Catholic University Law Review

Volume 33
Issue 3 *Spring 1984*

Article 5

1984

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SOME SUGGESTIONS ON PREPARING BRIEFS ON THE MERITS IN THE SUPREME COURT OF THE UNITED STATES

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Briefs on the merits in the Supreme Court—those filed after the Court has decided to hear a case by granting certiorari or noting probable jurisdiction—are not fundamentally different from briefs filed in any appellate court. The ample general literature on appellate advocacy therefore applies to this subject as well.[1] It should not be necessary to add to this literature, but the day-to-day experience of reading briefs that have been filed and drafts proposed to be filed suggests that perhaps it is. I begin with a few thoughts about the general subject, articulated in the Supreme Court context, and then offer some more specific suggestions on Supreme Court briefs. I do not purport to be exhaustive or to discuss all of the pertinent Supreme Court rules, as does Stern and Gressman's indispensable handbook.[2]

I. GENERAL OBSERVATIONS

The common deficiency of most bad or mediocre briefs is a lack of perspective, which results in a failure to give the audience the information it wants and needs. Since the audience is a panel of nine Justices or three judges, such perspective is obviously best acquired by being one of them or a judicial law clerk. The experience can, however, be simulated—and should be periodically—by simply taking the time to read a few briefs as though one were on the bench. Choose a field in which you have some

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1. A helpful general text is R. STERN, APPELLATE PRACTICE IN THE UNITED STATES (1981). *See also* Friedman, *Winning on Appeal*, 9 LITIGATION 15 (1983); Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIGATION 11 (1978) (both useful commentaries from appellate judges).

2. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978). Note, however, that the Supreme Court's Rules have changed since the most recent edition of R. STERN & E. GRESSMAN was published.

general knowledge (preferably the field in which you are about to write) and read the briefs and opinions in several recent cases in which you have not been involved.[3] Which briefs do you find most persuasive? Which briefs pave the way followed by the decisions? Which ones leave you troubled by unanswered factual or legal questions suggested by the opposing briefs or by your own reflection? Which briefs are simply difficult to fight your way through? Are there parts that you cannot resist skimming or passing entirely? A modicum of such role-playing will be more instructive than my maxims or those of anyone else.

In your judicial role-playing, and in writing a brief, it is essential to recognize the time constraints under which Supreme Court Justices and other appellate judges must work. In 1959, Professor Hart estimated that on the average each Justice had no more than two hours to devote to reading the briefs in each case heard on the merits before casting his vote at the post-argument conference.[4] With the certiorari workload more than doubled in the intervening years, Professor Hart's estimate must now be regarded as the maximum time available.[5] The role-player should adhere to these same time constraints. And any Supreme Court brief must be written in a manner that allows a Justice to grasp fully, in an hour or less of focused reading, the nature and significance of the issues presented, the essential factual context in which they arise, and the points of the argument. Professor Hart's moral bears repeating:

> [W]ritten arguments filed with the Court are not documents like law review essays which the author is entitled to expect each of his readers to peruse carefully and reflectively from beginning to end. Perhaps the writer of an opinion reads a brief this way. But for other members of the Court these documents necessarily serve a different function than the communication simply of a connected line of thought. They are documents from which busy men have to extract the gist in a hurry . . . . Briefs on the merits need not only tell their story to one who takes the time to read all

3. It is particularly easy to get access to Supreme Court briefs and records, which are kept in numerous depository libraries around the country and many of which are available in reprint form. The depositories are listed in appendix C to R. STERN & E. GRESSMAN. The Bureau of National Affairs publishes series of reprints of the briefs and appendices (as well as certiorari petitions and briefs in opposition) in the fields of trade regulation, securities law and labor law.

4. Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 91 (1959).

5. *Compare The Supreme Court 1958 Term*, 73 HARV. L. REV. 126, 129 (1959), with *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 1, 299 (1983). For a more nearly current analysis of some aspects of the Justices' workload, see generally G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT (American Bar Foundation 1976).

> the way through them, but to be so organized that they can be used, like a book or reference, for quick illumination on any particular point of concern.[6]

From this perspective, it is clear that less is more. Think of the page limitations imposed by the rules not as an arbitrary hindrance but as an essential challenge to the advocate's powers of concise exposition and persuasion.

