

STRUCTURING APPELLATE BRIEFS

Thomas L. Hudson*

Much has been written about legal writing, and some of it is even helpful.¹ But even the good stuff often focuses on style or other similar aspects of legal writing such as “avoid legalese.” One, of course, must master all of this, but another critical aspect of what differentiates good legal writing from bad is organization, otherwise known as structure. Indeed, even if each sentence reads well, and even if the document ultimately makes the necessary points in a civil and credible manner without unnecessary duplication, when the structure is off, it is like looking at a sculpture with the limbs unintentionally out of place—jarring, to say the least.

In appellate briefs, perhaps due to their length, structure becomes particularly important. A well-structured brief will stand out, and a poorly organized brief may cause the reader to gloss through it or put it down.² But what makes a brief well organized? At the highest level, of course, the governing rules often require a particular structure. Most appellate courts re-

* Partner, Osborn Maledon. The author has practiced appellate law for over twenty-five years and has helped hundreds of lawyers write better appellate briefs. He is a fellow in the American Academy of Appellate Lawyers, a past chair of the State Bar Appellate Practice Section, served as a Ninth Circuit Appellate Lawyer Representative, and was named the 2015 Phoenix Appellate Practice “Lawyer of the Year” by Best Lawyers®. Thanks to the many helpful comments I received from various lawyers and judges, and especially Mark Harrison and the Honorable Randall H. Warner for their particularly helpful and extensive comments.

1. See generally RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005); Diane S. Sykes, *From the Bench: Advice to Appellate Litigators*, 39 *LITIG.* 4 (2013).

2. JOAN M. ROCKLIN ET AL., *AN ADVOCATE PERSUADES* 110, 187–216 (2016) (emphasizing the importance of proper structure and describing key techniques for structuring persuasive appellate briefs).

quire a jurisdictional statement, issue statement, statement of the case, statement of the facts, argument, and conclusion.³ But within each of these sections, there is another layer of shape and structure to which the best appellate lawyers pay attention. In fact, if you pay attention to this structure, you will see that many of the best appellate briefs often implement the same high-level structure within the required overarching organizational elements.

With some planning and editing, you too can do this (if you are not already doing so). Before getting to the details, however, a few caveats. First, the scope of this article is primarily limited to structure, so it will not touch on many other important aspects of brief writing such as issue selection, themes, and framing.⁴ Second, the examples below use terms like “Appellant” and “Appellee” because it makes the examples easier to follow. In your own briefs, you should avoid those labels.⁵ Third, and for similar reasons, nothing below should be taken as advice about drafting the table of contents. With that, let’s get going.

I. THE INTRODUCTION

Absent some important overriding concern, the opening, answering, and reply briefs should begin with an introduction, overview, or summary. In the opening and answering briefs (reply briefs are discussed below), the introduction provides the first opportunity to help the reader begin to understand—big picture—what the case is about, why it is interesting, and why you should win. Unless you are litigating a highly publicized case like *Bush v. Gore*,⁶ a good introduction should assume no prior knowledge about the case. In no more than a

3. *E.g.*, ARIZ. R. CIV. APP. P. 13 (content of briefs).

4. These topics are discussed ably elsewhere. *See, e.g.*, BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2d ed. 2013).

5. ARIZ. R. CIV. APP. P. 13(e).

6. 531 U.S. 98 (2000).

page or two, it should begin framing the case and provide a high-level overview, with details to come later.

When drafting the introduction, think about what you would tell a stranger about your case if you had thirty seconds to do so. What does the 10,000-foot view of the case look like? What is the first thing you want the reader to know about your case? Often, a “This is a case about” phrase works well.

For example, in one of the now infamous marriage equality cases, the appellees (represented by Ted Olson, David Boies, and other very talented lawyers)⁷ began their brief with such a phrase: “This case is about marriage, ‘the most important relation in life,’ and equality, the most essential principle of the American dream, from the Declaration of Independence, to the Gettysburg Address, to the Fourteenth Amendment.”⁸

Of course, not all cases lend themselves to such lofty themes. Moreover, you do not want to overdo it. So, if it’s an abuse of discretion issue about case management, do not claim it’s about the client’s fundamental right to due process. But with that in mind, recognize that cases often boil down to a high-level issue that can be framed in a moderately interesting and persuasive manner. The goal is to think hard about the entry point of the case and start there.

