clearly, succinctly, and honestly. If it is apparent that argument is being made at this stage in the brief, it is possible that the issues will be skimmed or ignored by the reviewing court. Certainly, overtly argumentative, self-serving or hyperbolized issues are unhelpful and distracting.

Statement of the Case

The statement of the case should include a statement of the nature of the case, the course of proceedings and disposition, and a short summary of the relevant facts, with appropriate references to the transcript. This statement is equivalent to the "jurisdictional statement" required in federal appeals. The effective brief writer is aware that this section is not an opportunity for argument; rather, it is an objective statement of the trial court proceedings and rulings which are pertinent to the appeal. Inaccurate or biased statements of what occurred invite condemnation by your opponent and destroy credibility with the appellate court. As a matter of courtesy, the statement of the case should also clarify any possible confusion which might exist regarding parties and their involvement in the appeal.

Headnotes

The introductory headnotes or point titles of a brief are an extremely important but often overlooked part of the appellate brief. First, in California, each point must be stated separately under an appropriate heading, or a dismissal may occur.[22] Second, because of their introductory character, the headnotes set the tone for everything that follows. Third, headnotes can—and should—concisely

21. *See id.*
22. Superior Sand Co. v. Smith, 19 Cal. App. 2d 166, 64 P.2d 1149 (1937).

summarize and favorably predispose the court toward your position. Too often, however, headnotes do not perform this function. Many headnotes are obviously written too quickly and are thus often meaningless to the court. Consider the following example:

> **Point I:** The trial court committed reversible error by denying defendant's motion.[23]

This tells the court virtually nothing. Consider another example:

> **Point I:** The trial court erred in giving flawed essential elements instructions to the jury and thereby denied the defendant due process and fundamental fairness since it is error to give the jury, within the essential elements instructions, one statement containing more than one essential element of the crime and requiring of the jury simple and singular assent or denial of that compound proposition, fully capable of disjunctive answer, which if found pursuant to the evidence adduced would exculpate the defendant.[24]

This headnote is incomprehensible because the attorney attempted to state too much in this headnote. In each example, for different reasons, an opportunity to inform and influence the judge was lost.

The importance of headnotes justifies time and effort in their formulation. The following examples are taken from the briefs in *United States v. Nixon*.[25] That case, in which President Nixon sought to withhold his taped conversations from judicial scrutiny, was argued before the United States Supreme Court. The briefs were prepared by two excellent lawyers: James D. St. Clair, Counsel for the President, and Leon Jaworski, the Watergate Special Prosecutor. The headnotes are succinct, informative, and persuasive. Each headnote is logical, tight, and clearly suggests the conclusion the attorney wants the Supreme Court to reach. Obviously, a great deal of care was taken in preparing them.

> **Point I:** This internal dispute within a co-equal branch does not present a justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution.[26]
>
> **Point I:** This dispute between the United States, represented by the special prosecutor, and the President—two distinct parties—presents a live, concrete justiciable controversy.[27]
>
> **Point II:** A Presidential assertion of privilege is not reviewable by the courts.[28]

---

23. All examples of writing in this article are taken from actual work by attorneys. To avoid embarrassment or violation of privacy, the author prefers not to provide identification of those examples.
24. *Id.*
25. 418 U.S. 683 (1974).
26. Brief for Respondent at 44, 418 U.S. 683.
27. Brief for Petitioner at 34, 418 U.S. 683.
28. Brief for Respondent at 48, 418 U.S. 683.

Point II: The courts have both the power and the duty to determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding as a ground for refusing to produce evidence.[29]

Point III: The judicial branch cannot compel production of privileged material from the President.[30]
Point III: Courts have the power to order the production of evidence from the executive when justice so requires.[31]

Additionally, subheadings are encouraged if a point involves relatively complex legal or factual matters. Successful subheadings, often labeled with capital letters, are usually short, declarative statements supporting the assertion in the headnote.[32] In summary, a good brief deserves good headnotes. They introduce and capsulize your argument, and, if done with care, persuade the court to sympathize with your position.

