Anatomy of the Written Argument

by Gary L. Sasso

Brief writing has become the appellate advocate's most important skill. If trends continue, it will soon be the only skill that matters.

Appeals today increasingly are decided on the briefs. In the Eleventh Circuit, nearly 50 percent of all cases are decided without oral argument. When oral argument *is* scheduled, particularly in federal courts, counsel often get just 15 minutes—enough time to stand up, clear your throat, answer a few questions, and sit down. Oral argument will be used to nail down points already developed in the briefs and to address the court's particular concerns. The basic case must be made—and will often be won—through the written briefs.

Although appellate judges rely heavily on briefs, they nevertheless have little time to devote to them before deciding the case. It may not be enough that a crucial point is made *somewhere* in your brief or that a key argument will gradually come into focus after repeated reading, careful analysis, and lengthy meditation on your scholarly discussion. Points must be apparent quickly. A brief that is ineffectively organized and analytically obscure—or one that is unnecessarily subtle and complex—may jeopardize an appeal that should be won.

Problems of this kind are common. They occur most often with the argument portion of the brief, the very section that must explain why the court should rule one way or the other. This happens because lawyers chronically assume that others—including judges—have the same understanding of an issue, or a whole case, that the participants have attained only after weeks or months of study. If you start out thinking that an appeals court knows, or even cares, as much about your case as you, you are already on the wrong track.

The argument section of a brief must be organized and reasoned on a very different assumption You must assume that the court neither knows about, nor is especially sympathetic to, your legal position. That may sometimes—rarely—be an inaccurate assumption, but if it is, it will do no harm

Once you have the correct view of your judicial audience, you can take the first step in structuring the argument section of your brief: Make your affirmative case at the outset. Remember, the operative assumption is that panel members know *nothing* about your case. They will be lost or unconvinced if you start by refuting arguments made by the other party or adverse positions taken by the court below.

This is a common trap. Counsel for the appellant often begin and end their argument by attacking the lower court's rulings Likewise, appellees typically devote their argument to refuting the appellant's contentions. The problem with this is that it does not show the court that you should win; it proves only that opposing counsel or the lower court may not have adequately explained why you should lose.

Appeals are not debates. They are not decided on the basis of who refuted the most points and subpoints. Appellate courts want to identify the right way to analyze the issues before them. But finding fault with arguments or picking at misstatements made by the other side or by the lower court is not the same as providing the correct solution to the legal issue on appeal. That—and not mere faultfinding—is what the appellate court wants.

The party that gives the court a cogent explanation of how the issues should be analyzed has a substantial advantage. Before you engage in fencing with your opponent or the court, you must provide an overall picture into which the fencing fits. This is because, in most appeals, there is more involved than who is right in the tripartite contest between the parties and the court. Appellate judges read the briefs for guidance on how an issue can sensibly be resolved, not only for the parties in the immediate case, but for others facing the same problem. Until the court is satisfied about this, it will be uncertain how to decide the case. It will read with impatience your naysaying about the failings of opposing counsel or the court below.

Setting forth your affirmative case may not require very much If you have a simple case, all the better The sooner the court understands this, the sooner it will be inclined to rule in your client's favor. But be careful· Just because *you* think your affirmative case is self-evident, do not assume the court will You have a perspective, and a grounding in the

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case, that the court will not share You must explain your view to the court

Once you have explained to the court why your client deserves to prevail under applicable legal principles, then attack arguments to the contrary Now you can do so from a position of strength. The court will have the benefit of the frame of reference you have provided as it considers arguments made by your opponent. It will more likely be receptive to your refutations and may think of others on its own. By helping the court do its job, you stand a better chance that it will make your position its own

You may be tempted to disregard these principles in particular cases. You may be so troubled or offended by your opponent's outrageous arguments that you will feel a special need to meet them from the start. You may be aiming for some kind of dramatic effect. Resist these temptations. Do not engage the other side on its own turf until you have demonstrated to the court that you know your own. As for dramatic effect, appellate judges are, for the most part, unmoved by drama. They read briefs to gain information, not exhilaration or entertainment.

In constructing your affirmative case, be sure to start at the beginning—not the chronological beginning, but the logical beginning. Every argument has a predicate. You must identify it and establish it before moving on. This is a rule that is usually honored in the breach. Countless briefs just jump into the middle of a legal analysis. They start arguing a point of view before laying the groundwork. Such a brief will do little to persuade someone who does not subscribe to that point of view from the start.

Your objective in constructing an affirmative case should be to start with a proposition that the court—whatever its bent—*must* accept; then reason logically, step by step, to your conclusion. If you do this well, you will arrive at your destination with the court right beside you. Your conclusion will make sense, not just because you say so, but because the court will have reasoned along with you. In a way, the technique is one familiar to cross-examiners. You nibble toward your destination with a series of points or questions that can only be answered yes. The main constraint on this approach is the page limit on your brief and the realization that judges do not have all day to read.