In terms of process, many drafters find it helpful to start by jotting down some initial thoughts about what the introduction should include, and then write the rest of the brief (before finishing the introduction). They then return to the introduction after the rest of the brief is fairly polished.

Although this technique may seem counterintuitive, it works. To draft the best introduction, you must have a deep and abstract understanding of the case’s

7. Including Theodore Boutsous, Jr., Christopher Dusseault, Theane Evangelis Kapur, Sarah Piepmeier, Enrique Monagas, Matthew McGill, Amir Tayrani, Jeremy Goldman, and Theodore Uno.

8. Brief for Appellees at 1, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) (citation omitted), <http://afer.org/wp-content/uploads/2010/10/Brief.pdf>.

battleground points and themes. You will gain this deep perspective only after going through the rest of the drafting process. Thus, although you may initially draft the introduction whenever you like, revisit and redraft the introduction after drafting the rest of the brief. At that point, after understanding the brief as a whole, you will be in the best position to write the best introduction possible.

II. THE PROCEDURAL AND FACTUAL BACKGROUND SECTIONS (AKA STATEMENT OF THE CASE AND FACTS)

Both the opening and answering briefs should also include sections that explain the case's relevant procedural history and background facts. Subject to the governing rules, this information often may be combined. But sometimes it is better to start with the statement of the case if, for example, the procedural posture plays an important role on appeal.⁹

A few things to keep in mind: First, tell your story as persuasively as possible. After reading the fact section, the reader should want you to win. Do not, however, omit any bad facts to achieve this result.¹⁰ Many others have made this point, so no need to dwell on it. Just make sure the judges and law clerks hear everything bad about your case from you first. Your credibility depends on it.¹¹

Second, do not feel the need to include every detail in either the procedural history or fact section. For starters, exclude irrelevant detail. For example, if it does not matter that X Corp. is a "Delaware Corpora-

9. The FRAP Advisory Committee separated the statement of the case and the statement of the facts in 1998, then reintegrated them in 2013. *Compare* FED. R. APP. P. 28(a) advisory committee's note to 1998 amend. ("[T]he separation will be helpful to the judges."), *with* FED. R. APP. P. 28(a) advisory committee's note to 2013 amend. ("Experience has shown that [the separation has] generated confusion and redundancy."), https://www.law.cornell.edu/rules/frap/rule_28.

10. Ethics rules prohibit lawyers from misstating the law or facts. MODEL RULES OF PRO'FL CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

11. *Id.*

tion,” don’t waste the reader’s time with that detail. The same holds true with dates that do not matter.

Moreover, you also need not include every relevant detail in these sections. Unfortunately, some writing instructors teach that every detail used in the argument section must have first appeared in the facts/procedural history sections.¹² This is bad advice. In the real world, brief readers typically read the background sections once and they will not remember every detail. They will then read the argument sections multiple times (often in parallel with the corresponding argument sections from the other briefs). In these sections, the precise details often matter, and it is much easier for readers to process details in the argument section. Within the argument section, the details will now be in context and the reader should already understand the big picture. So, although the statement of facts must include the relevant background (at least at a high level), don’t get bogged down with the nitty gritty until it matters.

In certain unusual cases, you might even consider including a separate subsection in the relevant argument section with the additional details. If, for example, the appeal involves a complicated procedural history where those details really matter (*e.g.*, a *Daubert* hearing and ruling where the proffered expert’s testimony matters),¹³ you could provide a high-level overview of what happened in the procedural history section, and provide the rest of the nitty gritty in the argument section. In such a case, the procedural history could describe the *Daubert* challenge and ruling at a high level, *e.g.*, “The trial court held a *Daubert* hearing on Defendant’s motion, and precluded Plaintiff’s expert from testifying.” The body of the argument section could then include a subheading called something like “Additional procedural history relevant to the district court’s ruling

12. *E.g.*, CHRISTINE COUGHLIN ET AL., A LAWYER WRITES 249 (3d ed. 2018).