Statement of Facts

In many respects, the statement of facts is the heart of the case on appeal and hence, the most important part of the brief. Although our appellate courts limit themselves to considering only questions of law, many contentions of law are won or lost on the facts. This is because the facts, if presented properly, tell a compelling story which can favorably influence the judge. Judges often know a great deal about the law, but they know nothing about the facts of your particular case. Because judges cannot be expected to wade through the entire record in every case, it is up to you to tell the judge what the facts are in an understandable way.

Every assertion of fact in the brief should have a transcript or record reference.[33] In fact, multiple references to the transcript are a good way to check the accuracy of matters asserted in the summary of proceedings. Similarly, when reference is made to exhibits that are part of the record, the reference should be specific and directed to the relevant parts of the exhibit. This should be done in the shortest possible fashion and involve only the points on appeal. Also keep in mind that if you fail to give the court a general background of the case, the judge may become confused when you begin to argue these points on appeal.[34] Be sure to state the facts fairly. A dishonest or

---

29. Brief for Petitioner at 48, 418 U.S. 683.
30. Brief for Respondent at 72, 418 U.S. 683.
31. Brief for Petitioner at 61, 418 U.S. 683.
32. Headnotes should be stated in the form of propositions which if sustained would lend substantive support for the disposition requested by the preparer. *See* Lady v. Worthingham, 55 Cal. App. 2d 396, 130 P.2d 435 (1942).
33. CAL. R. CT. 15(a) (West 1981). *See also* Robison v. Hanley, 136 Cal. App. 2d 820, 827, 289 P.2d 560, 564 (1955).
34. A primary source of confusion occurs when the brief, in its statement of facts, contains only facts favorable to one party. Such occurrences have been dealt with harshly by the courts. *See, e.g.*, Manteca Veal Co. v. Corbari, 116 Cal. App. 2d 896, 254 P.2d

incomplete statement of the case not only discredits the attorney, but also hampers the court's efforts to understand the case. Be candid, clear, and honest in drafting your statement of facts; it is no place for rhetoric.

The purpose of this statement is to provide the judge with a short, accurate, compelling account of the relevant facts. In order to be compelling, the statement should be aggressive but not purely argumentative. For example, there is nothing wrong with emphasizing that only one witness testified to a certain fact, when five other witnesses testified to the contrary. Consider another example. Instead of writing: "The court below reversed," counsel should write: "The court below reversed on the ground the evidence was clearly insufficient to justify the jury's finding that Jones was guilty." Likewise, it would also be a mistake to be overly-argumentative: "There is no way Jones can be guilty. The wise court below agreed when it reversed the jury's ridiculous finding that Jones was guilty." If your statement of facts offends or misleads the court, the court may turn to the opponent's brief or the record to find a trustworthy statement of facts.[35] Also, do not hide unfavorable facts—they are in the record. More likely than not, if you do not bring them to the attention of the court, your opponent will. You are in an appellate court not only to present your client's case, but also to answer the other side. If you do not acknowledge unfavorable facts, you are fooling no one, and you forgo the opportunity to frame the facts in a way which minimizes the damage. In short, your statement of facts tells the story of your case and should unfold in a logical manner. To insure this, avoid excessive detail and limit any direct quotations from the record to particularly significant language.

Argument

In the argument the effective brief-writer enunciates his position and persuades the court as to its strength, supporting it with appropriate citations. Keep in mind, however, that an appeal is not a second chance to present your case to a trier of fact. The appellate court only reviews and passes on the propriety of what happened in the trial court. On appeal, error is not presumed—it must be affirm-

884 (1953).

35. In one case the reviewing court found the appellant's statement of the facts not supported by appropriate references to the record, and thus, accepted the statements of facts as presented in respondent's brief. *See* Rosen v. E. C. Losch, Co., 234 Cal. App. 2d 324, 327 n.1, 44 Cal. Rptr. 377, 379 n.1 (1965).

atively demonstrated.[36]

Select the points you will argue on appeal with care. Generally, the fewer points the better. It is a rare case that has more than two or three grounds for reversal. If, in formulating points on appeal, you have more than two or three points, it may mean you are either trying to retry your case to the appellate court or that you have needlessly split a few issues into smaller parts. If the latter is true, you should probably consolidate your headnotes and use subpoints.