Bear in mind the functions of the briefs in the deliberative process. Apart from a relatively cursory study some months earlier when certiorari was granted (or probable jurisdiction noted), the briefs are the Justices' introduction to a case and the impressions derived from them are more likely than not to be decisive.[7] The one time when you can be reasonably certain of all nine Justices' undivided attention to the merits of your case—as you choose to present them—is when they first sit down with the briefs in chambers. Oral argument is a much more uncertain thing, with less time available, numerous potential distractions and much less control on your part. First, the brief has to convey what the issues are, in both conceptual and practical terms, and what the relevant facts are. Only then is it time to present your arguments; resist any attempt to convince the Court on the first page that the decision below was outrageous or that the petitioner's arguments are frivolous.[8] Your brief must also anticipate any questions that may linger after the argument, and serve to refresh the Justices' understanding of your position as they review the case before voting at the post-argument conference. In order to fulfill these functions, both the brief for the respondent or appellee and the "topside" brief should be complete in themselves, rather than merely attacking the statements and reasoning in the opponent's brief or the opinion below. The Court should be able to understand the entire case as well as your arguments within the four corners of your brief, and the presentation must be such that the reader can easily refer to particular points whenever the occasion arises.[9]

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6. *See* Hart, *supra* note 4, at 94. There may be even greater time constraints in the United States Courts of Appeals, where the caseload per judge is considerably higher than in the Supreme Court. *See* G. CASPER & R. POSNER, *supra* note 5, at 75-77; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 15 (1982).

7. It appears that all of the Justices, like most contemporary appellate judges, read the briefs before oral argument—contrary to the practice that was apparently fairly widespread in earlier days when oral arguments were more leisurely.

8. In the Supreme Court, both sides should remember that roughly two-thirds of the cases heard on the merits are reversed. *See* G. CASPER & R. POSNER, *supra* note 5, at 69, 299. The Court already knows the outcome you want; your job is to lead it to that outcome in a deliberate manner.

9. While the brief also has the very important function of showing the Justices and

Think of the proceedings in the Supreme Court (or the court of appeals, for that matter) more as a new case than as an extension of the proceedings below.[10] Keeping this in mind may help avoid the pitfall of viewing the appeal as an exercise in self-vindication—to prove that the trial strategy was correct notwithstanding its failure, that the judge or judges below were stupid or biased, or that opposing counsel misrepresented the facts. Just as the trial lawyer must restrain his client's passions when they interfere with an effective presentation, so also must the appellate lawyer restrain the trial lawyer's passions. The fact that the appellant should have won on a point below does not necessarily mean that it is a strong point on appeal. A misstep below, bad luck, or simply the way the evidence appears in the cold pages of the record may make it necessary to abandon a point or recast it drastically. A fresh look at the whole case is essential.

Whenever feasible, it is desirable to bring a new lawyer in on the appeal—whether from your office or from outside—as a guarantee of a fresh look. While this may seem extravagant and duplicative at first, it ordinarily is not in a case of any magnitude. The trial lawyer may think he remembers the record, but memories are fallible and he must read the record just as carefully as a new lawyer. Otherwise, there is a danger not only of misstatement in the brief, but also of failing to perceive points that emerge from the paper record much better than they may have sounded live. Ideally, yet another new lawyer should be brought in when the case reaches the Supreme Court, where often the presentation should differ significantly from that in the court of appeals. At the very least, any brief should be critically read by someone not involved at the earlier stage, and time should be allowed in order to make this a meaningful operation.

Every brief should have one principal author or editor who is responsible for organization, consistency, and style. Frequently, this should not be the most senior lawyer on the case; it should be one who can devote intensive attention to the task and know the record and the authorities. Good briefs are written by individuals, not committees or assembly lines.

Although the rules prescribe the format of the briefs in broad terms, and include several technical requirements, they leave the writer a great deal of leeway as to both structure and style. There is no single way to write a brief, and the best way to explain what the case is about and show why

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their law clerks how to write an opinion in your favor, it is a mistake to treat that as its exclusive purpose. You are not simply writing a memorandum for use by a law clerk. What is much more important is that you are communicating directly with the nine very busy people who will decide your case.