13. “A *Daubert* hearing is a trial judge’s evaluation to ensure that an expert’s testimony is reliable and relevant.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (interpreting FRE 702 to require “[p]ertinent evidence based on scientifically valid principles”).

on the *Daubert* motion.” That subsection would include the relevant details (*e.g.*, the details of the expert’s testimony perhaps with selected quotes, etc.). Those details would likely be glossed over and/or forgotten by the reader if set forth in the statement of the case. Including them closer to the section where they matter will make it easier to follow the argument.

III. THE ARGUMENT SECTIONS (OPENING AND ANSWERING BRIEFS)

Your job in your first brief (opening or answering) is to convince the appellate court that you *should* win (*i.e.*, that you have justice on your side), and that the law requires you to win. (Stated differently, convince the court it should rule in your favor and give it the legal tools necessary to do so.) Toward that end, both the opening and answering briefs must tell the reader what the case is about, what law governs the case, and why your client wins under the relevant law. It must, of course, also explain how the lower court got it wrong (or not).

In some cases, the opening brief should also deal with the points you expect your opponent will make in response. To make this determination, consider the moves of the argument and think about how it will play out. Are you better off raising and anticipating this in your first brief (knowing your opponent will provide a response)? Or will it be better for your opponent to first develop the argument in the answering brief, with your response in the reply (thereby leaving no opportunity for your opponent to respond in writing)?

*A. In Both the Opening and Answering Briefs,
Generally Make Your Positive Case First and Then Deal
with the Arguments Against Your Side*

1. The Opening Brief

As noted above, part of the opening brief's job is to convince the appellate court that the lower court erred. As the appellant, you are, after all, asking the appellate court to review one or more of the lower court's rulings. In light of that, many lawyers believe they must *first* argue that the lower court got it wrong. They accordingly begin the opening brief argument section by providing a detailed explanation of the many ways in which the trial court went awry.

In nearly all cases, this organizational strategy is a mistake. Think about it. In most cases, if the trial court errs it does so by either getting the law wrong or misapplying the law to the facts. Logically, then, to comprehend how and why the trial court erred—particularly in complex cases—one must first grasp the relevant legal principles, and then understand how they apply to the facts in your case. Accordingly, start by convincing the court that your position is legally correct, and after doing so then discuss why the trial court got it wrong.¹⁴

This means that for each issue or sub-issue, you should start the opening brief argument section with the legal principles relevant to the issue. Here, help the reader understand the law necessary to decide the case. After establishing the relevant legal principles, the brief should then explain how these legal principles apply to the facts of the case. If you are the appellant and you have decided to pursue an appeal, the conclusion must be that your client prevails under the relevant law and facts. In other words, make the positive case for why you should win *first*.

14. See RICHARD K. NEUMANN ET AL., LEGAL REASONING AND LEGAL WRITING 317–18, 424–29 (8th ed. 2017).

After you have made your positive case, then demonstrate how and why the lower court erred. Here, think about your battleground points, and ideally keep them on the *de novo* side of the standard of review ledger. Note too that by the time you get to this point, much of the work may already be done. If, for example, the error lies in misapplying the correct state's law, you can draw on your prior positive case to tee up the rebuttal: "Instead of applying the Kansas rule as required by the governing choice of law rules, the district court looked to Missouri law. It did so because it mistakenly believed"

Within your analysis of the lower court's ruling, these later sections should also generally deal with any arguments your opponent made that the lower court accepted. In some cases, you can blame your opponent for the lower court's error, *e.g.*, "Although Kansas law applies, the Railroad convinced the district court to apply Missouri law. This was error for three reasons. First, as discussed above,"

If merited, you may also address other arguments your opponent made that the lower court rejected or did not reach if it makes sense for the appellate court to first learn about those arguments from you. These arguments could be captured under a subheading with something like "The district court correctly rejected and did not rely on the Company's other reasons for applying Missouri law."

2. *Opening Brief Example*

Below is an example of this organizational structure modeled on a case where the central issue involved prejudgment interest on an arbitration award reduced to judgment in federal court. For purposes of the example, assume the following:

- The law is clear that *after* a court confirms an arbitration award (*i.e.*, reduces it to judgment), the federal post-judgment interest rate applies.