When you formulate the respondent's argument, remember always that the respondent prevailed in the trial court. The trial court's findings and conclusions are binding on appeal and are reversible only on a showing of some abuse of discretion. The appellant has the burden of convincing the appellate court the relief requested should be granted. For that reason, the respondent should attempt to emphasize that these matters are binding and that the appeal should fail. Reversals often occur when respondents allow themselves to be distracted by appellant's collateral attacks on which the trial court has already ruled.

A good brief represents the synthesis of much research, including research from foreign jurisdictions, as well as thorough research of California law. If no California authority exists for a proposition you assert, say so, and cite appropriate authority from other jurisdictions. An advocate best fulfills his obligation if the brief informs the court not only of California authority but also of foreign cases with similar facts. If the case law in other jurisdictions is split or confusing, resort to law review articles can be helpful to the court. This is especially true where the area of law is complex or technical, in such situations, law review articles can be extremely beneficial. The judge has little time to become an expert in the area of the law involved in your case before drafting his opinion. Use legal encyclopedias[37] with great caution. Cite them only when you have no other authority. Remember they are not the decisions of any court; rather, they are someone else's analysis of those decisions.

Conclusion

The conclusion should be short, stating the precise relief sought. If you simply ask the court to reverse the trial court's decision, you have not done enough unless you also point out the case should be dismissed or the case should be remanded for certain further proceedings. Usually, one or two sentences will be enough to communicate the desired relief.

---

36. Oslan v. Comora, 73 Cal. App. 3d 642, 140 Cal. Rptr. 835 (1977).
37. *E.g.*, CAL. JUR., AM. JUR., C.J.S.

The Respondent's Brief

Although many of the rules applicable to the appellant's opening brief regarding format are also applicable to the respondent's brief, respondent's brief[38] is different in that it serves as an answer to the appellant's contentions. Some courts have viewed the failure to file a respondent's brief as fatal to the respondent's position on appeal.[39] The Appellate Rules of Court specifically state that respondent's brief must include a separate argument in response to each point argued by the appellant.[40] The respondent should, as a general rule, never begin any new matter without first answering the appellant's opening brief. While respondent should make it very clear what arguments are being answered, he need not clarify or correct any poorly stated argument made by the appellant. The heart of respondent's brief is the argument and authorities.

The respondent may also include a supplementing summary of proceedings or statement of facts if he feels appellant's summary is deficient, incomplete, or inaccurate. Respondent can gain enormous advantage by restating appellant's rambling rehearsal of the facts or his confusing statement of the issues. The appellate court usually will turn to respondent's brief when preparing the opinion.

Appellant's Reply Brief

The purpose of appellant's reply brief[41] is to reply, answer, or explain an issue raised in respondent's brief which appellant did not sufficiently cover in appellant's opening brief. Although a reply brief may be necessary from time to time to rebut the respondent's arguments or additional cases, appellant should carefully consider the need for a reply brief. Appellants should take care to insure the reply brief is short, limited in scope, and not a mere duplication of arguments developed in the opening brief. Reargument only increases the already heavy reading burden of the judges. Generally, new issues raised by appellants will not be considered by the court.[42]

38. *See generally* CAL. R. CT. 14(a) (West 1981).

39. Roth v. Keene, 256 Cal. App. 2d 725, 64 Cal. Rptr. 399 (1967) (failure to file a brief is an abandonment of any attempt to support the judgment); Grand v. Griesinger, 160 Cal. App. 2d 397, 325 P.2d 475 (1958) (failure to file a brief is in effect a consent to reversal).

40. *See supra* note 38 and accompanying text.

41. *Id.*

42. Courts have consistently held that matters presented for the first time in appellant's reply brief will not be considered. Nelson v. Gaunt, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981); Utz v. Aureguy, 109 Cal. App. 2d 803, 241 P.2d 639 (1959); *but see*

1. Follow the court rules.

This suggestion is of foremost importance because the court will reject even the most effective brief if it does not comply with the rules of court as to form, length, etc.[43] Before you begin your brief, make sure you are familiar with these rules.