10. In fact, certiorari is literally an original action in the Supreme Court, as all appeals were originally. *See* STERN, *supra* note 1, at 6.

your position is right will vary from case to case. Brief writing is a creative art rather than merely a mechanical exercise of summarizing the record and recording the results of someone's legal research. The artist must develop and refine an overall concept, must have the daring to take a novel approach, and must have the patience and discipline to rework his material, often throwing away painfully constructed prose that cannot withstand harsh editorial scrutiny.

II. BRIEFS IN THE SUPREME COURT

In format, Supreme Court merits briefs are not significantly different from other appellate briefs. Their contents and tone are obviously affected by the fact that the Court is *Supreme*. Authority has much less significance, and reasoning has much more, even if it questions the precedents in the lower courts or, sometimes in the Supreme Court itself. With nine Justices and a collection of exceptionally bright law clerks, a Supreme Court brief is subjected to more intense intellectual analysis than most briefs. And while the Court often decides cases on extremely narrow grounds, it is obviously more inclined than lower courts to explore the broader ramifications of the issues before it.

Although the Court's Rules do not dictate in detail the manner in which you should present your case, you must obviously read them carefully and comply with their formal requirements. These are basically set out in Rule 34, which includes the all-important admonition that "[a] brief on the merits shall be as short as possible, but, in any event, shall not exceed 50 [printed] pages in length,"[11] and in Rule 33.[12] Rule 34 permits the respondent or appellee to omit from his brief all but the Summary of Argument, Argument and Conclusion if he is content with his opponent's statement on the other points. It is so rarely advisable to do so, however, that the following discussion will apply equally to both sides' briefs. The framing of the questions and the presentation of the facts are ordinarily much too sensitive to leave to one's opponent.

Some suggestions about the major sections of the brief follow:

11. Unlike the United States Courts of Appeals, the Supreme Court is still accustomed to receiving printed briefs. Although reproductions of typescript are permitted if bound into the traditional brief size, printing is preferable unless it is not economically feasible. Note that, unlike motions for extra time, motions to exceed the page limit may not be granted by the clerk. "Except in the most extraordinary circumstances," such a motion must be submitted at least 15 days before the filing date, and "is not favored." SUP. CT. R. 33.4.

12. R. STERN & E. GRESSMAN, *supra* note 2. *In extremis*, the Deputy Clerks at the Supreme Court can provide further guidance. Rule 30 sets forth the procedures relating to the Joint Appendix and Rule 36 sets forth special requirements for briefs of amici curiae.

1. *The Questions Presented*.—The issues to be briefed on the merits in the Supreme Court are already defined by the grant of certiorari or notation of probable jurisdiction. Rule 34.1(a) provides that a brief "may not raise additional questions or change the substance of the questions already presented in [the jurisdictional statement or petition for certiorari]." The questions may, however, be rephrased within those boundaries (including consolidation or division of questions), and it is often advisable to do so. A petitioner who phrased the questions in his petition so as to catch the Court's attention may want to shade them somewhat differently after the Court has taken the case, when his purpose is the different one of persuading the Court on the merits.[13] It is frequently best to save the final formulation of the questions until after the argument is written—reflecting the goal that the questions should subtly suggest the answer. Questions must not, however, be overly argumentative or they will impair the brief's credibility at the point where it is needed most. They must fairly state the legal issues "in the terms and circumstances of the case but without unnecessary detail."[14] How to do this is best learned by example.

2. *The Statement of the Case*.—The Rule tells no more than that this section must contain "all that is material to the consideration of the questions presented, with appropriate references to the Joint Appendix."[15] This ordinarily means, as in any other brief, a description of the proceedings below and the pertinent facts.[16] As in any brief, a main goal of the Statement should be to convince the Court of the equity of your position.

The length and shape of the Statement can vary enormously depending on the nature of the record below, the questions presented, and the posture of the party for whom the brief is filed. If the case comes up on a pure question of law following a motion to dismiss, the Statement may be five pages long; if it comes up after a trial, it may take many more and even justify an expansion of the page limit. The petitioner may want to make the pertinent facts sound simple, the respondent may want to make them sound complex and disputed—or vice versa—and each may legitimately try to accomplish his purpose.