But what exactly *is* the "predicate" of a legal argument? For some arguments, it comes from statutory or constitutional language. (This is obviously more true of statutory issues; constitutional disputes often depend as much on decades of judicial gloss as on the bare language of constitutional provisions.) You are almost always on safe ground starting with statutory language. However hostile the court may be, it simply *must* accept that a statute says what it says. This first step may include discussion of an entire statutory scheme, selected components of the scheme, the narrow provision at issue, or all of these

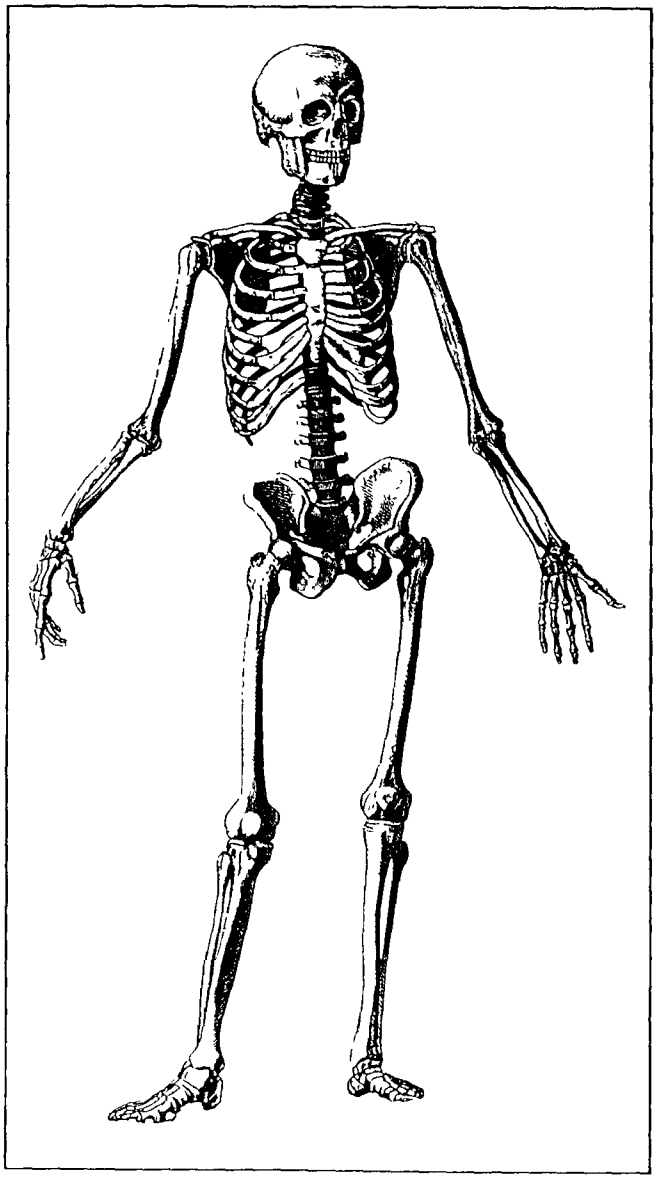
After laying the predicate of statutory language, begin to argue your case by emphasizing, grouping, or excerpting the language that makes your point At this stage, relying still on the statutory language, you try to show what the legislature meant to achieve.

Identifying the aims of legislation is a vital part of any argument based on a statute. Statutory language is notoriously ambiguous Clever lawyers can single out, juxtapose, or just outright construe statutory terms to reach, within reasonable limits, any number of results. Courts understand how this is done. What makes one construction more persuasive than another is its harmony with legislative aims Every statute, and each of its provisions, is enacted to serve a purpose. You must identify that purpose, and whenever possible demonstrate that it will be served best by the construction you propose. If you do that, then your construction of the law will be more than just a demonstration of your facility with the English language

The next step in a statutory argument is developing support, if you can, from the legislative history for your construction of the statutory language and your interpretation of the legislature's objectives If the statute is implemented by a regulatory agency, buttress your construction by interpretations or applications of the statute by the agency.

All of this may seem elementary, and it is. But it is basic knowledge apparently forgotten in brief after brief. The fact is that there are simple, sensible ways to put together most arguments. Though you ignore them at your peril, they are neglected every day.

Of course all rules—even ones as basic as these—have



exceptions. You must be adaptable Occasionally, for example, judicial decisions may supply the best predicate for a statutory argument This may happen if the statutory language seems unfavorable to you but has been given a helpful (for you) judicial construction. It may also occur when a truly controlling decision has established a vital part of what you must show The holdings of such cases will constitute the predicate of your argument—they will be a starting point that the appellate court must accept. When relying on case law in such circumstances, however, you must explain the basis for the courts' conclusions in order to satisfy the reader that you have properly represented the cases.