2. Use short, declarative sentences.

Although sentence length does not in itself determine clarity, it has a great deal to do with the way a sentence is structured. Generally, the longer the sentence, the more complex its structure. Obviously, many appellate brief-writers still believe they cannot write short, clear sentences because their subject matter is complex. This widely held belief is a myth. Avoid complicated sentences which require the judge to engage in a kind of verbal algebra—especially required to understand negatives. For example, the awkward phrase "No minors . . . shall be punished for other than" actually means "All minors . . . shall be punished for."[44] In short, avoid using sentences which are so long and convoluted that the reviewing judge needs to read them twice in order to extract your meaning. Chances are, the judge will not read the sentence again.

3. Use well-organized and logical arguments.

Rambling, tangential arguments serve only to frustrate and confuse the reviewing judge. Organize your argument into specific, logical patterns. Logical, well-organized arguments use good connecting words and phrases such as "accordingly," "moreover," "nevertheless," "turning now to the *Wellenkamp* case," and other introductory words and phrases. The judge will soon be lost if you cut and paste thoughts and concepts together without showing the relationship of the new material to the preceeding material.

4. Write well-developed briefs.

There is a movement away from lengthy briefs—and rightfully so. Very often, the more time spent writing the brief, the shorter it will be. However, it is also possible to write a poor brief because it is too

---

Radinsky v. Thomas, Inc., 264 Cal. App. 2d 75, 70 Cal. Rptr. 150 (1957) (Here the appellate court paid lip service to the notion that appellants must raise all points on appeal in opening briefs, yet, without explanation, decided to consider them anyway. Apparently, the court was attempting to underscore the weakness of appellants' position by emphasizing that even if they considered all the points raised, both those points properly and improperly raised, appellant would still be unsuccessful.).

43. *See supra* note 5 and accompanying text.

44. *See supra* note 23 and accompanying text.

short, terse, cryptic, and filled with half-developed thoughts. The only safe rule is never to sacrifice precision, clarity, and completeness in the arguments for brevity.

5. Apply the facts to the law.

Judges decide cases on the particular facts in your case. Do not devote the majority of your argument to abstract issues of law. When applying the facts to the law, do so in a way that will develop an emotional tone of "justice," "public policy," or "fairness" that will make the judge *want* to sympathize with you.

6. Select as few issues to appeal as possible.

One to three issues is ideal. A proliferation of alleged errors may leave the impression you are "fishing" or that you are attempting to retry the case. Arguing a weak issue may distract the judge from the argument of a stronger issue which may carry the appeal. Avoid this "shotgun" approach. Also, make sure you do not try to raise an issue on appeal that was not raised in the trial court below. If you are caught doing this, you will likely anger the court. Wasting the court's time on such issues always invites rebuke during oral argument. In selecting the issues, keep in mind California appellate courts rely heavily on the harmless error doctrine.[45] One effective writing technique is to show how a different result might have been obtained had no error been made.

7. Avoid mere conclusory statements.

An example of a conclusory statement is: "Parole Evidence doesn't apply." The reviewing judge wants to know why. Mere general assertions are usually ignored. Remember, you are trying to persuade. Even if the argument makes good sense, the court may reject it summarily if it lacks supporting authority.[46] A brief which relies on the force of logic alone, without the support of precedent, is doing only

45. The number of California appellate cases which rely on the harmless error doctrine is legion. *See, e.g.*, California School Employees Ass'n v. Sunnyvale Elementary School Dist., 36 Cal. App. 3d 46, 111 Cal. Rptr. 433 (1973); Ernest W. Hahn Inc. v. Nort-cet Corp., 34 Cal. App. 3d 171, 109 Cal. Rptr. 709 (1973). This should not be unexpected in California; the Civil Code expresses the maxim: "*de minimis non curat lex*" (the law disregards trifles) which suggests that reversal may be precluded where the error involved does not substantially affect appellant's case. CAL. CIV. CODE § 3533 (West 1970).

46. *In re* Steiner, 134 Cal. App. 2d 391, 285 P.2d 972 (1955); Zainudin v. Meizel, 119 Cal. App. 2d 265, 259 P.2d 460 (1953).

half a job.