The Statement must not, however, be overtly argumentative, and any

13. The party which prevailed below can always support the judgment on any ground, but the petitioner or appellant cannot assert new grounds for reversal in his brief on the merits. *See* STERN, *supra* note 1, at 269-70; R. STERN & E. GRESSMAN, *supra* note 2, at § 13.8.

14. *See* STERN, *supra* note 1, at 270.

15. SUP. CT. R. 34.1(g).

16. If there have been any important developments since the record below was closed, they should, of course, be set out.

lack of candor or omission of facts is foolhardy as well as improper. Even if the opponent is not astute enough to point it out, the Court will most likely discover it under circumstances where counsel is not present to explain. Be sure to give detailed record citations, as Rule 34.1(g) requires; this will tend to keep you honest. Selectivity is essential, and statements err more often than not on the side of over-inclusion.

Sometimes the facts relating to a particular point can best be saved for the Argument section where the point is taken up. For example, when there is a question as to the exclusion of evidence, it may be awkward to ask the Court to turn back many pages for the detailed facts. In other situations, subsidiary facts on a particular point might be set out in an appendix so as not to disrupt the flow of the Statement.[17] The one most important thing to keep in mind is that the Statement is not a formal ritual, but a flexible vehicle for explaining what the case is about. It takes considerable artistry to highlight what is favorable and to explain what is not without being unduly argumentative.

In stating the facts, and in arguing from them later on, be sure to keep in mind the Supreme Court's "two court" rule. The Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[18] This is one reflection of the Court's elevated role in the judicial system; fact review is for the courts of appeals, not the Supreme Court.

3. *The Summary of Argument*.—There is a dangerous tendency to view this part of the brief as a nuisance and to deal with it mechanically. One of the problems is that it cannot be written until after the Argument itself is written, and by that time the author often is short of time or too spent to devote any substantial creative effort to it. The purpose of the section is apparent—to permit the Justices to understand your arguments in a nutshell even if they read no more. This means that it must be short (ordinarily two or three pages) and must omit all but the most important case citations and subsidiary points. If the Summary is too elaborate, it will encourage the reader to skip over the Argument itself, but if it is too cryptic it will do no good at all. Ideally, the Summary should be written afresh by the person most familiar with the brief some time after the main Argument section is completed. It may sometimes be organized somewhat differently than the Argument itself.

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17. This might be a way to handle nonrecord facts of the "Brandeis brief" sort. *See infra* note 20 and accompanying text. You cannot, however, use such appendices to evade the page limit.

18. Graver Tank Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); *see* R. STERN & E. GRESSMAN, *supra* note 2, at § 4.14.

On occasion, it may be useful to combine the Summary of Argument with a general preface to the Argument; this can be captioned "Introduction and Summary of Argument." This approach is feasible only if the summary itself can be very short. If the summary must be more ponderous, any introduction should come in the Argument section itself.

4. *The Argument*.—In any brief, and particularly in the Supreme Court, the Argument section can usefully be viewed as the part of the brief that shows the Court that a compelling opinion can be written in your favor.[19] The purpose is not to display the author's scholarship and straightforward lucidity will be more effective than elaborate or subtle discourse. Your general reading of other Supreme Court briefs and the Court's opinions will have reminded you that the Court starts with a good deal of general learning and—in some areas where it has recently been active—a very detailed knowledge of the law. Your familiarity with your particular field and with the Supreme Court's opinions in it will guide you in deciding the extent to which the argument should (relatively speaking) start in midstream, i.e., when you are joining a legal discussion that was actively going on when you arrived. The Court will be impatient with reiterations of elementary principles or the details of cases with which it is familiar. The result may be a loss of attention to the important parts of your argument. The question here is one of discretion as to how much the Court need be told and the tone in which it should be addressed—something that can only be learned from actual or vicarious experience.