- The law is clear that a court may not award any additional “prejudgment” interest that predates the issuance of the arbitration award (doing so is considered an improper “modification” of the award).
- The law is unclear about whether a district court may award “prejudgment” interest from the date of the issuance of the award until its confirmation in federal court, and, if so, whether the federal rate or state rate applies in a diversity action.

With those assumptions and background, consider this example showing the use of the recommended structure in an opening brief for the first issue (whether a district court may award prejudgment interest that runs from the issuance of the arbitration award until its confirmation in federal court).

ARGUMENT

- I. Appellant Smith is, as a matter of law, entitled to prejudgment interest on the arbitration awards.
 - A. Because this is a diversity action, prejudgment interest is determined by State law.

This section would lay out the law concerning the applicable law in diversity actions and establish that state law determines whether a party may recover prejudgment interest, and if so the applicable rate.
 - B. State law entitled Appellant Smith to post-award, prejudgment interest at the higher State rate.

This section would apply the relevant state law to the case and argue that it entitles the appellant to prejudgment interest at the higher state rate.

- C. All relevant policy considerations confirm that Appellant Smith is entitled to post-award/prejudgment interest at the higher State rate.

This section would discuss the underling policy rationale behind the relevant legal rules and show why those considerations confirm the result requested in this case is the correct one. This section would end the positive case.

- D. The district court's ruling denying Appellant Smith prejudgment interest cannot be squared with the pertinent statutes or case law.

This section would begin the negative case by explaining how and why the district court went wrong.

- E. Appellee Jones's remaining arguments made below for the lower federal rate do not withstand scrutiny.

This section would end the negative case by rebutting the arguments the appellee will likely make or that may concern the appellate court.

- F. Conclusion.

Whether labeled as a separate section or not, the argument section on this issue would end by concluding that the appellate court should reverse the district court's ruling and remand with instructions to amend the judgment to include the requested interest.

- II. [Second issue on appeal would use the same structure.]

A few observations. First, the brief begins with Section A by discussing the relevant legal rules and what they require. Section B then discusses how those legal rules (now established) apply to the facts in this case, *i.e.*, how the court should analyze the issue. Section C helps convince the appellate court that the appellant *should win* by discussing how the result requested in this case fits the underlying rationale for the legal rules (*e.g.*, interest should compensate the prevailing party for delay). After making that positive case, the brief then turns in Section D to analyzing the district court's ruling and is able to do so in the context of the correct legal principles having already being established. Next, Section E anticipates some of the opponent's arguments. Section F then concludes the discussion of the first issue (thereby putting the rebuttal in the middle).

A few caveats. First, although starting with the positive case generally works best, that does not necessarily dictate how to frame the issue's major heading. Roman numeral I in the argument section could be something like "The trial court erred by dismissing the breach of contract claim." Each case is different, and there are many ways to implement this basic structure. The key is to be deliberate about helping the reader to understand what the law requires and why you should win before digging into the trial court's error.

Second, although the argument section should generally follow this structure, that does not mean the reader should not have some understanding of why you think the district court erred before getting to the argument section. Both the introduction and the statement of facts/case present opportunities to begin planting some of these background seeds. But the meaty details of how and why the trial court erred should come in the argument section, after the reader understands what the result should have been.

3. *The Answering Brief's Argument Section*

The answering brief must defend the lower court's ruling and fend off the criticism in the opening brief.

But like the opening brief, you should generally structure the answering brief by developing your positive case first. So again, *after* laying out the relevant legal principles and why they require that you win, turn to debunking your opponent's arguments.

4. *Answering Brief Example*

Consider the following example from a case that involved pension legislation that altered the formula for calculating increases to pension benefits for certain elected officials. The primary issue involved whether the new legislation (referred to below as “the New Pension Legislation”) violated the pension impairment clause of a state constitution. The case turned on the meaning of “benefit” in the pension clause, and whether the New Pension Legislation “diminished or impaired” that “benefit” under the constitution.