8. Cite to a few controlling authorities.

Generally, you should avoid long lists of string citations. Judges are not impressed by *ad nauseum* string citations. They are more interested in quality than quantity. Cite the case which is most recent and most closely on point for a general proposition. If the most recent case you cite stands for the same proposition as eight to ten earlier cases, chances are the most recent case will refer to many of the older cases within the opinion. Be content with that. When citing opposing authorities, do not be afraid to distinguish their facts in a convincing manner. You can gain a tremendous advantage if you address these cases and use them to your advantage.

9. Edit your quotations.

Long rambling quotations in your brief will likely lead the judge to conclude you were too lazy to edit them. The judge may quit reading rather than edit the quote himself. One would not think of publishing an unedited law review article, book, or newspaper story, but lawyers are often surprisingly casual about using unedited quotes. If necessary, you can place lengthy quotations from the record and other sources in the appendix.

10. Avoid footnotes.

An appellate brief should not be speckled with footnotes. The judge may be distracted from the thought you are trying to communicate when a footnote appears. The judge must break his or her train of thought and look down to the bottom of the page. After having done so, the judge may have lost his or her train of thought from the original sentence. Although this issue has proponents on both sides, many appellate judges believe that if something is not worth putting into the text of the brief, it is not worth putting in a footnote. Like all rules, this one has exceptions, and a particular situation may necessitate the use of footnotes. Generally, however, footnotes tend to show lazy research rather than erudition.

11. Be professional.

Do not engage in personal attacks on your opponent or the trial judge, even if they are deserved. If your opponent's actions have been outrageous, the judge will see this without your help. Also, briefs which charge opposing counsel with violating minor court rules are usually inappropriate. If the infraction of the rules is serious, you can bring it to the court's attention by appropriate motion. Vehement accusations and name-calling often reflect your own short-

comings more than they do your opponent's.

Professional behavior includes abstaining from personal attacks on the trial judge (i.e., "the judge's incompetence is exceeded only by his bias"). Because most judges feel a sense of affinity for one another, the appellate court may view such language in your brief as an undeserved personal attack on judges in general.

12. Make your brief stimulating.

Your brief should not be so dull and boring that it cannot hold the judge's attention. Do your best to put yourself in the judge's position when you write your brief. Anything you can do to make your brief shorter, lighter, and more readable will undoubtedly improve its effectiveness. Most legal arguments can be intellectually stimulating if properly presented.[47]

13. Keep it simple.

Judges are more likely to be persuaded by writing that is understandable and pleasing to read. Unfortunately, much legal writing does not meet this standard. The appellate brief-writer's primary responsibility is clarity, not entertainment. Stylistic embellishments and fanciful construction are distracting. Sometimes, however, techniques such as metaphor and simile can be purposeful and effective if used to persuade and explain, not simply to decorate. For example, one imaginative insurance defense lawyer successfully argued for denying coverage to its insured, who collided with a spare tire abandoned on the highway. Contending that coverage was predicated on collision with a vehicle and not a tire, he argued, "A tire is no more a car than a horseshoe is a horse." This simile was effective because it was functional.

14. State your strongest point first.

Do not dilute the point which may decide the case by putting it at the end of your brief. The court needs to know what you think is important and should not be forced to read through numerous pages of underbrush to find out. Some attorneys, however, choose to put their next strongest point last on the theory that the mind remembers what is most recent.

---

47. For numerous enlightening examples of cumbersome legal language made more readable and stimulating, see generally WYDICK, PLAIN ENGLISH FOR LAWYERS, *passim* (1979).

15. Avoid legalisms.

Curtail your use of "said," "aforesaid," "hereinafter," and "such," and you will be surprised at how simple and readable your brief becomes. A legalism, in the words of one judge, is "a word or phrase that a lawyer might use in drafting a contract or pleading but would not use in conversation with [his or her spouse]."[48] Consider the following examples: "I can do with another piece of that pie, dear. *Said* pie is the best you've ever made," or "Sharon Kay stubbed her toe this afternoon, but *such* toe is all right now."[49]

Of course, legal jargon is unavoidable when there is no reasonable equivalent in ordinary language. For example, phrases like "equity of redemption" and "tenancy by the entirety" are not readily translated into common language. Even some Latinisms, such as *res judicata,* and *stare decisis* are probably unobjectionable. Use legalisms carefully. If you use them inappropriately, they can easily destroy the freshness and spontaneity[50] of your brief.