If the appeal involves common law questions, then your predicate will be the common law principle that you seek to apply. This will be taken, of course, from judicial decisions. To establish that the principle can properly be applied on your client's behalf, you must develop the rationale of that principle and show that it will be satisfied by a ruling in your favor.

Such a matching of policy to the case is critical, but it is often omitted. Appellate judges want to know why. They will not be satisfied if you simply state a precept, cite some cases, and say you win

The reason for this insistent inquisition is easy to explain: Courts want to know *why* you should win. We all know that decisions can be found to support virtually any result. Appellate briefs typically recount—and often just pile up—the cases that support the results urged by the respective parties. Often such briefs fail to give the appellate court a clue why it should follow one line of cases rather than another. The decisive factor will often be the policy behind the principle. In fact, that policy may well provide the basis for reconciling seemingly conflicting cases. It is therefore vital to identify and establish the policy behind the rule. Without doing this, you cannot show that the application you advocate makes the most sense.

Occasionally, you may have the opportunity (or misfortune) to argue an issue of "first impression"—supposedly an issue that has never been directly and authoritatively addressed. In such matters, having a proper predicate is especially important. The truth is that no issues are truly novel. Ironically, the more "novel" an issue may seem, the more basic and familiar will be the predicates for its resolution. Any issue reduces ultimately to a few basic principles that have found expression somewhere in the law—things such as the integrity of the family or the inviolability of freely negotiated contracts. Such basic precepts—firmly and indisputably established—are the predicates you must use when briefing an issue of "first impression." Your job is to make the novel proposition seem familiar or, at most, a natural extension of something that is.

By starting with your affirmative case and clearly establishing the predicates for your argument, you will necessarily have developed a structure—an organization with a point of view—for your brief If you rely on judicial authority, you must fit the cases into that structure; do not permit them to dictate it Judicial decisions are useful, normally indispensable, tools; there must be authority for what you argue legally But appellate briefs that merely collect cases and regurgitate their holdings provide little assistance to the court, and—even worse—squander an invaluable opportunity to persuade

Appellate opinions are rarely written like briefs They are never written with your case in mind. You cannot just cite them or quote them Because they are often hastily written, many opinions are cryptic, incompletely reasoned, or logically unsatisfying. Some have gaps in research And, apart from those fresh off the press, they are written without the benefit of all the authority that may be at your disposal. Your brief must do more than merely catalog and digest this imperfect material

The best briefs, the most persuasive ones—the briefs that assist the court the most—are those that fit cases into a logical, cogent analysis of the issue on appeal. Such an analysis will emerge only *after* you have read the case law, but it will rarely be found in any given opinion.

At times, you may be able to develop your analysis from one or two decisions. Usually, however, just summarizing those opinions will not be enough. You must adapt the analysis in the decisions to the particular issue in your case. Consider how the reasoning of those decisions might be tightened by organizing the discussion differently, or by giving greater emphasis to certain points. Then, by quoting selectively from those decisions, restructure them in your brief to gain the maximum effect from them. Be sure, however, to do so fairly. Although you enjoy considerable license as an advocate in making an argument, if you compromise your own credibility, you will severely compromise your client's case.

Often you will not have one or two key cases that do the job. You may have to canvass a wide range of authority—bits, pieces, and snippets of the law that may seem in disarray. In that case, do this: Read the cases and other authorities and then put them aside. Ask yourself what, in general, was the key concern of the courts that ruled in your direction and, on the other hand, what troubled the courts that leaned the other way Do not get bogged down in details; distill the main themes. Then scrutinize the facts of your case. Study the issue in your case as though *you* had to decide it. Only then will you perceive how the law may be explained, sensibly and concisely.

Do this by structuring your discussion of the case law according to how you—and not necessarily a given opinion or two—conclude that the legal issue must be analyzed. Your analysis will be informed by what the cases say or hold, and will draw support from them. Whenever possible, such an analysis should be constructed largely from well-chosen but short quotes from the decisions. Throughout, remember that your analysis, and the passages you quote, must be organized to address directly the issue in your case and to guide the court on how to resolve it. Your analysis must provide the court with a framework for reading other cases, a hypothesis that other cases will prove.

Finally, although you must fully explain the analysis you develop, do not make the court trudge through every dreary yard of your thought process. Briefs should not read like law review articles or meandering essays. Your discussion must move from point to point, logically and effortlessly, as though prescribed by natural law. It must sound authoritative, not exploratory or exotic. Although your brief may not mimic the judicial opinions that buttress your argument, your analysis must have sufficient authenticity as a statement of the law that the appellate court can adopt it as its own opinion. Your objective, after all, is to *show* the court how it can rule in your client's behalf □