ARGUMENT

- I. The superior court correctly held that the New Pension Legislation violates the Pension Impairment Clause because it “diminished or impaired” a “benefit.”
 - A. The superior court correctly construed the term “benefit” in the Pension Impairment Clause.
 1. The Pension Impairment Clause’s plain language shows that the pension payments impacted by the New Pension Legislation qualify as a “benefit.”
 2. The State’s definition of “benefit” ignores common sense and is unsupported by any authority.

- B. The superior court correctly construed the phrase “diminished or impaired.”
1. The New Pension Legislation diminished or impaired Pensioners’ right to permanent base benefit increases under existing law.
 2. The State’s interpretation of “diminished or impaired” violates the rule that constitutional provisions must be interpreted in accordance with their plain meaning.
- C. Decisions from other jurisdictions confirm that the New Pension Legislation is unconstitutional.

Note that at the highest level, this brief is quite clearly defending the trial court, emphasizing that the “superior court” reached the “correct” result. In other cases, the answering brief may simply use headings that match the legal issues; the brief need not literally include a heading saying the lower court reached the correct result. The important point is to demonstrate what the law requires, and in some manner make clear the brief is defending the trial court. (But keep in mind that an appellate court may generally affirm so long as the trial court reached the correct result for any reason.¹⁵ Consequently, convincing the appellate court to affirm may require establishing alternative bases to affirm.)

15. *See, e.g.*, *United States v. Doe*, 136 F.3d 631, 633, 636 n.11 (9th Cir. 1998)

B. Deciding How Much of the Positive Case to Make in the Main Brief Before Turning to Rebuttal Points

When setting out to make the positive case first, choices must often be made about how much of the positive case to make before turning to the critique of either the trial court or your opponent. Generally, this should be done on an issue-by-issue basis, as in the examples above and as illustrated below:

Issue 1

Positive case (why you win)	Negative case (critique of lower court and/or opponent)
Governing legal principles	
Fact and application	
Conclusion—our side wins under governing law and facts	
	The lower court nevertheless reasoned . . .
	But this rationale fails for two reasons.
	First, . . .
	Second, . . .
	Appellee also contended . . .
Conclusion as to first issue	

In some cases, much of the disagreement occurs within the context of either factual or legal sub-issues. For example, in the prior answering brief example, the answering brief establishes the positive case first on each of the key battleground sub-issues (the meaning of both “benefit” and “diminished or impaired”), and then

deals with the opening brief's points on those issues immediately thereafter, as illustrated below:

*Issue 1—Lower court correctly held that
pension legislation violates the
Pension Impairment Clause*

Positive case (why you win)	Negative case (critique)
Pension payments qualify as a “benefit”	State’s definition of “benefit” is wrong
Pension legislation “diminished” or “impaired” a benefit	State’s interpretation of “diminished” or “impaired” is wrong
Other reasons your side wins	
Conclusion as to entire issue	

This brief could have made the positive case first with respect to each of the sub-issues, and then dealt with the opening brief. To decide which organizational structure will work best, put yourself in the likely position of your audience. For example, if you are the appellant, assume the reader is familiar with the lower court decision (or at least knows what you said about the lower court decision in your prior sections). If you are the appellee, assume the reader has read the opening brief. With these assumptions, then ask whether the reader will want to know not only your reasons for your position on the sub-issue, but also why you think the lower

court and/or your opponent is wrong on the sub-issue before moving on.

If you believe a reader may need the sub-issue addressed completely before psychologically being in a position to hear the rest of your argument, then clear the weeds on the sub-issue. If not, you can consider dealing with the negative portion of the sub-issue after completing your positive case. You can also try drafting it both ways to see which version makes the most sense. The question is always what order of presentation will make the most sense and be the easiest to follow and understand by a reader likely to be in the position of your expected audience.

IV. THE REPLY BRIEF

Even after mastering the best practices for opening and answering briefs, many lawyers struggle with reply briefs. Some resort to basically rehashing everything in the opening brief. Some naturally jump straight to taking on point-by-point everything said in the answering brief. The better strategy, in effect, combines these two strategies but does so in a more persuasive manner by using the “reorient and refute” technique.