16. Don't hesitate to supplement your brief with charts, maps, or tables.

Visual aids provide a very simple way to inform the judge of pertinent information. Charts, maps of tracts, or street maps may quickly demonstrate a key point that might take you hours to write in words. Very often, these visual aids are so helpful to the court that the court may lift them from the brief and publish them with the opinion.[51]

17. Use definite, specific, concrete language.

Whenever possible, use specific language instead of general language. Avoid the temptation to use words which are ambiguous and do nothing more than duplicate thought. One witty writer expressed the problem in this way: "Law is law: in such and so forth, whereas and when as, wherefore and therefore, provided always, nevertheless, notwithstanding, and of course, because . . . ."[52] Remember, an appellate brief is not a showcase for your fifty-cent words. Lengthy, rarely used words are often more distracting than they are helpful. Avoid using the passive tense whenever possible and use vigorous

48. Smith, *A Primer of Opinion Writing for Four New Judges,* 21 ARK. L. REV. 197, 209 (1967).

49. *Id.* at 209-10.

50. *Id.* at 209.

51. *E.g.,* Lewis v. City of Los Angeles, 137 Cal. App. 3d 523, 187 Cal. Rptr. 273 (1982) (diagram of intersection); Masin v. La Marche, 136 Cal. App. 3d 696, 186 Cal. Rptr. 619 (1982) (diagram of tracts of land); Scuri v. Board of Supervisors of the County of Ventura, 134 Cal. App. 3d 400, 185 Cal. Rptr. 18 (1982) (maps).

52. Dore, *Expressing the Idea—The Essentials of Oral and Written Argument* in ADVOCACY AND THE KING'S ENGLISH 817 (1960).

words and phrases which people can understand. "The power of clear statement," wrote Daniel Webster, "is the great power at the bar."[53]

18. Omit needless words.

For the same reason a machine has no unnecessary parts, a sentence should have no unnecessary words. Each word should logically relate the desired meaning of the sentence. For example:

Bad: the reason why is that
Good: because

Bad: in a hasty manner
Good: hastily

Bad: in spite of the fact that
Good: although

19. Cite and discuss relevant statutes and rules.

Very often, attorneys overlook relevant statutes, spending needless hours researching cases. Furthermore, if you fail to research relevant statutes and rules, the court may discover the statute or rule on its own. Should the court make such a discovery, it is likely to view the remainder of your brief as less credible, no matter how good it is.

20. When in doubt, leave it out.

When you are in doubt as to whether something adds to your brief, leave it out. Authorities that do not really support your argument tend to weaken it.

21. Check citations for accuracy.

If the court cannot find the authority you cite, it cannot verify the proposition you claim it supports. Courts do not generally rely on citations in a brief which they cannot independently verify. The same holds true for citations to the transcript. For example, you may have checked the transcript and found page 371 correctly supports a factual statement. Then, your secretary, while typing the final draft, changes 371 to 317. If not re-checked, this error will reach the court. It will upset the judge to have to do your proofreading for you. In the same vein, strive for consistency in citation form. You need not

53. Letter from Daniel Webster to R. M. Blatchford (1849), *quoted in* M. MCNAMARA, 2000 FAMOUS LEGAL QUOTATIONS 89 (1967).

strictly follow the *Uniform System of Citation,*[54] which most law reviews use, but at least be consistent. If the judge notes that you cite the *California Reporter* three different ways, your brief will appear sloppy.

When citing California cases, the official citation must be given first, followed by parallel citations to the *Pacific Reporter* and *California Reporter.* Although parallel citations are not required, it is good practice as a matter of courtesy to provide them. However, to conserve space, the parallel citations may be dropped in subsequent references to the same decision. When citing cases, the date should appear immediately after each case name.[55]

22. Take time to proofread your brief.

Grammatical errors and spelling mistakes are embarrassing and must be eliminated. All re-writing and proofreading should take place before your brief goes to the printer. It is no pleasure to file a "NOTICE OF ERRATA."