The Argument should ordinarily be broken down into logical and relatively short subsections, each having a brief heading in argumentative language. When all of the headings and subheadings are put together in your table of contents, they alone should show clearly what your points are and how they are interrelated—a kind of summary of the Summary. An Introduction is frequently helpful. This is not a summary but an explanation of the structure of the brief and the interrelationship of the various points. It is essential in any event that the brief of the petitioner or appellant state with particularity, at the outset, exactly what the errors to be corrected are and exactly what relief is sought. In general, if the brief does not state in simple terms what you want and why you should have it, it needs to be reworked.

One advantage the Supreme Court brief-writer has is that of knowing in advance the identity of the "panel" that will be hearing the case (barring

19. As noted earlier, however, you should not take this notion so literally as to interfere with the primary purpose of convincing an educated reader of the merits of your position as a matter of law.

recusals). In an area where a substantial number of the present Justices have written, it may be feasible to strategize about trends and to determine the best way to assemble a majority favoring your position. On the other hand, playing to the presumed biases of individual Justices can be risky if overdone, and rhetoric is of little help. In any event, your points must be intellectually sound and, unless you have made a considered decision to attempt to change the law, must be consistent with the Court's majority decisions.

The nature of the authorities that can be used in support of your arguments is, as previously suggested, extremely broad, but you must keep in mind the Supreme Court's role in the judicial system. Because lower court decisions are pertinent but not decisive, the Court is more influenced by their reasoning than their number and not infrequently reverses positions widely accepted in the lower courts. String citations of cases are almost never convincing, particularly where (as often) their support of a particular point is obscure at best. In most instances, any case that is worth citing to the Supreme Court is worth discussing sufficiently to show why it is particularly on point or sheds analogous light on the question at hand. And be careful with quotations: the excerpts you choose not only must fairly support your point, but must plainly appear to do so without requiring the reader to go to the original source to determine whether you have quoted out of context. Snippets separated by dots or stars are unconvincing; either paraphrase or preferably quote enough so that the language speaks for itself. On the other hand, multipage quotations are seldom helpful.[20]

You will, of course, have fully researched the legislative history of any federal statutes upon which you rely, and will have reviewed the scholarly writings on the legal points at issue. You will also have surveyed other potential sources of relevant historical, scientific or sociological information that are susceptible to the peculiarly generous kind of judicial notice in which the Supreme Court is willing to indulge ("Brandeis brief" materials). The extent to which such materials should be used in the brief and how they should be presented are, of course, matters of judgment under the particular circumstances of each case. The general principle is that, while the brief cannot safely stray far from the record with respect to the

20. Footnotes—sometimes lengthy ones—can be very helpful in balancing completeness against readability. They may be a vehicle for setting out lower court authority or for dealing with subsidiary or contingent arguments. The best rule to follow, however, is that anything which you believe is essential for a Justice to read should be in the main text, or at least alluded to in the main text. You might profitably think of the footnotes as addressed primarily to the law clerks and the ultimate opinion writer (or writers), that is, those with more than an hour to spend on your brief.

facts of the particular case, the Supreme Court will "take judicial cognizance of all matters of general knowledge."[21]

The brief for the petitioner or appellant should present all of the arguments worth making on his side and anticipate and "pull the teeth of" the factual statements and arguments the other side can be expected to make. Do not save anything for the reply brief that you can put in the main brief. Reply briefs should be limited to essential responses to unanticipated points, and you should not hesitate to do without one if there is nothing essential to say. It is common not to file reply briefs in the Supreme Court; they are certainly not necessary to show that you are serious about your case. Note that reply briefs are limited to twenty pages.[22] Ordinarily, they should be even shorter.

5. *The Conclusion*.—The Conclusion is required to "specify with particularity the relief to which the party believes himself entitled."[23] It should do that meticulously—which may require some elaboration—but no more. Do not use it as yet another summary or as a rhetorical peroration.

21. Muller v. Oregon, 208 U.S. 412, 421 (1908). This was the case where Brandeis filed his famous brief. The "general knowledge" upon which the Court relied included "the fact that woman has always been dependent upon man" and has a lesser "capacity for long-continued labor . . . ." 208 U.S. at 421-22.

22. *See* SUP. CT. R. 34.4.

23. *See* SUP. CT. R. 34.1(j).