A. The Reorient-and-Refute Approach to Reply Briefs

The reorient-and-refute approach to reply briefs involves bringing the reader back to the main point or points established in the opening brief, identifying the point or points the answering brief explicitly or implicitly concedes, and then critiquing the remaining points of disagreement so that no doubt remains that your side should win. A well-written reply brief allows one to review only the reply brief and have a good understanding of the case and the dialectic. The reader should have no doubt about what issues the court must resolve to decide the case.

To implement this approach, make sure you reread the opening and answering briefs, understand the key

premises and battleground points, and then identify (1) the concessions (explicit or otherwise) in the answering brief, and (2) the disagreement points that remain and their nature (*e.g.*, legal, factual, superficial, fundamental, etc.). Take notes about these points as you reread the briefs. You may want to review the matching argument sections of both briefs' side by side to ensure you thoroughly understand the nature of the remaining disagreements.

B. The Reply Brief Introduction (or Summary)

Having identified the relevant concessions and battleground points, the reply brief introduction should lay these out at a high level. Often, you can summarize the main points established in the opening brief, *e.g.*, "As demonstrated in the opening brief, state law dictates the applicable prejudgment interest rate, and in this case that means New York law governs." In other words, bring the reader back to your opening brief (the reorient part of "reorient and refute"). Depending on the nature of how the debate has so far unfolded, the introduction should then identify the concession points and the high-level nature of the remaining disagreement with the details to follow.

For example (and recognizing that each case is different), the reply brief could begin with something like the following:

The opening brief demonstrated that the trial court denied Company's motion for judgment as a matter of law on the basis of a legal theory that has been rejected by the California Supreme Court. Recognizing as much, the answering brief does not dispute that *Smith v. Jones* controls this case, and instead contends that facts unique to this case make it different. Not so. As explained further below,

There are, of course, many other ways to reorient and refute without literally specifying what the opening brief said. One alternative is to instead call out the

ways in which the answering brief failed to engage the opening brief:

Although the answering brief goes on for sixty pages, it fails to address the arguments in the opening brief. With respect to Appellee's six-figure windfall under the slander of title statute, Appellee fails to refute that (1) the statute requires scienter on the part of the client (not the attorney), (2) the client here did not have the requisite scienter, and (3) Appellee violated its statutory duty to notify Appellant of its basis for claiming slander of title (which would have avoided everything that occurred afterwards).

The key point is to help the reader at the outset of the reply understand what battle points remain.

C. The Reply Brief Body

The remainder of the reply brief should then turn to the rebuttal points in accordance with the reorient-and-refute approach. For each major point, consider whether it would be helpful to provide an overview of the dialectic. For example, using the prior example where the first sub-issue involves whether a slander of title statute requires client (rather than attorney) scienter, the subsection on that issue could begin with something like this:

The opening brief demonstrated that the controlling law requires a party seeking sanctions under the slander of title statute to prove that the client (not her attorney) had the requisite scienter. The answering brief disputes this foundational rule, but in doing so relies on older cases that pre-date the precedent that controls this case.

After laying out this history of the debate, the remainder of this section would then flesh out the details. By doing so, one could read just the reply and understand the nature of the parties' disagreements and the structure of the dialectic—the touchstone that should guide your drafting of the reply brief.

V. CONCLUSION

Although it is unlikely your conclusion will make or break your case, it is still an essential piece of a brief.¹⁶ Take advantage of it. In addition to making clear your requested relief, consider driving home a final take-away point or two in one or perhaps two paragraphs.

With that, I conclude with this story. One of my law school professors would regularly have his small section write anonymous essays and then have the students identify the best two essays in the group. To my surprise (but not my professor's), there was almost always broad consensus about which essays were the best written. Although individuals' writing skills vary widely, people generally recognize good writing when they see it, and they also know what bad writing looks like. This is particularly true of structure. People know it when they see it, but often struggle to implement it. Using the tips in this article, you can write briefs that will be recognized for their good structure.

16. ARIZ. R. CIV. APP. P. 13(a)(9) (An appellant's opening brief must contain "[a] short 'conclusion' stating the precise relief sought."); *see also* CAROLE C. BERRY & RAYMOND MICHAEL RIPPLE, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* 121 (5th ed. 2016) (acknowledging the "wide range of opinion as to what the Conclusion should contain" while advising always to check court rules for guidelines and to "gently remind the court of the essence of the arguments").