23. Use italics and typographical emphasis sparingly.

To show emphasis, underline or use italics. Avoid excessive use of exclamation marks and bold-face type. Use emphasis sparingly. Exaggerated emphasis may imply that you have little confidence in the judge's ability to appreciate the argument you are making. In the words of one appellate practitioner:

> I should think that where the pages of a brief begin conversationally in small pica, nudge the reader's elbow with repeated italics, rise to a higher pitch with whole paragraphs of the text—not mere headings—in blackletter, and finally shout in full capitals, . . . the judge might well consider that what was a well intentioned effort to attract his attention was in reality a reflection on his intelligence.[56]

24. Be accurate.

Refrain from deliberate misstatements of fact. Integrity requires that all factual statements be correct and supported by appropriate references to the record. It also requires that cited cases stand for the proposition for which they are cited. A quotation should have the same meaning within the context of the brief as it did within the context of the material in which it originally appeared. In sum, your brief must be so accurate that even one who disagreed with your conclusions would be unable to point to statements that are not supported by the record or authorities.

---

54. HARVARD LAW REVIEW ASS'N, A UNIFORM SYSTEM OF CITATION (13th ed. 1981).

55. *See* FORMICHI, *supra* note 5 at §§ 76, 84.

56. Davis, *The Argument of an Appeal,* 26 A.B.A. J. 895, 896 (1940).

Each appellate judge reads thousands of pages of appellate briefs. This represents but a fraction of the judge's reading, which also includes transcripts, records, reported decisions and other authorities, writs, materials on motions, and material necessary for day-to-day administrative operations of the office. Within this context, it becomes critical that a judge be able to rely on statements within a brief. If a single statement is wrong, then all statements are likely to be suspect. Furthermore, you run the risk of gaining the reputation of being an attorney whose briefs may not be trusted. Honesty and accuracy are emphatically the best policy.

CONCLUSION

This article does not purport to be an exhaustive compilation of rules and techniques which, if followed, will inevitably produce the perfect California appellate brief. Rather, it merely suggests positive, concrete ways to make appellate brief-writing more effective. Effective brief-writing, simply stated, is the means by which counsel assists the appellate court in reaching a just and equitable resolution of a case. To accomplish this, the effective brief-writer must adhere to the technical format outlined in the California Appellate Rules of Court, provide an accurate and objective statement of the facts and proceedings, narrow the legal issues on appeal, and finally, aggressively and accurately formulate arguments based on relevant legal precedent. Attention to these suggestions will not only produce the kind of brief appellate judges prefer to read, but will also increase your chances of success on appeal.

APPENDIX*

I. California Appellate Brief Checklist
   A. Procedural requirements
      1. Timely filing requirements (Rules 16, 37)
      2. Number of copies (Rule 44(b))
      3. Notice
         (a) Appellant's Opening Brief (Rule 17(a))
         (b) Respondent's Brief (Rule 17(b))
      4. Extensions of time for filing (Rules 16, 37, 43)
         (a) Late filings (Rule 43)
   B. Brief format
      1. Printed briefs (Rule 15(b))
      2. Typewritten briefs (Rule 15(d))
      3. "Other" briefs (Rule 15(c))
      4. Length (Rule 15(e))
      5. Paper size, margins, and type specifications (Rule 15(b)(3))
   C. Structure of the Brief
      1. Appellant's Opening Brief (Rule 13, 15)
         (a) Topical Index (Rule 15(a))
         (b) Table of Authorities (Rule 15(a))
         (c) Statement of Issues (optional)
         (d) Statement of the case (Rule 13)
         (e) Statement of facts (Rule 13)
         (f) Argument
         (g) Conclusion
      2. Respondent's Brief (Rule 14(a))
      3. Appellant's Reply Brief (Rule 14(a))

* References to "Rules" are to the California Rules of Court (West 1981 and Supp. 1983).